TRANSFORMATIONS IN AMERICAN LEGAL HISTORY

LAW, IDEOLOGY, AND METHODS

Essays in Honor of Morton J. Horwitz

Volume II

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Simon Greenleaf, Boston Elites, and the Social Meaning and Construction of the Charles River Bridge Case

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I THINK OF THIS ESSAY AS RENEWING A SCHOLARLY CONVERSATION WITH Morty that began a long time ago about the relationship between legal history and social history, and under what conditions legal history might be entitled to call itself a form of social history. Chapter 5 of Transformation I was entitled "The Relation between the Bar and Commercial Interests,"¹ and in response, I wrote an essay, "Law and Culture in Antebellum Boston,"² in which I argued, first, that Morty's instinct was correct, that there was a relationship or alliance, but that his evidence of that alliance—deduced primarily from legal doctrine perceived to be favorable to the interests of the commercial elites—was insufficient to establish the alliance, and, second, that if the net were cast a little more widely into the realm of social history, there was plenty of evidence to sustain the claim. I do not exactly want this current essay to be déjà vu all over again, but I do want to revisit

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another corner of Transformation I, Morty's insightful discussion of the Charles River Bridge case—in particular, his telling connection linking law and economic development, his assertion that the case "represented the last great contest in America between two different models of economic development,"—and ask once again how we might more fully understand the case, even the analysis of legal doctrine, if we set it more completely in the social history of the period. I begin by describing briefly the factual contours of the case and then set the dispute within the cultural context of Boston at the time, focusing on why the case took on such an important symbolic role for those accused of being "aristocrats," the Charles River Bridge defenders. Finally, I explore the claims by the Charles River Bridge supporters that their foes were "agrarians" by examining the impact the social and legal arguments had on the career of one of the competing Warren Bridge lawyers, Simon Greenleaf.

I make several contentions in this essay: first, that it was only in Boston during this time when these particular social forces were drawn together—especially elites experiencing status anxiety and stress—allowing the controversy to be sustained with such intensity for so long, and second, that knowing and understanding the social environment allows one to translate or crack the code of the legal arguments and opinions, to reveal how the social alarm wove its way into the fabric of law and why the question of building a free bridge could lead some elites to believe that a society was failing or in danger of collapse.

THE CASE

The factual details of the case are well known.4 In early 1785, a group of entrepreneurs filed a petition with the Massachusetts state legislature seeking a charter granting them permission to build a toll bridge over the Charles River between Boston and Charlestown. The legislature responded favorably, granting the charter, and in its terms required the proprietors of the bridge to do a number of things, including paying Harvard College an annual stipend of £200 to reimburse the college for its lost ferry rights over the same site that had been granted by the legislature in the mid-seventeenth century to help support the college. The charter gave the proprietors the right to collect tolls for a forty-year period. In 1792, and then again in 1807, additional toll bridges were chartered by the legislature at different locations over the Charles River. When the first of these bridges, the West Boston Bridge, was proposed, the Charles River Bridge proprietors complained to the legislature that it was likely to reduce the tolls over their bridge. Nevertheless, the legislature chartered the West Boston Bridge and simultaneously extended the original Charles River Bridge charter from forty years to seventy years.

That is where the situation stood until 1823, when a group of Charlestown merchants and entrepreneurs began the process of seeking a charter from the
celebration began by the ringing of bells, the firing of cannon, and the lighting of bonfires. The celebration took on a more formal character on 2 March with the participation of the officers of government and members of the legislature. On the evening of the third, Charles Francis Adams, then a young Boston lawyer, went to dinner, “a very pretty Supper” and perhaps one of Lowell’s sumptuous fairs, at the home of his father-in-law, the former marine insurance broker and prominent though cautious investor Peter Chardon Brooks, reputed to be the wealthiest man in Boston. Brooks had married Ann Gorham, the daughter of Nathaniel Gorham, one of the original vice presidents of the Proprietors of the Charles River Bridge, and Brooks also owned stock, rapidly diminishing in value, in the company. He had seven surviving children: four sons, one of whom, Edward, was a coauthor of Charles River Bridge committee reports publicly defending the company’s position, and three daughters, one, Abigail, who married Adams; one, Ann, who married Nathaniel Frothingham, minister of the staunch Unitarian First Church of Boston; and one, Charlotte, who married the recently elected governor of Massachusetts, Edward Everett, who had attended the Warren Bridge ceremonies the previous day and had delivered a speech. Also in the immediate extended family was former congressman Benjamin Gorham (with whom Edward Brooks had read law), a lawyer for the Bridge Corporation in the original state court action against the Warren Bridge, and a son of Nathaniel Gorham, and brother of Ann Gorham Brooks. Adams faithfully recorded in his diary the events at dinner that evening:

Evening went to see Mr. Brooks. The usual family evening. Mr. Frothingham and his Wife, Mr. Everett and his Wife, Edward Brooks and ourselves with the addition of Mr. B. Gorham his Wife and son William—a very pretty Supper and pleasant time. But at the close there were indications of a heavy thunder squall—the Warren Bridge by the lapping of the Act lapping Tolls yesterday became free and the occasion was taken at Charlestown to make a celebration to which Governor Everett forgetful of his relations with Mr. Brooks was asked and did attend. He made a speech in many respects insulting which coming to Edward’s ears irritated him so much as to make him unmanageable. Luckily my wife was close to him and kept him amused in partial conversation until late, but just as we rose from table, the conversation happening to turn that way, Mr. Everett became the mark of some biting observations. He had the good sense to make no reply—And thus the matter ended. On returning home with Edward I found him just in that state of excitement which becomes quite regardless of restraint. I profoundly pity Mr. Everett who from the day of entering a political career with many triumphs has perpetually had occasion to perceive how unfit a coward is for the storms of the popular sea.

Though the governor was a close relative, Adams had no qualms in branding him a “coward” for the sin of speaking at the public ceremony. In 1829, Everett, then in Congress, had received a letter from one of his constituents taunting him about the opening of the Warren Bridge. “Fine time for your constituents,” he wrote, but “not quite so fine for some of your family friends...” Now Everett’s family taunted him.
state to build a new toll bridge—the Warren Bridge—virtually contiguous to the old bridge, which would, within a specified period of time, become toll free and the property of the state. The Charles River Bridge proprietors fought the proposal for five years in public and before the legislature. Eventually, in 1828, the legislature chartered the Warren Bridge. The Charles River Bridge proprietors immediately filed a lawsuit in state court seeking to enjoin the construction of the bridge. The request for a preliminary injunction was denied, and the case was then argued on the merits before the Massachusetts Supreme Judicial Court. When the Massachusetts high court divided 2–2, effectively denying the injunction, the Charles River Bridge proprietors appealed to the United States Supreme Court, asserting that the law creating the Warren Bridge was a violation of the contract clause of the federal constitution. The case was first argued in 1831 and was held over for reargument every year until 1837, when it was finally decided in favor of the Warren Bridge in an opinion by the newly appointed chief justice, Roger Taney, over a bitter dissent by Justice Joseph Story.5

By 1837, the traffic over the Charles River Bridge had disappeared to the vanishing point, and it was not until 1841 that the Massachusetts legislature voted a modicum of compensation for the lost value of the enterprise. The question that arises is, Why would the shareholders and the officers of a corporation resist the new charter for a period of fifteen to twenty years? Why would they expend the time, energy, and money to pursue this course of action against increasingly diminishing odds? The answer, I think, lies in the social structure of Boston society at the time. The Charles River Bridge case became a symbol of a society under stress and distress, and it is unlikely that such a combination of forces could have coalesced almost anywhere else at this time in America.

THE SOCIAL SETTING

I would like to set the scene faced by Boston elites in the 1820s and 1830s by recounting the words uttered on the floor of the United States House of Representatives by an obscure Jacksonian congressman from Maine named Joshua Lowell. No one better captured the withering class resentment of the period than Lowell. He “referred contemptuously to” “[t]he Whig merchants in Boston . . . who ride in their carriages, drawn by gay horses, surrounded by rich equipage, who live in marble palaces, furnished in the most splendid and magnificent style, who fare sumptuously every day, sitting down at tables which groan under the weight of the luxuries and the dainties of the season.”

Lowell’s sentiments help frame two events, four years apart and seemingly unrelated, that I think capture the environment of cultural anxiety unleashed by the Charles River Bridge case. At midnight on March 1, 1836, the Warren Bridge became toll free, actually quite a few years after originally intended. “At that moment a
Let us travel forward four years to April of 1840. Henry Wadsworth Longfellow is describing the father the scene outside his house after it escaped the threat of a fire that consumed the buildings adjacent to his home on Brattle Street in Cambridge. As the spectators gathered to watch the flames, Longfellow saw Samuel Fay, the Middlesex County probate judge, “growling and muttering now and then ‘it is all owing to the d——d democracy’ and Judge Story gesticulating, shouting and tramping this way and that, —mouth wide open, and fire gleaming on his gold spectacles; and ejaculating ‘We should all have our houses burned down about our ears; and it is all because you won’t hang the rascals, when you catch them’.”

It is, of course, possible to understand the legal and constitutional doctrine in the Charles River Bridge case without knowing anything about these two episodes, but it probably is not possible to understand fully the dimensions of the case without wrestling with the social conditions and consequences that fueled these two expressions of acute cultural anxiety. I doubt it was about the money for the Brooks family. What did the Charles River Bridge case reveal about a society under stress? Why should the “tale of two bridges” have precipitated such an uproar?

THE ARISTOCRATS

As Boston elites entered the nineteenth century, they faced a dilemma that would soon become readily apparent. On one hand, they had “accumulated wealth in commerce” that they “later invested in the newer financial, transportation and manufacturing enterprises that transformed the face of nineteenth-century New England.” On the other hand, as a result of their successful economic activity, they “feared . . . rapid social change” that “threatened stability by unleashing chaotic individualism which rewarded those unrestrained by standards of appropriate behavior,” a change that had the potential of undermining their social status and control. The challenge for these elites as a fading republican aristocracy was whether their efforts could “stabilize[] as [they] transformed.”

The Charles River Bridge controversy was to be the realization of their worst nightmares. The original proprietors in 1785 conceived of their enterprise as a combination of civic virtue, serving the community and providing for its needs, and an opportunity as well to make a fair but not exorbitant profit. They had tried to protect their interests as early as 1792 by contending that the legislative grant of their charter was an exclusive one that prevented other bridges from being built across the Charles that might diminish their tolls, their reward for investing in the risky venture. The legislature had rejected their exclusivity arguments, and it approved the charter for an additional, though not geographically contiguous, toll bridge.

Their problem in opposing the perceived private entrepreneurial market for additional services, as well as the public legislative determination that the public
good or necessity might be served by another bridge, was that it looked like they were merely serving an exclusive monopolistic, aristocratic, selfish interest of their own, rather than the needs of the community, which they claimed had motivated them in part at the birth of the project. This perception was exacerbated over time by a number of factors: first, the growing wealth generated by the Charles River Bridge and other commercial enterprises by the same cohort of merchants and investors, who translated their success into social, economic, and political power, a power cemented by increasingly visible and strong family ties; second, the fact that some infrastructure development projects, like canals and turnpikes, were not particularly successful or profitable (some, in fact, proved to be ruinous investments), so that the Charles River Bridge's steady diet of profits and dividends stood out by sharp contrast; third, that "Federalism's 'Indian Summer' in Massachusetts came to an end" in the 1820s, and in its wake "middle class groups, and a peripheral elite group, challenged the established economic and political elite, and to the populist contention that public policy should benefit the many and not few, it added the theme that open economic competition was essential to economic growth and to a republican society." As Ronald Formisano has emphasized, "the controversy," including the brief formation of the Free Bridge political party, "sprang not from technological change but rather from the contagion of the 'spirit of improvement' through the social status hierarchy." And into the 1820s, "all the bridges—West Boston (1793), South Boston (1805), Canal or Craigie's (1809), and Mill Dam (1821)—were ventures of the established commercial elite, as it developed out of the group, of the merchant-manufacturing elite." Finally, the link between rising Jacksonian political sentiment in the state and entrepreneurs seeking to establish a presence in the marketplace led to a rejection of deferential politics and social hierarchy. The push culminated in the 1820s with another free bridge controversy contemporaneous with the proposal to build the competing Warren Bridge. This other attempt to build a free bridge to South Boston helped fuel the rhetoric, the stakes, and the anxiety for the stockholders of the Charles River Bridge.

The various economic development projects entering the marketplace at the expense of perceived exclusive economic privilege deeply offended the sensibilities of the commercial elites. Their ethic guided their behavior. "The elite entrepreneur ... was not a free agent but a morally responsible person answerable to family and friends as well as to community and conscience." The exemplar of this cultural code was Peter Chardon Brooks, Charles River Bridge proprietor. In Edward Everett's biographical sketch of his father-in-law Brooks, Everett described the general characteristics of the Whig Boston merchants of Brooks's time: prudence, moderation, and caution. Of Brooks more specifically, he observed that he "was indebted, at no period of his life, to great speculative profits. His prosperity was the result of persevering attention to regular business, and to the good judgment with which he availed himself of such subsidiary advantage
as fairly came in his way, without risk and without resorting to borrowed money.” This philosophy allowed him to retire from his active marine insurance brokerage in 1803, at age thirty-six, after only fourteen years in the business. “[C]ontent with moderate returns,” he “avoided investments attended with risk and uncertainty” and “[h]e did not engage largely in manufactures; feeling how liable they were to suffer by capricious legislation, caused by fluctuating political influences.”

The juxtaposition of property with character was typical of Whigs. Balance of character, like respect for property, would guarantee balance in society and “reinforce the external controls so weak in their society.”

There lay the root of the discomfort of the Charles River Bridge proprietors. First, they saw their own risks as minimal because they assumed that legally their property was in the form of a state-granted, exclusive, monopolistic privilege protected by a vested right in which they had confidently invested. Second, they saw the Warren Bridge investors as speculators violating the ethic of moderation not only by undermining, if not destroying, the original safe Charles River Bridge property, but also by entering the market and increasing the risk for all investors. The problem was that once the Warren Bridge became toll free and publicly owned, the state in effect was underwriting the risk and, irony of ironies, reducing the risk. Where once the state had created a privilege, it was now setting out to wreck it, which led to the third problem: the political influence of the legislature could lead to the sacrifice of what once was perceived as a secure investment in providing for public needs. As Daniel Webster had warned in his argument before the Massachusetts Supreme Judicial Court, “[p]ublic necessity is apt to be public feeling, and on this rock we are in danger of making ship wreck of the bill of rights.” The scramble for enterprises encouraged by the political process, no longer controlled solely by elite representation, appeared chaotic. Almost anyone could join. In 1826, as the bridge controversies were fermenting, Everett commented in a letter that “the distinction of the One, the Few & the Many has no existence.” Traditional social roles were suddenly displaced, barely recognizable.

The prolonged two-decade Charles River Bridge controversy seemed to be one last stand on principle and self-preservation. In order to understand why, it is helpful to look at the rhetoric confronting the elites in retreat.

In early 1837, a short story appeared in the American Monthly magazine. As the editor explained in a brief note, “The public are familiar with the suit lately decided in the U.S. Supreme Court of Errors, between the proprietors of Charles River and Warren Bridges.” The story, entitled “Martha Gardner; or, Moral Re-action,” contained the account of poor Martha’s legal encounters with the grasping monopoly of the Charles River Bridge Corporation. Published anonymously, it was written by “Democratic lawyer William Austin, a classmate of Joseph Story at Harvard, where he declined election to Phi Beta Kappa because he disliked secret societies.” The heroine, Martha Gardner, an aging widow, owns property adjacent to the terminus of the Charles River Bridge on the
Charlestown—not the Boston side—of the bridge. Her lineage is the stuff of reliable republican patriotic lore—"Her family name was Bunker, whence came Bunker hill."35 She is likewise a familiar figure—"What man or woman of sixty has not bought sweetmeats, nuts, and apples at the shop of Martha Gardner, at her little mansion measuring ten feet by twelve...."34 And she is a sympathetic character, a victim of long standing, having already survived the burning of her home during the heroic revolutionary war battle of Bunker Hill. But the Charles River Bridge Corporation is not content to let Martha live out her life in peace. Rather the corporation callously begins a lawsuit against defenseless Martha "for part of her little patrimony—the dock, adjoining the bridge,"35 in other words, a taking, an exercise of the eminent domain power delegated by the state to the corporation.

The strategy of representing Martha as a widow was almost certainly not an accident, for the Charles River Bridge Corporation over the years of litigation with the Warren Bridge repeatedly argued that some of its innocent shareholders were widows and minors, who would be grievously wounded by the failure of the bridge.36 The publication of "Martha Gardner" certainly indicated that the battle of widows and orphans had been joined and contested. "We have our own victims," proclaimed the proponents of the new bridge.

Shortly before Martha Gardner's death, the climactic scene of the morality play concludes. A violent storm threatens to sweep all away before it, and as the storm rages, so too rages Martha against the injustices of the corporation. Suddenly, she realizes that "this storm gives me new courage, a new spirit; and raises me far above its idle rage. I am above the storm, I am on the top of Jacob's ladder, and see the heavenly blue. This storm quiets my soul, it has caused, for a moment, Charles River Bridge to disappear. I am in a new element, I am at the gate of heaven, and hear a voice you cannot hear—I hear a voice above the storm, saying 'Martha Gardner shall be avenged, but not in her day.'"

Another contemporaneous cultural signal reveals the complex social impact of the case. Writing over a year after the Supreme Court decision, William Ellery Channing, initially the most reluctant of Unitarian ministers, and by now a confirmed if genteel social reformer, sought in his essay on "Self-Culture" to suppress all discussion of class conflict. "To me it seems," wrote Channing, "that the great danger to property here is not from the laborer, but from those who are making haste to be rich."38 What was Channing's evidence for this observation? The Charles River Bridge case, of course. "For example," he argued, "in this commonwealth, no act has been thought by the alarmists or the conservatives so subversive of the rights of property, as a recent law, authorizing a company to construct a free bridge, in the immediate neighbourhood of another, which had been chartered by a former legislature, and which had been erected in the expectation of an exclusive right. And with whom did this alleged assault on property originate? With levellers? with needy laborers? with men bent on the prostration of the rich? No; but with men of business, who are anxious to push a more lucrative trade."39
This, then, complicated the social analysis. Perhaps the Warren Bridge advocates were viewed as economic upstarts, pushers and climbers who destabilized the delicate social fabric with an impatient clamor for success outside established norms. These economic calculators sought an increased portion of the pie, all the while giving off signals that threatened an increasingly nervous elite society.

No one better illustrates this threat confronting the Charles River Bridge proprietors than David Henshaw, who was at the same time pursuing a free bridge for South Boston. Everyone understood that his arguments in favor of his free bridge in the face of the well-established (1804) South Boston toll bridge were generally, if not precisely, analogous to the Warren Bridge’s application to the legislature for a charter. Henshaw had made his money in “the not so respectable drug business,” which “made him obnoxious to the Beacon Hill and State Street elite.” And he served as collector of the Port of Boston under the Jackson administration, dispensing patronage. He was also prominent in the management of the failed Commonwealth Bank in the 1830s. Henshaw founded the *Statesman*, which became the major Jacksonian newspaper in Boston, and which “railed against rich aristocrats,” warning in 1826, as the free bridge controversies heated up politically, that “the city will become the homes of nabobs and vassals, not of independent traders and mechanics.” At a July 4 Jackson dinner in Boston in 1828, Henshaw derided “[t]he New England Aristocracy. . . . [S]elfish and sectional in their feelings—offensive and oppressive in their acts—narrow minded and short sighted in their views, they are incapable of ruling beyond New England and unworthy of ruling in it.” And yet again on the fourth of July in 1836, he focused his ire on “corporate” monopolies, “trust companies,” “life insurance offices,” and “mortmain estates.” He particularly singled out Harvard College, with all its connections to the wealthy merchants, as “a seminary rich on mortmain funds, rich from the income thus wrung from the hand of labor, but mosty from age and indolence, and loitering half a century behind the progress of the age.” The class antagonism was unmistakable.

Some of these resentments, with accompanying rhetoric, surfaced as well in the pamphlet wars surrounding Henshaw’s South Boston Bridge and the Charles River Bridge. Henshaw’s anonymous pamphlet written in 1825, entitled *An Appeal to the Good Sense of the Legislature and the Community in Favor of a New Bridge to South Boston*, began by asserting that “[i]t is quite time to restrain the spirit of monopoly, which is endeavoring to be perpetuated under the specious claims of inviolating of chartered rights.” And he complained that “we have a monopoly in the practice of physic, modeled after the English fashion; our existing colleges are trying to secure a monopoly in literature, and our bridge corporations a monopoly of traveling. But these must all crumble before the light and intelligence of the age.” Why? Because “[i]n a country like ours, the interests of the many, and the prosperity of the state, must not be sacrificed to the aggrandizement of the few.” Monopoly “benefits the few, at the expense of the many,” while
competition "benefits all at the expense of none." Over and over again, Henshaw emphasized "encounter[ing] the remnants of the English system of monopoly, and the remains of English aristocratic notions of making the many subservient to the few"; that "the march of improvement should not be checked by the sordid policy of men with narrow and selfish interests"; and "the vast many of the middle classes of society, whose limited means ... compel them to be impeded up in miserable or inconvenient dwellings." Finally, "legislation should never be behind the wants of society, but should keep pace with and stimulate it to improvement. It has been too much the case, that the public interests have been sacrificed to private enterprises and speculations. A narrow and selfish policy has been pursued. The whole community has been made tributary to the aggrandizement of a few individuals to the lasting injury of this section of the country." Massachusetts "pamper[s] individuals at the public charge." An effete aristocracy limits "growth and prosperity ... with ... narrow and sickly notions." Free bridges would open channels of communication, travel, and commerce so that all would benefit.

The charge of aristocracy was unsettling to the elites. The precise public definition of an aristocrat cut deeply. As John Ashworth has perceptively pointed out, when Democrats or Jacksonians like David Henshaw used the term "aristocrat," they had something specific in mind. They were, of course, not referring to an inherited status or nobility in the European sense, or the natural elites that might emerge to govern under civic republicanism. Rather their ideas were derived in part from the theories of the Virginian John Taylor, in particular his Inquiry into the Principles and Policy of the Government of the United States, published in 1814. "Governmental aid to a favored class was aristocracy." In the United States, Taylor wrote, aristocracy is "a Proteus, capable of assuming various forms." Therefore, "some test" was needed "to make the forms appear in the hideousness common to the features of the family." And the test was simply "an accumulation of wealth by law without industry." "Title by wealth is the shadow," but "an accumulation of wealth by law is the substance." As Ashworth puts it, "[t]his was the essence of aristocracy"—in Taylor's words, "[a] transfer of property by law is aristocracy, and aristocracy is a transfer of property by law." This then was what triggered the social resentment directed at the Charles River Bridge proprietors in the changing political, economic, and social climate. The charter creating the corporation and conferring rights allowing it to charge tolls amounted to state aid to a favored few—the transfer of property by law in the form of a state grant or contract. They were by law allowed to benefit from a tangible interest to which no one else was entitled. This was aristocracy pure and simple, not equality of opportunity framed in a "democratic social space." To counter, the owners of the Charles River Bridge used their own category of condemnation for the assault on their perceived rights. The Warren Bridge petitioners, enabled by the legislature, were engaged in "agrarian" behavior, a term with a special meaning of its own. And it is on the terrain of "agrarianism" that the
social dislocation and legal ideas met in conflict. In order to crack the code of legal argument, one has to appreciate first the meaning of the charge leveled against the Warren Bridge entrepreneurs that they were "agrarian." And no one was more sensitive to the intended Whig slight or charge of agrarianism than Simon Greenleaf, counsel for the Warren Bridge and Royall Professor of Law at Harvard.

THE AGRARIANS

My argument in the case of Warren Bridge having been greatly mis-represented by some persons, as though it was agrarian in its character, & tended to the destruction of vested rights, & justified the taking of private property for public uses without compensation; I here deposit the original notes from which the argument was delivered; that my pupils, at least, & any others, may see that the argument was not of that character; & that in this case I advanced no such doctrine as has been unjustly imputed to me; but that on the contrary, I placed the defence on the acknowledged principles of constitutional & common law.  

Shortly after returning to Cambridge from the argument of the Charles River Bridge case in Washington in late January 1837, Greenleaf sat down and composed
the somewhat defensive cover sheet to his notes for the case as he prepared to deposit them for posterity in the Harvard Law School Library. Greenleaf spent most of February putting down a firestorm of criticism of his oral argument before the Supreme Court even prior to the announcement of the Court's decision, which vindicated his views. Indeed, the Court's opinion, coming from an institution only recently revered, but now, since the death of Chief Justice Marshall, considered in elite Boston circles as politically captured and in decline, only served to exacerbate the problem. For Greenleaf, who had spent about three years representing the Warren Bridge in other forums before he argued their cause to the Supreme Court, the public reaction came as a shock. It was to be the first of his unhappy interactions with Boston elite life and society.

The key to understanding Greenleaf's defensive posture is his use of the term "agrarian," a choice of terminology that was not accidental. In it also lie the clues to translating or cracking the code of the legal argument, making intelligible the way the issues of social ferment were framed for judicial presentation and decision. Greenleaf had written to Charles Sumner from Washington during the argument of the case in January of 1837 that he and co-counsel had "avoided everything 'peoplish' in our remarks, confining ourselves closely to legal views alone."60 Daniel Webster in his concluding argument for the Charles River Bridge was not so sanguine, saying quite directly that the old bridge's problem "began in a clamor about monopoly—that all bridges were held by the people—and that what the State wanted it might take. That was bad enough in taverns and bars and garrets in Essex County and was very little better when dressed with more decorum of appearance, and advanced in this Court."61 So the contours of the social conflict fed the argument. Though Greenleaf was trying to separate himself from the politically charged environment of Judge Fay's "d—d democracy," the far more serious question was how that democracy operated, what the precise meaning of "agrarian" policy might be. If Joshua Lowell's Whig merchants were aristocrats, they were not without rhetorical devices or inventive of their own to hurl back at their opponents. "Agrarianism signifies 'the forced equalization of the ownership of cultivated land.' The Whigs employed the term in this sense except that they applied it not merely to land but to all property."62

The Charles River Bridge predicament resonated among the Whigs because it highlighted "the egalitarian thrust of Democratic theory, the attack upon wealth and talent in government, the suspicion of wealth and capital in society, comprising in all a greater measure of equality."63 The Whig merchants were "convinced" that the "Democrats were attempting to introduce an excessive and unnatural degree of equality into the nation," and "that it would result only in increasingly wild and tyrannical measures and the destruction of liberty."64 The pejorative use of "agrarian" is shorthand for alarm. Egalitarianism in the Charles River Bridge case literally meant redistribution, taking property from someone, as Webster intimated, and giving it to another—the classic A to B. By indirectly destroying the
toll-charging franchise of the Charles River Bridge, and substituting in its stead the
toll-charging franchise of the Warren Bridge, soon to be toll free and then
maintained by the state, the legislature had effectively taken the right to charge
tolls from one property owner asserting an exclusive privilege and given that privi-
lege to another property owner. The Charles River Bridge proprietors claimed an
uncompensated taking was underway from the start. In 1827, in explaining to
Henry Clay the local Massachusetts political climate surrounding the birth of the
free-bridge party, Webster referred to the dispute as "a taking proposition for a free-
bridge." The specter of redistribution, of coerced, forced equality, was real to the
Whigs. The "aristocrats" were accused of transferring property by law through gov-
ernment grant, therefore depriving others of opportunity, and the "agrarians" were
accused of forcibly taking or redistributing that property in order to equalize its dis-
tribution in the face of state-sanctioned privilege.

From the outset, the Charles River Bridge proprietors had argued that the
creation of a geographically contiguous, competitive, and eventually toll-free
bridge had, in addition to violating the corporation's contract with the state,
amounted to a taking of its property, by its virtually ensured destruction, and that
since it was a taking, the state was required to provide compensation. When the
suit was filed in state court, the plaintiffs alleged that the chartering of the Warren
Bridge, dooming the fate of the older bridge, violated Article X of the Declaration
of Rights in the Massachusetts Constitution, the eminent domain clause that
required compensation. William Aylwin, on behalf of the Warren Bridge, denied
"that any property . . . has been taken. The claim of the plaintiffs is, in reality, to a
mere naked right, to the exclusion of the public . . . for the purpose of transporta-
tion. Such a right cannot be property, within any known or practical meaning of
the term, nor, if infringed, is there a taking or appropriation of property within the
intent" of the Constitution. Furthermore, he said, on the fourteen occasions
where bridges were built at or near "existing ferries, no compensation was forth-
coming." By this point the new, free South Boston Bridge had been authorized
and built without any compensation having been paid to the original South
Boston Toll Bridge. The state constitutional provision applied only to the taking
of real property, and the injury to old toll bridge interests was simply consequen-
tial under Massachusetts law and, therefore, not compensable.

Webster, in response, was having nothing of it. It was a taking, pure and sim-
ple, without any compensation. "It is admitted," he argued, "that this franchise
is private property, and that the Warren Bridge takes two thirds of our income. The
whole effect of the recent act is to take the fruits and profits of the franchise . . ."
And he then asked, "Is property taken by the government from the plaintiff by
the late act? The Constitution does not say land, or real estate, or personal estate,
but it uses the most general word, property. Is a franchise property? The sum of
20,000 dollars a year is taken from the plaintiffs. Is this property?" Webster was
suggesting that the state had engaged in an act of expropriation or theft. The
Warren Bridge investors and the state would be in a position to garner income that did not rightfully belong to them. The question once this case was appealed to the United States Supreme Court was how to get before the Court this truly alarming example of "agrarianism."

The answer lay in the contract clause, and the process of framing the contract clause issues had begun in state court. Under Section 25 of the Judiciary Act of 1789, the Court was jurisdictionally confined in its appellate review of state high court decisions to considering whether state legislative acts violated federal constitutional provisions. There was no federal takings clause that applied to the states, so as G. Edward White has demonstrated, the contract clause became the repository of the "takings analogy," a proxy or stand-in for a gap in the protections that the Marshall Court filled. "The takings analogy surfaced, not only as relevant to the Contract Clause, but as a more general limitation on state legislatures. But the limitation had no express constitutional basis: Its origins lay in common law and in republican theory. Thus the early cases suggested that as the Court entertained more Section 25 cases it would either have to reject the takings analogy or implant it into constitutional language itself, thereby packing the Contract Clause with the general principle that once property rights had vested, a legislature could not divest them without committing a taking." And that is what the Court did, and that is what the Charles River Bridge owners hoped they would do again. At the time the case was first argued in Washington in 1831, however, the constitutional analysis had started to shift ever so slightly, and the Court deadlocked and could not decide the case. It was one thing to provide a bulwark of security for property against "nonproprietary classes" or "mob rule." It was another thing to use the contract clause to prevent "another set of property rights" from acquiring constitutional legitimacy. "Once the issue was framed as a choice between types of property . . ., the preference was easy because a central maxim of republican theory had been discarded: The assumption that change, especially economic change, facilitated decay rather than progress." The Whig merchant elites in Boston, however, continued to interpret the events as decay, catastrophe, and declension. Because the Court was torn between intimations of progress tied to more limited notions of Section 25 contract clause review, on one hand, and, on the other hand, "[remaining bound in by the older takings analogy[,] the idea that a legislature could take property from A and give to B in the name of 'competition,' 'commerce,' and 'progress' was never fully embraced." As a result, the Court experienced "paralysis" and could not decide the case. The effect was to heighten the anxiety and raise the stakes in Boston.

In early 1835, Webster, writing a series of letters to co-counsel Warren Dutton, had suggested the possibility of compromise or settlement. He seemed to understand, in part because of intervening Supreme Court appointments, that the likelihood of success for the Charles River Bridge was receding. "I fear that the Charlestown Bridge is a dead corpse." Peter Chardon Brooks had written in 1833
suggesting circumstances and terms under which the bridge proprietors might be willing to settle, and confessing, "I know you must be sick of it. So am I." The corporation had all along shown a willingness to try to satisfy the demands of the state in order to stave off the competition. But their offers had always fallen on deaf ears. And also by 1835, Greenleaf had received a letter from Justice Story. In a more modern ethical setting, the letter might be construed as an inappropriate ex parte communication from a judge to counsel in a pending case. Story wrote, "I observe that the Warren Bridge now is in the hands of the State & that all the claims against it are extinguished. Why does not the Legislature under such circumstances buy out the Charles River Bridge at once?" Maybe it was just an abstract question, thinking out loud about political events back home. But Taney's confirmation was pending, and Story could not have been optimistic. Perhaps he was suggesting to Greenleaf, who might have been in a position to help counsel for the side that Story already knew he was aligned against, that a settlement with some sort of compensation would be best.

When the case was reargued in 1837, therefore, the contract clause issues—whether the grant of the franchise was a contract; whether the contract was breached or impaired; whether the contract included an implied grant of exclusivity in the absence of an explicit exclusivity provision; whether the grant would be construed narrowly or liberally; whether in a public grant nothing passes by implication; whether the original ferry right was an exclusive right; whether the old bridge was entitled to that alleged exclusivity as a successor in interest to the ferry; whether public grants were to be construed in favor of the grantees, the public, or the grantees—all these issues were stalking horses for the takings issue, the question of redistribution.

Greenleaf was aware of the issue. In Dutton's argument in 1837 for the plaintiffs preceding Greenleaf's, he had suggested that the uncompensated taking was the heart of the problem and implied that the Warren Bridge Act was simply confiscation or expropriation. Greenleaf saw it differently. He did not think the old bridge was entitled to relief in the Supreme Court; if anything, they were left with seeking a remedy in state court in Massachusetts. No contract could be violated because the state's power of eminent domain, its right to take for public use, "could not be contracted away."

If Massachusetts has taken the property of the plaintiffs for public use, her honor is solemnly pledged in her constitution to make adequate compensation. If their rights have been sacrificed for higher public good, the laws of nations equally bind her to restitution. From these obligations she could not seek to escape, without forfeiting her cause; in this great family of nations her conduct in this matter has been uniformly dignified and just. The plaintiffs have never yet met her, except in the attitude of stern and uncompromising defiance. She will listen with great respect, to the opinion and advice of this honorable court; and if her sovereign rights were to be submitted to arbitration there is doubtless no tribunal to whose hands she would more readily confide them.
Webster set out in response to test the reach of Greenleaf's compensation argument. He pointed out a critical colloquy between Story and Greenleaf during oral argument. Story had asked Greenleaf:

Suppose, a railroad corporation received a charter at the hands of the state of Massachusetts, in which an express provision was inserted, that no other road should be granted, during the duration of the charter, within ten miles of the proposed road. The road is built and opened. Did he hold, that not withstanding that covenant, a subsequent legislature had the power to grant another road, within five rods of the first, without any compensation, other than the faith, thus given by their charter, of the state of Massachusetts? And the learned counsel replied that he did so say, and did so hold! This struck him, as it must have struck the court, as most startling doctrine. 86

Webster derided the idea that only the faith of the state stood behind the principle of compensation in a situation he found analogous to a taking. The legislature was not particularly trustworthy; after all, it had already violated the promise of exclusivity, and that is why we had constitutional provisions restraining it, like the state constitution's eminent domain clause and the federal contract clause. The year before, in February of 1836, Greenleaf had argued on behalf of the Warren Bridge before a committee of the Massachusetts House of Representatives that "[h]ad the old charter contained an express covenant never to impair tolls by a new avenue, it would have been void for want of power to make it." 87 The assertion may have received some notoriety at the time, but nothing like the public outcry that greeted Greenleaf when he returned to Boston after making his argument. News of his dialogue with Story had reached the Boston newspapers. The Whigs were not pleased, and Greenleaf was both defiant and mortified.

On Saturday morning, January 28, 1837, an account of the argument appeared in the Whig paper, the Boston Daily Atlas, signed "J. F. Otis," later identified by Greenleaf as J. F. Otis, 88 a reporter for the influential national Whig newspaper in Washington, the Daily National Intelligencer. 89 Greenleaf's argument, J observed, "though very able and elaborate," was "far less interesting than other efforts of his," and, what was worse from Greenleaf's perspective, "it struck me, too, as being rather too radical in some of its positions." 90 Greenleaf was wounded, and now back in Boston, he wrote to Story (while the case was still publicly pending decision). He complained that "the Atlas had given a very perverted & unjust view of [his argument] in a letter of its Washington correspondent...." who only knew mine through the perverted & unjust medium of our opponents. I was particularly vexed," he continued, "at being made to say that the State might take private property or sacrifice rights for public use without compensation—whereas you know that I have ever held that the obligation to remunerate the party thus impoverished was sacred & binding on the State. I only insist that in such cases the State is the final judge of the amount due, & must be presumed to mean right—and to be actuayed by just & liberal motives, & incapable of defrauding its own citizens.
However, I shall put the matter right by a brief report of the case, as soon as I hear the decision. On that same date, his co-counsel Davis wrote to Greenleaf from Washington with his own complaint:

I intimated that there would be an attempt to bring us into a false attitude before the public. You see one of the proofs of it, especially as regards myself, in the Atlas. If it were in an unfriendly paper I would not care a straw, but you must feel that the report of Mr. Webster's argument in that paper does, whether so designed or not, do us both, but especially my self, injustice, for there seems to be almost special pains taken to show me up in false attitudes. You know that the whole thing presents a false view of my reasoning.

The Whig elites had turned on their own representatives (Davis, after all, was a Whig United States senator from Massachusetts), not only because they were perceived as being on the wrong side, but also for making the wrong arguments, seeming to sanction the rampant legislative redistributive instinct.

Davis felt particularly aggrieved by two additional articles summarizing Webster's argument, signed again by J, that appeared in the Atlas on January 31 and February 2. The article on February 2 had quoted Webster's rendition of the Story and Greenleaf colloquy and repeated Webster's response that he found Greenleaf's answer "startling." But most of Webster's ire and sarcasm had been reserved for Davis, and it was to the alleged distortions in his argument as represented by Webster and repeated in the Atlas that Davis reacted. On January 31, I wrote that, according to Webster, Davis "began by referring particularly to the ground taken in relation to the 'compensation,' which was alleged to have been already given to the plaintiffs, in consideration of their charter. It had been called 'ample, liberal, and princely,' and he had imputed to Davis the position that the corporation had money enough and chastised him for the suggestion thrown out (Davis) . . . that capitalists are apt to part with their capital reluctantly." In fact, in his February 14 response in the Atlas, Greenleaf repeated what he had said in oral argument in response to the equitable claim of undue hardship in the case, that "the proprietors had nearly a million and a quarter of dollars for what originally cost about fifty thousand; and as those who had invested money in the bridge at a later period, when its stock was high in the market . . . these investments had been made after sufficient notice that the State denied the existence of any exclusive right in the corporation." But Greenleaf concluded that this had nothing to do with the legal rights or merits of the case.

Daniel Webster actually was one of those subsequent investors with notice. And it must have been perturbing to the Whig merchant class to have their recent investment strategies described as speculative and somewhat risky, rather than moderate and secure, particularly the implication that the original proprietors were cast as already having been "ample" compensated for their risk over time, though deprived of the full long-term prospect (first forty and then seventy years) upon which information they had first made their decisions.
According to Webster, this hardly amounted to a “consequential” injury, and it certainly did not qualify as “reasonable compensation.” Nothing was “reasonable,” claimed Webster, but the fulfillment of the contractual expectations between the state and the original proprietors, and one party alone should not be allowed to judge for itself the reasonableness or adequacy of the compensation. The line had been drawn on compensation—if the state behaved by chartering a competing company in the face of an exclusive grant, implied or express, it was tantamount in impact to a taking and compensation was required. Otherwise, it amounted to legislative and ultimately judicial sanction of (depending on the phrase) theft, plunder, expropriation, confiscation, annihilation, destruction, redistribution. If there was no original guarantee of exclusivity, then the chartering of a competing bridge, even one that was to become free, was not a taking, required no compensation (though the state’s liberality might call on it through its collective conscience to intervene by grace), and did not amount to redistribution, just an example of an enlightened legislature looking out for the interests of the public or the people as they participated in a growing and expanding economy benefiting all. The Whigs did not object to growth. They just did not want it to take place at their expense or at the cost of their status.

By the end of February, two weeks after the announcement of the opinion, Greenleaf and Davis were still preoccupied with the reaction to their efforts. But Davis had calmed down a little. “As for the calumnies I feel but a little interested about them,” he told Greenleaf. “I had no doubt that an outcry would be made & I know it would not be kept up without carrying our names with it. All I wished was to put the public on the Enquiry & I know they would follow the scent.” As to “the good people on the other side, . . . we must let them have the poor privilege of growling themselves into repose provided always that they only show their teeth but do not bite.” The problem from Greenleaf’s perspective was that they were biting, and in the interim he tried to defang them. As he promised Story, he intended to respond and explain himself.

Greenleaf did not wait for the decision, as he told Story he would. He prepared a response ahead of time, though ironically enough, it was published in the Atlas on the morning the decision was announced in Washington, February 14, 1837. It was submitted anonymously, though in the newspaper simply signed “G.” Greenleaf took 2,200 words to summarize cogently the main points in the Warren Bridge argument. He began defensively by saying that his purpose in publishing this accurate account was “no more than an act of common justice to the gentlemen who were engaged for the Warren Bridge, that their arguments should be correctly stated, especially as they are charged, in more than one place, with supporting doctrines, savoring, at least, of radicalism and misrule.” Greenleaf included in his version Story’s question to him about a railroad with an exclusive grant having its exclusivity violated by a subsequent competitive grant issued by the legislature, and he recorded his response that the state had the right to make
the second competing grant "if," as Story put the query, "it deemed it expedient for the public convenience . . ., but that the state ought to make compensation to the party injured." He further asserted "that the right of eminent domain, or to take private property, or sacrifice private rights, for public necessities, or convenience, must always be unlimited, from its very nature; but at the same time, the State was bound to make compensation to every individual, who was thereby made to contribute more than his just proportion to the public burdens." However, he went on to say, "the constitutional provision, that no private property shall be taken for public uses without compensation, applies only to property directly taken and not to property consequentially impaired." And since the injury was merely consequential, and not a direct taking, "the plaintiff's case addressed itself fairly to the liberal consideration of the State of Massachusetts, but denied that it was a proper subject for adjudication in the federal courts." And he then concluded:

It was no where asserted, by either of the counsel, that the State might take private property, or sacrifice private rights, without compensation; and it may be safely stated that neither of those gentlemen ever maintained such doctrine, in the course of their professional lives; but they did insist that the question of compensation in this case did not belong to this Court, but belonged to the Legislature of Massachusetts alone; and that in all cases of consequential damages, such as this was, the exercise of legislative discretion was not to be reviewed in a court of law.

Whether it is obvious to the imputation of radicalism, or has been correctly represented in other accounts, the reader will judge.

Greenleaf's ideas about the relationship among consequential damages, compensation, and the liberality of the state seem to have been derived from a series of Massachusetts cases, including the pivotal 1823 decision Callender v. Marsh. In Callender, as a result of street regrading work done under the auspices of Boston's surveyor of highways, the foundation walls of Callender's house, occupied by him for about twenty years, were damaged, forcing him at great expense to repair his home. Callender sued to recover damages caused by the grading activity and, among other things, claimed that the statute authorizing the surveyor's action had violated the takings clause of the Massachusetts Constitution. But Chief Justice Parker for the Massachusetts Supreme Judicial Court found that no direct taking had occurred and that the injury was merely consequential or indirect, and therefore not compensable. Parker built his reasoning in part on an earlier opinion of his in Thurston v. Hancock, which had a different factual predicate. Nevertheless, Parker went out of his way to say "that an individual may . . . be made involuntarily to contribute much more than his proportion to the public convenience; but such cases . . . must be left to that sense of justice which every community is supposed to be governed by." Those cases, "though proper for the favorable interposition of the community for whose benefit the individual suffers, . . . do not give a right to demand indemnity." And, he went on, "it is certainly worthy
consideration, whether an application to the legislature ought not to be made, to authorize them to indemnify those citizens who may, in the necessary exercise of powers used for public improvement or convenience, be made indirectly to contribute an undue proportion for those purposes. 109

In their 106-page pamphlet of public justification, the Charles River Bridge proprietors recognized the threat of Callender, and they devoted three full pages with extensive quotations from Parker’s opinion in an attempt to distinguish the case from their situation. 110 According to their view, Callender, as a private homeowner, had no rights, as they did, “derived from grant of the State,” 111 and additionally, the state had engaged in authorized and appropriate activity in Callender’s case, so the injury was incidental, unlike their injury, which was direct.

Story raised the question of Callender openly in his dissent: 112 “We have been told, indeed, that where the damage is merely consequential (as, by the erection of a new bridge, it is said that it would be), the constitution does not entitle the party to compensation; and Thurston v. Hancock and Callender v. Marsh are cited in support of the doctrine. With all possible respect for the opinion of others, I confess myself to be among those who could never comprehend the law of either of these cases; and I humbly continue to doubt, if, upon principle or authority, they are easily maintainable.” What seemed to bother Story about the cases was that they undermined the basic principle that where there was a wrong or injury there was a remedy and a requirement of compensation, and that simply recategorizing the injury as if it were not a “legal” injury, damnum absque injuria, was simply unacceptable, sweeping the underlying problem under the rug. But more to the point, even if those cases were correct, “they do not apply to a case like the present, if . . . a new bridge is a violation of the plaintiff’s franchise.” Why? Because “[t]hat franchise, so far as it reaches, is private property; and so far as it is injured, it is the taking away of private property.” And “if not within the scope of the constitution, it is, according to the fundamental principles of a free government, a violation of private rights, which cannot be taken away, without compensation.” 113

Story was adamant. A constitutionally mandated remedy was required. This was a direct injury—a taking, not a consequential injury—and the injured party did not have to wait to see if a suitably sympathetic legislature would be moved to compensate. The whole point of the constitutional principle was to take the decision out of the hands of the political process and legislative temptation and protect property interests that otherwise might be victimized by the agents of the people motivated by some fleeting “public feeling,” as Webster had warned in argument in Massachusetts nearly a decade before. Story found Greenleaf’s legislative route for compensation (perhaps derived from Parker’s suggestion in Callender) misplaced and dangerous.

Greenleaf did not quite seem to understand why his response to Story’s question would send a chill down the spines of Whig merchants contemplating
investment strategies in new transportation infrastructure. Railroad entrepreneurs tied to the network of old wealth, witnessing the Charles River Bridge’s plight, thought they had learned their lesson, insisting on exclusive monopolistic privileges in the charters, leaving nothing to implication. In 1830, when the Massachusetts House of Representatives had refused to grant the Boston and Lowell investors a monopoly, the investors “withdrew their petition.”

“Faced with the prospect of losing the line altogether, the House then reconsidered its action and ended by awarding the Boston and Lowell a charter complete with a monopoly.” Now Greenleaf was suggesting that even all explicit monopoly grants were vulnerable, subject to a reconsideration of state public policy that only promised the possibility that compensation might be considered if injury through competition was inflicted on the original enterprise. But indemnity under that analysis was not mandatory. The taking or redistribution fear made the Whigs very nervous. In November of 1835, Josiah Quincy Jr., treasurer of the Western Railroad, complained in his diary of the difficulties of efforts to finance the project. “Went round . . . to obtain subscribers for the Western Railroad and they all with one accord began to make excuses . . . Some have no faith in legislative grants of charters since the fate of Charlestown Bridge.” Greenleaf made the calculation more difficult, more speculative. But Josiah Quincy Jr.’s reaction was mild compared to the chilly response Greenleaf received from Quincy’s father, Josiah Quincy Sr., the president of Harvard.

Two days after Greenleaf’s article appeared in the Atlas, he received a letter from Quincy. Greenleaf’s explanation was not sufficient for the president, whose university had given Greenleaf permission to take a leave in order to argue the case directly against Harvard’s interests. If the Charles River Bridge charter were effectively extinguished, so would be the annuity the corporation was obligated to pay Harvard for the abandonment of its ferry rights. Quincy was a lawyer and a politician before he became Harvard’s president. As mayor of Boston, he had championed the extension of the public Faneuil Hall market, and he proved adept at exercising the power of eminent domain. He knew a taking when he saw one. When objections arose when he was mayor to the city exercising the power, he had wryly observed: “It is a curious fact, that among the most conspicuous of the opposers of the extension of this power to the City, are men, who are now in the enjoyment of mill-dams, race-ways and water-powers, all derived from legislative enactment; all taken, or authorized to be taken, from private proprietors, under the authority of the legislature! How is the doctrine of ‘public use’ applicable to these mill-dams, race-ways and water-powers, which is not more true in relation to the utility of an extension of the great central public market of this metropolis?” Of course, the public market was distinguishable from the bridge, but the ironies abounded.

Quincy was also concerned about preserving the public image of Harvard. In 1840, he admonished a young faculty member that “I . . . distinctly stated to you
that...I held it an incumbent duty of every officer of the Institution to abstain from any act tending to bring within its walls discussion upon questions on which the passions and interests of the community are divided, and warmly engaged.”

Though Greenleaf’s efforts were not “within its walls,” it was public and an issue “warmly engaged,” and Quincy told Greenleaf, “I know, Sir, I am speaking to one, to whom it rather becomes me to listen. But...I was desirous that my own opinion should not be misapprehended.” Greenleaf had written to Quincy the day after his Atlas article appeared, including the article with his letter. Quincy told Greenleaf that it was his “intention to have written to you on reports concerning that argument, which were spread.” But he thought he would wait until Story’s return from Washington in order to ask Story directly for his account. Quincy then voiced his concern: “[t]he statement which I received as current” about the dialogue between Story and Greenleaf. What bothered Quincy was Greenleaf’s purported statement that no compensation was required for violation of an exclusive grant, “[n]o qualification was stated, or intimated, as having been made by you at that time.” Quincy now noted that apparently “there was a qualification annexed by you to the reply,” that “the State ought to make compensation.” He continued, “This alters the case very materially, and considered as a modification of individual opinion, ought to be, and is to me, perfectly satisfactory. It was saying as much as, in the relation you stood to the question, any man had a right to ask, or expect. I am happy, therefore, in the publication you have made as it will undoubtedly remove erroneous impressions, concerning the nature of your argument, from other minds and certainly from mine.” Nevertheless, from Quincy’s point of view, the “qualification” was insufficient and troubling, for

[At the same time candor compels me to say that] if the only qualification of the doctrine be that “the state ought to make compensation” without going further, and providing the remedy and judicial process, by which compensation is to be ascertained and attained, then I consider the doctrine neither safe nor sound—as no doctrine, in my judgment, can be which admits the principle that a legislature may take away private right, for public convenience, without providing an adequate remedy; and by remedy I mean one that is substantial, effective & attainable,—independent of the legislative will.

The doctrine that a legislature can grant rights, derogating from rights previously granted by an antecedent legislature, can in my judgment, then only be safe and sound, by reason of the qualification “making therefore compensation,” when either the general laws of the state provide a remedy and a judicial process, effective to ascertain & attain that compensation;—or when the legislature by the act, which derogates from the rights first granted, grants also, in the same breath (ino flatus) a judicial process, and legal remedy for the attainment of compensation for the injury.”

“Every other principle,” he concluded, paraphrasing Macbeth, “keeps the promise to the ear and breaks it to the hope.”

Quincy's point that not requiring compensation when explicit grants of exclusivity were jeopardized, but leaving it to the discretion of a legislature subject to the
vagaries of public feeling or opinion and not constitutional morality or principle
guided by sound elites, unsettled Greenleaf, who had aspired not to be “peoplish” or
“agrarian.” Rather than grounding the problem in “safe” or “sound” principles,
Greenleaf had tried to argue that no taking had occurred, and therefore no redistribution
followed. The Whigs were not convinced. Quincy implied that Greenleaf’s
argument had contributed further to undermining the established order.

Just as damning was Justice Story’s response in dissent to Greenleaf’s winning
argument. In a little noticed or quoted passage, Story confronted Greenleaf
directly on takings:

> Although the sovereign power in free governments may appropriate all the property, public as
> well as private, for public purposes, making compensation therefore; yet it has never been under-
> stood, at least, never in our republic, that the sovereign power can take the private property of
> A and give it to B, by the right of “eminent domain,” or that it can take it all, except for public
> purposes; or, that it can take it for public purposes, without the duty and responsibility of mak-
> ing compensation for the sacrifice of the private property of one, for the good of the whole. These
> limitations have been held to be fundamental axioms in free governments like ours; and have
> accordingly received the sanction of some of our most eminent judges and jurists.125

This then for Story was an uncompensated taking, pure and simple. Though
he thought the Warren Bridge Act was unconstitutional as a violation of the con-
tract clause, what really bothered him was the coerced redistribution by untrust-
worthy legislative fiat. “Can the legislature have power to do that indirectly which
it cannot do directly? If it cannot take away or resume the franchise itself, can it
take away its whole substance and value? If the law will create an implication that
the legislature shall not resume its own grant, is it not equally as natural and as
necessary an implication, that the legislature shall not do any act directly to prej-
udice its own grant or to destroy its value?”126

Story’s “humiliation” in the case,129 his flirtation with resignation from the
bench,130 and his observation that “he was the last of the old race of judges”,130
Webster’s anger and despair;131 and Kent’s “disgust” with the result132 are all
expressions of social elites under stress fearing the erosion of principle but also the
loss of status and power. “As Story had said in his manuscript notes on the [first]
argument in the Bridge case [in 1831], ‘The only question here is of sheer
power!’133 Not quite. Actually, more accurately, it was about the loss of power and
the fear of a hierarchial society plummeting into decay and chaos. “Unlike the
Jacksonians, the Whigs generally welcomed the economic changes. But the social
changes—such as the decline of deference—seemed threatening to the
Whigs.”134 Nothing undermined deference in their eyes more than the legislature
taking entrepreneurial property originally acquired through “safe and sound”
investment, almost as if it were a natural process and distribution, and unceremo-
niously seizing it and then giving it to someone else who had not earned it and was
not required to pay for it.
Stung, Greenleaf retreated. Just three weeks after the Bridge decision was announced, Greenleaf wrote to Quincy seeking permission to move from Cambridge to Boston. He proposed it "merely as an experiment." The university statutes governing his endowed Royall professorship required his residency in Cambridge. He did not understand why it mattered where he lived, as long as he acquitted his responsibilities to the law school. Ten days later Quincy responded that the corporation had rejected his request. In late September, Davis was still writing to Greenleaf complaining that "the false assumptions of the Plaintiffs may carry away careless enquirers but all who investigate and follow principles will come out with us." But, he fretted, "we are right from top to bottom . . . & I am willing to go before the present & future generations on our views." 

To Francis Lieber in late December, Greenleaf wrote defending his basic creed "My doctrine is,—change nothing for the sake of change; for change is not always improvement—but never hesitate to change, where a certain advantage is to be gained. I am not a reformer, in the popular sense;—but a conservative—not an atheist or 'free thinker'—but a Christian religionist—not a servile follower of precedent, but a fearless seeker & votary of principle . . ." And in the classic language of the relationship between science and religion, the "Protestant Baconianism" of his age, Greenleaf stressed to Lieber that his faith in improvement and progress was animated by his religious beliefs. "[E]very new discovery in science, every new ray of truth which beams on my mind, fills me with intense delight, as it brings me to nearer acquaintance with the nature of that being, the fountain of all knowledge, before whose perfections my heart & my understanding profoundly bow." 

By 1842, a year after the stingy Charles River Bridge compensation bill was signed into law, when the prospect of an appointment to the Massachusetts Supreme Judicial Court was mentioned to Greenleaf, he wrote Story explaining why he might find the opportunity attractive and could imagine leaving the law school: "But I cannot live in this place. My parochial & social relations are mildewed, as I am principally reminded every returning week. The causes I need not mention." Though part of Greenleaf's discomfort in Cambridge stemmed from his evangelical Church Episcopal faith out of place in a Unitarian world, somehow he never escaped the stigma of the Charles River Bridge case and sought refuge outside Cambridge. Story wrote back to Greenleaf and tried to discourage him from accepting an appointment if offered. Others were more proactive. The possibility of the judgeship may have emanated from his old friend and co-counsel in the Charles River Bridge case, John Davis, now the Whig governor of Massachusetts. But the Whig hierarchy would not hear of it and activated its political network—William Pitt Fessenden, Whig congressman from Maine, immediately wrote to Daniel Fletcher Webster, suggesting that he enlist his father, Daniel Webster, in the cause of blocking Greenleaf's appointment. "I rec[eive]d a letter . . . from a respectable member of the bar, of Boston, . . . enquiring whether your father would not be prevailed upon to write Govr. Davis . . . so as to prevent Simon's appointment. It is a matter in
which I did not feel it to be my business to meddle, though I have the lowest possible opinion of the Professor.” And he concluded by asking the younger Webster if he would be willing to mention it to his father in order to ascertain his views on the situation. On the bottom of the letter is scrawled the response: “I entirely concur in Mr. Fessenden’s opinion. Danl. Webster.” Webster endorsed the back of Fessenden’s letter and sent it on to Davis with a note: “I have a good deal of reluctance in sending this to you; & yet I think I ought.” And emphasizing the delicacy of the matter, sealing Greenleaf’s fate with perhaps his own angry memories of his old antagonist in the Charles River Bridge case, Webster asked Davis to dispose of the letter with the instruction: “read & burn.”

But Webster was not done defending his ideological position. Just a few years later, he could not contain himself in oral argument before the Supreme Court, railing against “the most levelling ultraisms of Anti-rentism, agrarianism or Abolitionism.” Greenleaf was hardly an abolitionist or an anti-rent agitator, but agrarianism was another sin altogether, and Greenleaf from the start of his involvement in the Charles River Bridge case was perceptive enough to know that the charge was damaging, and he actively worked to deflect the allegation. The Boston elites, however, never forgave him for his sin.

CONCLUSION

Greenleaf’s experience with the Charles River Bridge case is an example of how the social forces driving the controversy could be unforgiving. The Whig merchants’ ideology in service of economic and political interests found opposition to cultural norms intolerable. And as elite social actors, they did not hesitate to ostracize or pillory even lawyers, who, as they must have understood, were simply fulfilling a role in an adversarial system. Some of the merchant hierarchy found this turn in the marketplace so distasteful, and the resulting competition so pressing, that they averted their gaze and turned to other cultural pursuits with their wealth, retreating and seeking refuge in “prudent” investments as well as charities, universities, churches, literature, music, horticulture, travel, and leisure.

In the various accounts of the Charles River Bridge case that stress political and economic motivations, the assumption seems to be that the legal analysis by the lawyers and the courts followed inexorably from the parties’ self-interested pursuit of material advantage. The case, however, is not simply a study in historical materialism, for the wealthy and powerful were not winners in the affair, but losers. The question is, Why did they expend so much thought and energy in defending what was to be a losing proposition? What propelled them to risk so much for so long? How could they so miscalculate? As Greenleaf’s story demonstrates, the Boston elites pressed on because their sense of social entitlement was endangered. The legal events were pushed by a
cultural hierarchy more interested in vindication than in finding a way to resolve a dispute. These elites expressed the anxiety framing their fears by articulating legal arguments about wealth redistribution, principally grounded in the takings analogy. But they were driven by perceptions of social alarm and decay. They understood that something was being taken away from them, and the bridge controversy became a metaphor for their belief that not just a bridge but a society was lost. In looking back at the Charles River Bridge case, for the legal historian, the critical question is not whether law matters, but rather of what matter law is made.

NOTES

5. 36 U.S. (2 Pet.) 420 (1837).
8. See, for example, “Report of the Committee appointed at the last meeting of the Proprietors of the Charles River Bridge, to take into consideration the present state of the affairs of the Corporation,” *Boston*, April 18, 1836.
12. The phrase is Kutler’s, *Privilege and Creative Destruction*, 1.
14. Ibid. The paradox has also been captured by others. “On the one hand, they embraced an austere, conservative eighteenth century political tradition that befitted men born to high station; on the other hand, they performed as freewheeling economic entrepreneurs in America’s nineteenth century industrial revolution.” Carl E. Prince and Seth Taylor, “Daniel Webster, the Boston Associates, and the U.S. Government’s Role in the Industrializing Process, 1815–1830,” *Journal of the Early Republic* 2 (1982): 266.
16. See “Report” [on the petition to build the West Boston Bridge, 1792], reprinted in *H. R. — No. 71, Commonwealth of Massachusetts* [The Committee of the House of Representatives, who were
instructed to inspect the records and proceedings of the Proprietors of Charles River Bridge . . . Report
(Boston, Feb. 27, 1827), 35
17 Oscar Handlin and Mary Flug Handlin, Commonwealth: A Study of the Role of Government
in the American Economy: Massachusetts, 1774–1861 (Cambridge, Mass.: Harvard University Press,
1947), 237; Julius Rubin, "Canal or Railroad? Imitation and Innovation in Response to the Erie Canal
in Philadelphia, Baltimore, and Boston," Transactions of the American Philosophical Society 51
(1961): 91; John Lauritz Larson, Internal Improvement: National Public Works and the Promise of
Popular Government in the Early United States (Chapel Hill: University of North Carolina Press,
2001), 229
18 Ronald Formisano, The Transformation of Political Culture: Massachusetts Parties,
1790s–1840s (New York: Oxford University Press, 1985), 190
19 Ibid
20 Ibid, 191
21 Ibid
22 Ibid, 196
23 Goodman, "Ethics and Enterprise," 442
24 Edward Everett, "Peter Chardon Brooks," in Freeman Hunt, Lives of American Merchants
(New York: Office of Hunt’s Merchants’ Magazine, 1856), 1:152
25 Ibid, 1:151
26 Ibid, 1:156–57
27 Daniel Walker Howe, The Political Culture of the American Whigs (Chicago: University of
Chicago Press, 1979), 218
28 Charles River Bridge v Warren Bridge, 7 Pick. 344, 441 (Mass. 1829)
29 As quoted in Handlin and Handlin, Commonwealth, 189
University Press, 1958), 602
31 "Martha Gardner; or, Moral Re-action," American Monthly, Dec. 1837, 574
32 Brook Thomas, Cross-Examinations of Law and Literature: Cooper, Hawthorne, Steele, and
Melville (New York: Cambridge University Press, 1987), 51. Thomas perceptively notes how a number
of Austin’s literary details in this story “anticipate” some of Hawthorne’s in The House of the Seven
Cables
33 "Martha Gardner," 566
34 Ibid., 565
35 Ibid., 567
36 See, for example, (Lemuel Shaw), Reasons, Principally of a Public Nature, Against a New
Bridge from Charleston to Boston (Boston: Wells and Lilly, 1825), 21; Review of the Case of the Free
Bridge between Boston and Charlestown . . . (Boston: Dutton and Wentworth, 1827), 67.
37 "Martha Gardner," 573.
1843), 2:391
39 Ibid
40 Formisano, Transformation of Political Culture, 192 Bray Hammond said Henshaw “was a
poor farmer boy, who became a banker, a railway-builder, newspaper-publisher, business-promoter gen-
38 erally, Collector of the Port of Boston, and Jacksonian political boss of Massachusetts.” Bray Hammond,
Banks and Politics in America, from the Revolution to the Civil War (Princeton, N.J.: Princeton
University Press, 1957), 338.

42. As quoted in Arthur B. Darling, *Political Changes in Massachusetts, 1824–1848: A Study of Liberal Movements in Politics* (New Haven, Conn.: Yale University Press, 1925), 49.

43. As quoted in ibid., 57–58.

44. As quoted in ibid., 199.

45. As quoted in ibid.

46. [David Henshaw], *An Appeal to the Good Sense of the Legislature and the Community in Favor of a New Bridge to South Boston* (Boston: True and Greene, 1825), 3.

47. Ibid.

48. Ibid., 2-3.

49. Ibid., 4.

50. Ibid., 10, 11, 14.

51. Ibid., 19.

52. Ibid.


54. Ibid.

55. As quoted in ibid.

56. Ibid.

57. For the concept of "democratic social space in place of a culture that is passed on from generation to generation," see Philip Fisher, *Still the New World: American Literature in a Culture of Creative Destruction* (Cambridge, Mass.: Harvard University Press, 1999), 28-29.


60. As quoted in Maurice Baxter, *Daniel Webster and the Supreme Court* ([Amherst]: University of Massachusetts Press, 1966), 127.


62. Ibid.

63. Ibid., 131.

64. *See Review of the Case, 21–22."


67. 7 Pick. at 411–12

68. Id. at 420

69. Kutler, *Privilege and Creative Destruction*, 22. See also Chief Justice Parker's acknowledgment of this fact in the state court opinion 7 Pick. at 531.

70. 7 Pick. at 426

71. Id. at 442

72. Id. at 444

73. Id. at 446. Webster was swimming against the tide here. "In antebellum America, state courts
usually required compensation only when the government physically took property or, at most, when governmental actions involved the physical invasion of property." William Michael Treanor, "The Original Understanding of the Takings Clause and the Political Process," Columbia Law Review 95 (1995): 792.


75 White, The Marshall Court, 671.
76 Ibid., 673.
77 Ibid.


80 Peter Chardon Brooks to Webster, Jan. 16, 1833, in ibid., 517–18.

81 Rutledge, Privilege and Creative Destruction, 103–13. See also Chief Justice Parker's reference to these circumstances, 7 Pick. 329–30. They were still trying as late as 1836, the year before the Supreme Court decision. See [Commonwealth of Massachusetts], Senate No. 38, "Report related to Warren and Charles River Bridges," about, inter alia, "Memorial of Charles River Bridge, proposing terms upon which they will surrender their franchise to the Commonwealth . . ." (Feb. 18, 1836).


84 Swisher, The Tariff Period, 82.
85 36 U.S. (11 Pet.) at 473.
86 Id. at 533.


91 Greenleaf to Story, Feb. 7, 1837, Joseph Story Papers, Library of Congress. Greenleaf was complaining particularly about two intervening published accounts of Webster's argument in the Atlas on January 31 and February 2, in which Webster was quoted as critically characterizing the Greenleaf and Davis arguments.

92 John Davis to Greenleaf, Feb. 7, 1837, Simon Greenleaf Papers, box 1, folder 7.

93 "The Massachusetts Bridge Case-Supreme Court-Mr. Webster's Argument," Boston Daily Atlas, Jan. 31, 1837.


95 Webster to Warren Dutton, April 20, 1838, in The Federal Practice, 1:646.


97 John Davis to Greenleaf, Feb. 28, 1837, Simon Greenleaf Papers, box 1, folder 7.

98 Ibid.
100 Ibid.
101 Ibid.
102 Ibid. See Treanor, "The Original Understanding," 792–93, for the observation that in antebellum state courts, "the majority view was that consequential damages—those from activities that did not involve physical invasions or appropriations of property for public use—were not compensable takings," and "that state regulation pursuant to the police power did not give rise to a compensation requirement, regardless of how dramatically that regulation affected the value of property.
103 "Charles River Bridge v. Warren Bridge."
104 Ibid.
107 1 Pick. at 432
108 Id.
109 Id. at 433.
110 Review of the Case, 48–50
111 Ibid., 50.
112 John Davis, in his oral argument before the Court on behalf of the Warren Bridge, discussed the applicability of Callender. 36 U.S. (11 Pet.) at 508–9. And Judge Wilde's opinion in the Massachusetts Supreme Judicial Court discussed both Thurston and Callender. 7 Pick. at 472
113 36 U.S. (11 Pet.) at 638
115 Dalzell, Enterprising Elite, 186
116 Ibid. For a discussion of the emerging consensus on the inefficacy of exclusive grants, see Horwitz, Transformation I, 138–39, and particularly the views of Chancellor Kent that the best way to control against the anti-developmental consequences of monopolistic railroad charters was for the legislature to insert reservation clauses in charters securing the right to alter or amend the terms.
118 Josiah Quincy, Remarks on the Constitutionality of the Memorial of the City Council for an Extension of Faneuil Hall Market (Boston, 1826), 6
120 Josiah Quincy to Greenleaf, Feb. 16, 1837, Simon Greenleaf Papers, box 2, folder 8
121 Ibid.
122 Ibid.
123 Ibid.
124 Ibid.
125 Ibid.
126 36 U.S. (11 Pet.) at 642
127 Id. at 617.
128 Story to Mrs Joseph Story, Feb 14, 1837, in Life and Letters of Joseph Story, ed William W Story (Boston: Charles C. Little and James Brown, 1851), 2:268
130 Story to Harriet Martineau, April 7, 1837, in Life and Letters, 2:275–77
134 Howe, Political Culture, 219
135 Greenleaf to Josiah Quincy, March 6, 1837, Harvard College Papers, v 8, 2nd ser., Harvard College Archives.
136 Josiah Quincy to Greenleaf, March 16, 1837, Simon Greenleaf Papers, box 2, folder 8.
137 John Davis to Greenleaf, Sept 28, 1837, Simon Greenleaf Papers, box 1, folder 7.
138 Ibid
139 Greenleaf to Francis Lieber, Dec 27, 1837, Francis Lieber Papers, Huntington Library, San Marino, CA.
141 Greenleaf to Story, Jan 28, 1842, Joseph Story Papers, Clements Library, University of Michigan.
142 Story to Greenleaf, Feb 10, 1842, Simon Greenleaf Papers, box 2, folder 10.
144 West Bridge v. Dör, 47 U S. (6 How.) 507, 521 (1848) (argument of D Webster, counsel)