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Law’s Revolution: Benjamin Austin and the Spirit of ’86

Aaron T. Knapp*

The better the society, the less law there will be . . . . In Hell, there will be nothing but law, and due process will be meticulously observed.1

[T]his devolution of power, to the people at large . . . . repeals all positive laws whatsoever before enacted.2

What impact did the American Revolution have on colonial law and legal systems? Historians have offered different interpretations. Some see primarily legal continuity after the Revolution rather than dramatic change—“evolution,” not transformation.3 Others find that the revolutionary conception of “law as the guardian of liberty” produced a number of modest institutional changes along libertarian lines, such as extending the trial by jury to cases previously tried by judges, strengthening criminal procedural protections, and, in the nineteenth century, disestablishment.4 The more significant post-Revolutionary legal

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4. WILLIAM NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 89, 89-109 (2d ed. 1994). Nelson also emphasizes the “breakdown” of “ethical unity” in Massachusetts society after the Revolution, but his analysis

271
transformation, however, came when a growing fear of mob rule after the debtor rebellions in the 1780s and a new desire for economic growth in the early national period transformed the old jury-dominated legal system into an “Americanized” lawyer- and judge-dominated one that abandoned just price principles in contract cases and advanced utilitarian conceptions of property rights. Law thereafter became a “tool” by which the economic elite could “seize most of society’s wealth for themselves and enforce their seizure upon the losers.” The outcome raises obvious difficulties here because it suggests reaction and counterrevolution rather than any affirmative legal influence exerted by revolutionary ideas.6

A more recent approach highlights the pluralistic dimensions of American law after the Revolution. According to one study, revolutionary ideology—specifically “the notion that sovereignty no longer came from the top down”—helped create and sustain highly localized legal systems in the Carolinas that depended on “the presence and participation of the people in local communities.”77 Magistrates in these localized venues produced “inconsistent rulings aimed at restoring the peace” rather than protecting abstract individual rights.8 For a time localized law stood apart from and often opposed to state and federal legal systems, which opposed each other in significant ways.9 Whether analyzing state, local or federal
equivocates on whether the Revolution itself or legal change after the Revolution (or some combination of both) primarily caused this breakdown. See id. at 2, 5, 109.


6. Attempts to marginalize the jury, for example, ran contrary to revolutionary republicanism, which celebrated broad jural power as an expression of community will and the guardian of liberty. See 1 LEGAL PAPERS OF JOHN ADAMS 229-30 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); SHANNON STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL (1990). A rich vein in the constitutional historiography beginning with Charles Beard’s An Economic Interpretation of the Constitution of the United States (1913) sees the movement for a new Constitution in 1787 in similar counterrevolutionary terms. In the 1980s, Bruce Ackerman inaugurated a revisionist tradition in American law schools that emphasizes the presence and influence of the revolutionary ideological heritage in the constitutional founding. See, e.g., Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013 (1984); AKHIL AMAR, AMERICA’S CONSTITUTION (2005); JACK BALKIN, CONSTITUTIONAL REDEMPTION (2011). This Article discusses the legal implications of the constitutional founding in Part V.B.


8. EDWARDS, supra note 7, at 7.

9. On conflicts between state, local and federal jurisdictions in post-Revolutionary Virginia, see F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA’S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828 (1994). Laura Edwards notes that during the same period in which legal localism developed, state-level professional reformers “applied Revolutionary ideals” to advance their own goals often in conflict with local law: namely, to create “a rationalized body of law based on the protection of individual rights, particularly property rights, and to centralize the operations of government to regularize the creation and dissemination of that body of law.” EDWARDS, supra note 7, at 8. Edwards’s own evidence, however, problematizes her assertion that state law and local law existed as separate “legal cultures.” See Jessica K. Lowe, A Separate Peace? The Politics of Localized
jurisdictions, however, all the foregoing approaches focus primarily on the law’s structural and substantive dimensions in assessing the Revolution’s legal impact, relying heavily on institutional source materials. Such scholarship may reveal how American legal institutions changed or failed to change after the Revolution, but can offer only narrow glimpses into how ordinary Americans viewed the law itself.

This Article shifts the frame of reference from legal institutions to legal culture in evaluating the Revolution’s effects. By legal culture, I mean the publicly expressed values and attitudes that post-Revolutionary Americans had toward the law and legal institutions. I will suggest here that the most powerful evidence of the Revolution’s affirmative long-term consequences in American legal history comes not from judicial or legislative records. We do not find it in the reform of inheritance or criminal laws, or in the jury’s marginalization, or in legal localism. Rather, the real American revolution in the law occurred in deeper attitudinal transformations experienced by a broad cross-section of post-Revolutionary Americans. Legal and constitutional historians have not ignored this perspective and, indeed, recent work suggests provocative new turns in this direction. Studies that employ this methodological frame, however, have converged around some unmistakable trends.

Two canonical statements on early American attitudes toward the law have structured a certain bias into the way we tell our histories of post-Revolutionary legal culture: Thomas Paine’s proclamation in 1776 that in America “the law is king” and Tocqueville’s later depiction of antebellum Americans as a society peculiarly infused with legalism and regard for the law. The pertinent legal historiography accordingly suggests that the
Revolution made Americans into a people who positively embraced law and looked to law to solve their problems and understand themselves: “Americans had law; they made law; they inherited law; they used law; they were subject to law.” Of course, constitutional scholars have produced an enormous corpus of literature demonstrating Americans’ singular enthusiasm for creating and debating constitutional law during and after the Revolution. Recent studies find new dimensions of the Revolutionary-era commitment to law in the eruption of “popular law talk” around criminal cases that made law itself into a “public sphere,” helping to “transform[] the rule of law into a dominant cultural feature of the Early Republic.”

The felt need to find more law and attitudes favorable toward it in early America has led historians to advance new and expansive definitions of law to frame their arguments. Rejecting the positivistic notion that law constitutes the command of a sovereign as too restrictive for their purposes, historians of American legal culture have in recent years discovered positive law in many unexpected historical places—in Revolutionary-era mobs, in customs expressly rebuffed by courts, in disparate conceptions of the local “peace,” in “popular constitutionalism,” and, indeed, in revolution itself. One study purports to locate “law” not in statutes, case reports, or treatises, but in “actual social relations” within local post-Revolutionary communities, as well as in the non-legal “body of knowledge” on which those communities drew, including religion, popular writings, and cultural traditions. Such broad-reaching
conceptions of law do render it difficult to imagine a commitment, belief, or point of contention in early America that existed outside law’s reach.\(^{18}\) Law, historians tell us, ascended to a “position of supreme imaginative authority” after the Revolution and, by the eighteenth century’s end, its “sphere of institutional and normative influence appeared unbounded.”\(^{19}\) It became “the principle source of life’s ‘facts.’”\(^{20}\) Indeed, “[i]f one looks carefully in eighteenth-century America,” one recent study concludes, “law is everywhere.”\(^{21}\)

This Article offers an entirely different interpretation of post-Revolutionary legal culture. In short, it contends that the American Revolution produced deep hostilities to law, lawyers, and legal institutions with important intellectual ramifications that the prevailing historiography elides in its quest to find more law and legalism in American history. My essential argument is that the American revolution in the law took place in an attitudinal revolution against the law. The Article investigates the origins, character, and historical consequences of this revolution using the writings of Benjamin Austin, Jr., an underappreciated Boston artisan and prominent early national state politician who wrote prodigiously in the Boston newspapers after the Revolution. In the spring of 1786, writing under the pseudonym “Honestus,” Austin published a series of influential essays arguing that neither lawyers nor the common law had any rightful place in America. The spirit of the times, Austin believed, required their immediate and permanent “annihilation.” The historical question of why Austin made these audacious claims and what kinds of responses they elicited, will receive substantial attention in the coming pages. Yet the Article will also treat Austin as a point of departure, suggesting that the republican antilegalism that his 1786 writings so powerfully embodied provides a prism through which to reconceive the history of American attitudes toward the law from the Revolution to the Civil War.

Part I discusses the immediate context and impact of Austin’s writings and otherwise lays out the Article’s conceptual framework. Part II offers a biographical sketch of Austin. Part III traces the evolution of the Massachusetts legal profession in the eighteenth century to the point at

\(^{18}\) Commentators have recently floated the title “Law As...” (as distinguished from “Law And...”) for this general strain in the scholarship: “Instead of parsing relations between distinct domains of activity, between law and what lies ‘outside’ of it, the objective of historical research about law might be to imagine them as the same domain: ‘law as...’” Catherine L. Fisk & Robert W. Gordon, Forward: “Law As...”: Theory and Method in Legal History, 1 U.C. IRVINE L. REV. 519, 523-34 (2011).

\(^{19}\) TOMLINS, supra note 7, at 21.

\(^{20}\) Id.

\(^{21}\) WILF, supra note 12, at 11 (emphasis added).
which Austin confronted it in the 1780s. Part IV provides a close reading of Austin's 1786 essays in their proper historical, intellectual and discursive contexts. The Article's final Part will suggest that Austin and the post-Revolutionary movement for which he spoke inaugurated an intellectual tradition within American legal culture that extended into the early national and antebellum periods. By all appearances, however, that tradition ceased to find articulate exponents after the Civil War and consequently dissolved as an intellectually distinct force of change within American legal culture. Concluding remarks will offer some reflections as to why this happened.

I. THE AMERICAN REVOLUTION AGAINST THE LAW

When they appeared in the spring of 1786 in Boston's Independent Chronicle, Benjamin Austin's writings provoked a statewide public debate lasting well over a year and produced an explosion of popular anti-lawyer activity across Massachusetts. On May 1 of that year, based on the "[m]any complaints [that] have of late prevailed from the pernicious practice of the law," Roxbury residents authorized their appointed representative to pursue the legal profession's total abolition. 22 Days later, Stoughton residents also ordered their representative to eradicate "the pernicious practice of the law as most elaborately and feelingly held up in public view by some eminent patriot under the signature of Honestus." 23 Town meetings in Boston, Lynn, Dedham, Concord, East Sudbury, Watertown, and Acton responded to Austin's writings with similar motions in the coming weeks. 24 On July 7, 1786, the Massachusetts legislature enacted the Referee Act, providing for a scheme of arbitration in lieu of litigation that bore striking resemblances to Austin's own reform proposals. 25 After the outbreak of Shays's Rebellion, at least three county

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22. WORCESTER MAG., May 11, 1786, at 71.
23. DANIEL HUNTOON, HISTORY OF THE TOWN OF CANTON, NORFOLK COUNTY, MASSACHUSETTS 428 (Cambridge, J. Wilson & Son, Univ. Press 1893). Weeks later, Stoughton residents again demanded that "the order of Lawyers, as they now practice, be entirely annihielad." Id. at 429.
25. See 1 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 267-68 (Boston, Cummings, Hilliard & Co. 1823); see also HORWITZ, supra note 5, at 151 (The Referee Act was enacted "[u]nder pressure of radicals like Benjamin Austin."). A number of other reform bills prompted by Austin's writings and related town instructions stalled in the upper house during this period. McKirdy, supra note 24, at 131-32. Calls for a statewide convention to consider a major overhaul of the state constitution ensued. ROBERT J. TAYLOR, WESTERN MASSACHUSETTS IN THE

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conventions sent petitions to Boston demanding either wholesale reform or annihilation of the legal profession. Thirteen town meetings passed comparable instructions, including Braintree, which moved in September 1786 to "crush or at least put a proper check or restraint on that order of Gentlemen denominated Lawyers the completion of whose modern conduct appears to us to tend rather to the destruction than the preservation of the Commonwealth." 26

Circulating and proving influential in many other states, Austin’s writings gave voice to a powerful resistance movement sweeping through postwar America. 27 "[S]ince the settlement of this country, Independence not excepted," wrote one observer, "there never was a more popular question agitated than this by Honesty." 28 Scathing editorials attacking lawyers filled the newspapers in other states. 29 Popularity controlled state legislatures de-professionalized their judiciaries and simplified procedures. 30 In New York, Vermont, and New Hampshire, among others,

26. See 2 CHARLES F. ADAMS, THREE EPISODES OF MASSACHUSETTS HISTORY 897 (Boston, Houghton, Mifflin & Co. 1894) (referencing Braintree town meeting instructions); McKirdy, supra note 24, at 136 n.101, 137 n.102; INDEP. CHRON., Oct. 1, 1786, at 1 (referencing Marlborough town meeting instructions). For the renewed petitions produced by the Worcester and Middlesex county conventions after the outbreak of Shays’s Rebellion, see SALEM MERCURY, Oct. 21, 1786, at 2.

27. GERARD GAWALT, THE PROMISE OF POWER 63 (1979); see also NATHAN HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 26 (1989) (noting that Austin “gained national reputation in 1786” for his anti-lawyers essays); WARREN, supra note 24, at 219 (remarking that Austin’s essays had "widespread influence"). New York paper reproduced excerpts from Austin’s anti-lawyer essays, which suggests that copies of the essays circulated in New York. See DAILY ADVISER (New York), June 26, 1786, at 2. Published in the crucible of the debate Austin had provoked, the Roxbury town meeting’s anti-lawyer instructions appeared in both New York and Philadelphia. PENN PACKET, May 19, 1786, at 3 (reprinting a column published in New York). Days after Austin’s last essay installment, the Braintree instructions, supra note 26, to abolish lawyers also appeared in Philadelphia. FREEMAN’S J. (Philadelphia), June 21, 1786, at 2. Bound copies of Austin’s writings also circulated in Pennsylvania. See LITERARY INTELLIGENCER (Philadelphia), May 1, 1807, at 1 (advertising one of Austin’s pamphlets for sale). Shortly after Austin’s last essay appeared, Connecticut editors included in their stories references to public discontent with the “abuses in the practice of the law” in Massachusetts. 1 NEW HAVEN GAZETTE & CONN. MAG. 243, 243 (1786). Austin’s essays appeared or were otherwise known about in New Hampshire. See Old Honesty, ESSEX J., MASS. & N.H. GENERAL ADVISER (Newburyport, MA with circulation in NH), Apr. 5, 1786, at 2 (writing in support of Austin’s essays against lawyers); see also 1 THOMAS C. AMORY, LIFE OF JAMES SULLIVAN 191 (Boston, Phillips, Sampson & Co. 1859) (noting that “spirit of disorder” provoked by Austin extended into New Hampshire). Finally, Rhode Island papers referenced Austin’s attempts to regulate lawyers. NEWPORT HERALD, Nov. 8, 1787, at 2.


30. Chroust, Dilemma, supra note 29, at 60-62. For a close analysis of de-professionalization in New Hampshire, see JOHN PHILLIP REID, LEGITIMATING THE LAW: THE STRUGGLE FOR JUDICIAL.
legal knowledge seemed the best reason to bar a man from serving in public office. Many states would ultimately pass acts prohibiting lawyers from citing to the common law. Members of the New Hampshire judiciary took particularly revealing positions. John Dudley, a yeoman farmer appointed in 1785 to serve on New Hampshire’s high court, apparently instructed his juries to disregard not only “the lawyers, the rascals,” but also the law: “It is our business to do justice between the parties, not by any quirks of the law out of Coke or Blackstone, books that I never read, and never will, but by common sense and common honesty as between man and man.”

Shays’s Rebellion broke out in Massachusetts but weeks after Austin concluded his essay series and in the rash of extralegal conventions, town meetings, and courthouse blockades that ensued in Western Massachusetts the rebels seem to have made Honestus their muse. A contemporaneous newspaper report purporting to have “penetrated” the “minds of the insurgents” and appropriately entitled “The Spirit of the Times” quoted one leading Shaysite’s mission statement: “The great men are going to get all we have, and I think it is time for us to rise and put a stop to it, and have no more courts, nor sheriffs, nor collectors nor lawyers!” Austin’s opponents—and many emerged—did not hesitate to conclude that Austin’s diatribes had occasioned the uprisings. Indeed, having closely followed the controversy for many months, the up-and-coming Bay State lawyer John Quincy Adams became convinced that Austin and his followers had “kindle[d] a flame which will subsist long after they are...”


33. WILLIAM PLUMER, LIFE OF WILLIAM PLUMER 153-54 (Boston, Phillips, Sampson & Co. 1856). The state-level trend of appointing unlearned judges continued well into the nineteenth century. Chroust, Dilemma, supra note 29, at 61. Samuel Livermore, who became New Hampshire’s chief justice in 1782, similarly “attached no importance to precedents, and to quote any would invite his anger.” Charles Corning, The Highest Courts of Law in New Hampshire—Colonial, Provincial and State, 2 GREEN BAG 469, 470 (1890). Livermore possessed “no law learning himself” and refused “to be pestered with it . . . . [L]aw books were laughed out of court.” JEREMIAH MASON, MEMOIR, AUTOBIOGRAPHY AND CORRESPONDENCE OF JEREMIAH MASON 28 (1917). Crévecoeur also joined in the chorus of dissent against the lawyers. CREVECOEUR, LETTERS FROM AN AMERICAN FARMER 196-97 (Fox, Duffield & Co. 1904) (1782) (“What a pity that our forefathers, who happily extinguished so many fatal customs, and expunged from their new government so many errors and abuses, both religious and civil, did not also prevent the introduction of a set of men so dangerous!”).
34. Braintree town residents issued their widely publicized petition to “crush or at least put a proper check or restraint” on lawyers in the middle of the rebellion, as did at least twelve other towns and three country conventions. See supra note 26 and accompanying text.
36. See, e.g., Of Satan and Honestus, MASS. CENTINEL, Jan. 20, 1787, at 4.
forgotten.” Adams saw in Austin’s writing not just the work of one man but a manifesto for a movement, an obstreperous spirit in the air that threatened to destroy established legal systems in all the states. Austin’s “poison,” Adams concluded, “has been so extensively communicated that its infection will not easily be stopped. A thousand lies in addition to those published in the papers have been spread all over the country to prejudice the people against the ‘order,’ as it has invidiously been called.”

Adams took the matter of Honestus quite seriously. Historians have not shared his passion for this topic. Treatments of Austin’s anti-lawyer writings have typically confined themselves to short passages, usually relying on sound bite quotations, within larger studies in legal or political history. Here and there one finds vague references to post-Revolutionary egalitarianism, colonial “pre-modern” nostalgia or, more often, economic aggravators as factors that led Austin to attack lawyers and their laws in 1786. But no historian has closely analyzed Austin’s essays (together a short book) in their proper cultural and jurisprudential contexts, let alone attempted to assess their larger historical significance. None has explored the link between Austin and Shays’s Rebellion or its implications. None fully explains why this outspoken Bay State firebrand waged such a ferocious attack on the Massachusetts justice system in 1786, why so many rallied behind him, or why many others mobilized to discredit him.

37. JOHN QUINCY ADAMS, LIFE IN A NEW ENGLAND TOWN, 1787, 1788: DIARY OF JOHN QUINCY ADAMS 73-74 (1903). Adams went on to note that, despite the popular agitation against lawyers, the profession’s numbers continued to grow. Id. at 74.

Austin’s essays and the responses they elicited ranged over a wide array of issues and topics, from attorneys’ fees to replevin procedures, from the English common law to classical political history. Forever abolishing the legal profession in America stood as one of Austin’s central objectives—one that greatly rankled J.Q. Adams and other gentlemen of the bar. The profession’s asserted monopoly on law and the means of knowing it, Austin maintained, gave lawyers immense unchecked power that ran afoul of the far-reaching egalitarian spirit pervading virtually every area of American life after the Revolution. It also enabled lawyers to auction off justice to the highest bidder, disadvantaging men of lesser means and rendering the entire legal system venal. To connect with his audience, moreover, Austin employed an anti-aristocratic rhetoric peculiar to the post-Revolutionary milieu but never before applied to the legal profession to conclude that the swelling “order” of Massachusetts lawyers would, if not immediately “annihilated,” evolve into a full-fledged aristocracy and destroy the young republic.

This anti-aristocratic ideology and the egalitarian premises on which it rested imbued nearly every aspect of Austin’s scathing critiques. But to go so far still gets only slightly below the surface of the resounding challenge that Austin issued to the Massachusetts legal system in 1786. For Austin’s essays registered an opposition not just to the bar’s aristocratic character or the “pernicious practice of the law,” not just to maldistributed bills of cost or aggressive property seizures. Austin and his followers insinuated a far more subversive threat, one that the Bay State legal elite—including future governors, federal statesmen, and at least one future president—immediately detected and, as we shall see, countered with every intellectual resource they could marshal. To begin, Austin did not clearly distinguish between the lawyers and the law on which they relied—the common law. And neither did the lawyers themselves. Where the common law existed so too did lawyers, and vice versa. Austin and his followers therefore insisted that the common law—that is, the one and only body of procedural and substantive rules and precedents to which Bay State judges and lawyers in the 1780s could turn for guidance—perforce had to be jettisoned along with the profession. If implemented, the proposal would have stripped the Massachusetts justice system of both professional legal advocacy and doctrinal authority—an unsettling prospect indeed for the Bay State bench and bar.

But Austin and his partisans seem to have taken the line of argument


40. See, e.g., Cousin German to Honestus, INDEP. CHRON., Mar. 30, 1786, at 2 (“The common laws ... together with the lawyers, must be annihilated.”).
even one step further. Listen: "Legal impositions are the worst species of tyranny," Austin wrote—the italics his. "Every act which is passed, so far from relieving the people, serves only as a link in the grand chain of TYRANNY." Austin here appears to have equated law with tyranny without qualification. Or again: "It is really preferable to be in confusion for want of law, than to be ruined with law." Consider the words of "Cousin German" writing in support of Austin on March 30, 1786:

To be revenged on those Philistines the lawyers, by their utter destruction, let us put our shoulders to the great fabric of the law, on which they are supported, and lay it in ruins . . . . If, like that strong man upon record, we should perish with them, we shall perish in triumph! Much to the lawyers’ consternation, Honestus and his disciples had trained their sights on points beyond the legal profession or the common law. They had commenced a revolution against law itself.

The idea of dispensing with law altogether may seem rather foolhardy to modern sensibilities. But before dismissing the notion as hopelessly radical, rash, or reactionary—as Austin’s opponents did—we must do our best to understand it seriously and sympathetically in its own time. Contemporaries could not have viewed Austin’s hatred toward lawyers as entirely unprecedented in New England. The Puritans originally banned lawyers, as did the Quakers. The seventeenth-century antinomian controversy arose out of a deep-seated crisis over the legitimacy of law,

42. Id.
44. See GAWALT, supra note 27, at 63 (observing “it was the system of law rather than individual lawyers that aroused animosity”); see also Letter from Christopher Gore to Rufus King (June 25, 1786), in 1 LIFE AND CORRESPONDENCE OF RUFUS KING 138 (Charles King ed., New York, G.P. Putnam’s Sons 1894) (“[A]cts against lawyers, or more truly against law, now occupy the time of the H. of Reps.”) (emphasis added).
45. One leading legal historian, for example, condescendingly characterizes Austin and his followers as “[t]he less thoughtful reformers.” NELSON, supra 4, at 69, 71; see also HATCH, supra note 27, at 28 (referring to Austin’s essays as “hopelessly naïve”).
46. See Gordon, supra note 38, at 437.
human or divine, in Puritan New England. New Light ministers during the Great Awakening detested lawsuits and lawyers. Edwards, Whitfield, and Bellamy preached that law and Christian religion operated at "cross-purposes" and that all law would ultimately wither away in the Work of Redemption. The wide discretion afforded to colonial juries to determine whether to follow applicable law in a given case represented one of the most powerful institutional expressions of popular antilegalism in colonial North America.

The documentary evidence of antilegalism as an intellectual phenomenon in colonial North America, however, exists in fragments only. Its colonial expressions remain largely inarticulate. One might argue, therefore, that Austin’s writings boast special significance in the first instance as the first fully developed articulation of this peculiar dissenting tradition to appear in American history. Actually this would greatly undersell Austin’s larger historical significance, for he and his partisans did much more than instantiate an existing tradition. They invented a new one. Austin’s critique of the law in 1786 acquired its distinguishing conceptual features not from colonial practices or beliefs, or from revivalistic theology, but from the transformative ideological currents born out of the revolutionary experience—from the nativistic rejection of the English legal heritage, revolutionary republicanisms’s ideal of self-rule, from an across-the-board resistance to established authority figures and an egalitarian spirit that seemed to know no limits. The


50. Heimert, supra note 38, at180-82. The ministers’ hostility to lawyers, however, arose out of the fear that lawyers might soon surpass them as authority figures within American society.

51. The historiographical tendency has been to put colonial and revolutionary juries—along with mobs and crowds—into a legal cast. See Kramer, supra note 16; Reid, In a Defensive Rage, supra note 16. For another perspective, we might listen to the seventeenth-century English judge presiding over Leveller John Lilburne’s treason trial. When Lilburne asserted at trial that the jury had the right to determine law as well as fact, Judge Jermin declared that permitting such discretion to the jury would “destroy all the law of the land; there was never such a damnable heresy broached in this nation before.” 4 Cobbett’s State Trials 1381 (London, R. Bagshaw, 1809) (emphasis added). For a study that finds Connecticut juries losing law-finding power in debt cases well before the Revolution, see Bruce Mann, Neighbors and Strangers: Law and Community in Early Connecticut (1987).

52. See, e.g., Auerbach, supra note 38, at 19-46; Heimert, supra note 38, at 179-82. Fragmentary expressions of early Quaker antilegalism may be found in 2 Clarkson, supra note 48, at 79-81.

53. See Bloomfield, supra note 29, at 4 (noting that, to many post-Revolutionary Americans,
Critical Period’s revolution against the law all but shed the theological frame that marked earlier anti-lawyer critiques. As one historian has revealingly put it, Austin’s attack on law and lawyers rested on “a literal application of the philosophy of the Declaration of Independence.” Thus, while Austin may have taken positions that echoed those of his colonial predecessors, he did so based on entirely new and different rationales. Over and above his critique of the Massachusetts justice system, moreover, Austin set out an affirmative alternative vision reflecting important post-Revolutionary changes in American legal culture that historians focused on institutional source materials have overlooked.

Lawyers have historically not fared very well in revolutions. The American experience represents a partial exception to this rule—at least in the early stages. The revolutionary revolt against lawyers came late in the day on American shores. As part of a process historians have called “Anglicization” that touched all aspects of colonial society and culture, the colonial bar developed strong attachments to English law and legal culture over the course of the eighteenth century. At mid-century, an

“lawyers seemed a counterrevolutionary force, blocking the emergence of a truly free republic”;

HATCH, supra note 27, at 28 (observing that Austin’s radical reform efforts reflect “a moment of historical optimism, a time when many in politics, law, and religion, flushed with the promise of the American Revolution, found it reasonable to take literally the meaning of novus ordo seclorum and to declare a decisive expatriation from the past”); POUND, THE FORMATIVE ERA OF AMERICAN LAW 7 (1938) (noting anti-English nativism in post-Revolutionary society, including “hostility to English law simply because it was English”). For an analysis of these and other ideological ramifications of the Revolutionary experience, see WOOD, supra note 38, at 229-41. The seminal study on Revolutionary republican ideology is BERNARD BAILYN, THEIDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967). See also STAUGHTON LYND, INTELLECTUAL ORIGINS OF AMERICAN RADICALISM (1968); J.G.A. POCOCK, VIRTUE, COMMERCETYPEAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY 404-43, 270 (1985) (contrasting republican and “juristic” modes of eighteenth-century Anglo-American political thought).

54. Nathan Hatch correctly suggests that Austin’s reform efforts, rather than embodying or extending dissenting religious currents from the colonial era, evidenced an anti-authoritarianism directly related to the American Revolution that provides important background for understanding subsequent religious transformations. HATCH, supra note 27, at 24-30. For a recent essay suggesting that Christian antinomianism explains the debates surrounding adoption of the common law in post-Revolutionary America, see Jay Michaelson, Hating the Law for Christian Reasons: The Religious Roots of American Antinomianism (Sept. 22, 2012) (unpublished manuscript), available at http://papers.ssm.com/abstract=2150722. For a study that attempts to split the difference, treating the “religious dimension of the American revolution” as critical to fully explaining “the intense moral antipathy” which post-Revolutionary radicals had for the legal profession, see ELLIS, supra note 32, at 253-56 (relying primarily on HEIMERT, supra note 38).

55. ELLIS, supra note 32, at 113 (emphasis added).

56. See JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 19, 293 n.6, 293 n.7 (2007); see also DAVID BELL, LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE (1994); EUGENE HUSKEY, RUSSIAN LAWYERS AND THE SOVIET STATE 33-79 (1986).

increasingly formalistic legal consciousness accompanied this Anglicizing trend. And yet no sooner had the lawyers finally built a professional identity on English foundations than an emotionally charged resistance movement against the mother country began to take shape. By every appearance, this seemed a recipe for professional disaster. But in fact it became a professional boon. In a “remarkable shift toward Whiggery,” a number of younger practitioners—Otis and Adams in Boston, the “Triumvirate” in New York, Dickinson and Wilson in Philadelphia, Jefferson in Virginia, Dulany in Maryland—successfully assumed intellectual leadership of the resistance movement and thereafter the American Revolution, giving the profession a power and prestige never previously enjoyed.

The move, however, involved American lawyers in a number of practical difficulties after independence had finally been won. As a natural extension of the lawyers’ own arguments during the Revolution, post-revolutionary Americans began to associate all things English, including English law, with the perceived vice, tyranny, and corruption of the Old World. And yet after Yorktown, as the confetti settled and the lawyers set about to make a living representing private clients or legislating, most found they had nowhere else to turn but the common law. And so in a nation whose independence had predicated itself on a rejection of English law, accomplished by men who in a
previous life had imported English legal culture into the colonies, post-
Revolutionary lawyers proceeded to insinuate English law and legal
culture back into the American system. 62

In many respects, public-minded Revolutionary-era lawyers helped
articulate an ideological framework that would provide republican radicals
like Benjamin Austin with intellectual ammunition to wage their attacks
on private-minded post-Revolutionary lawyers. 63 Even so, Austin’s
writings heralded an important shift in both popular and professional
orientations toward the law after the Revolution—from an Anglicized
common law paradigm based on formal rules and precedents understood
and applied exclusively by lawyers and judges, to an Americanized
humanistic paradigm or, as Austin put it, a justice system “of OUR OWN,
dictated by genuine principles of Republicanism, and made easy to be
understood by every individual in the community.” 64 Austin envisioned
extricating the justice system from the formalistic murk of prolix treatises,
writ forms, statutes, and common law case reports that only professional
aristocrats could understand, and reconnecting it to (i) the layman’s moral
sense of right and wrong, and (ii) community-specific customs and usages.
Common conscience, level with ordinary understanding, would serve as
the system’s monistic base, while diverse customs and usages, applicable
to particular communities (including transatlantic ones), would make up
its dynamic pluralistic superstructure. Neither base nor superstructure
required the assistance of intellectual elites and each rested on lived
human experiences rather than Blackstonian formalities. Lay juries and
community “referees” conversant with the specific subject matter in
question remained best qualified to discern, articulate, and apply these
norms. If parts of this alternative vision recalled practices from the pre-
Anglicized colonial past, Austin’s influential writings gave post-
Revolutionary reformers a new forward-looking republican vocabulary
with which to understand and justify those practices against the perceived
threat posed by a professional aristocracy committed to a hostile
paradigm. 65

Viewed from one angle, it appears that Austin and his followers did not
enjoy substantial practical success with respect to these proposed reforms.
The Bay State legal profession soldiered on, the common law retained its
authority in many courts, and informal lay-administered arbitrations would

63. Commenting on Shays’s Rebellion on March 1, 1787, Dedham-based lawyer and future U.S.
congressman Fisher Ames revealingly observed: “The people have turned against their teachers the
doctrines, which were inculcated in order to effect the late revolution.” 1 WORKS OF FISHER AMES 8, 11 (Boston, T.B. Wait & Co. 1809).
64. Honestus, INDEP. CHRON., Mar. 23, 1786, at 1.
65. See infra Part IV and Section V.A.
never supplant adversarial litigation conducted by a professional bench and bar as Austin had hoped. And yet the clear link between the Austinites and the Shaysites does gesture at the former’s larger significance in at least one respect: The Austinites’ revolution against the law in 1786 helped provoke the movement for a new constitution in late-1786 and 1787 and thereby served as one key link in the chain of events leading to the nation’s constitutional founding. Indeed, this Article will contend that understanding Austin and the spirit of the times for which he spoke explains the motivations behind the movement to frame a new Constitution, as well as the constitutional framework thereafter created, in ways that previous historians have overlooked. In linking the Austinites to the Shaysites, however, we must exercise some caution, for the prevailing explanations for Shays’s Rebellion point to class-based economic stresses, and historians interested in the topic have applied a similar materialistic model in explaining the intensified hostilities toward lawyers that preceded the rebellion. Close analysis of Austin’s writings and the responses they provoked suggest that ideological transformations rather than economic or class interests best explain the Massachusetts uprising. By the same token, the fighting opposition to Honestus recorded by prominent members of the Bay State legal elite in 1786 did not arise out of professional self-interest alone. As we shall see, members of the Massachusetts legal profession had mapped out a constitutional ideology that made lawyers critically necessary for the preservation of a republican form of government. All considered Austin not merely a pesky gadfly but a fearsome ideological threat going to the heart of the republican experiment.

But if the Austinites’ revolution against law itself did help spur the movement for a new Constitution in 1787, did the ideas they articulated survive the counterattack? Or did Publius’s new constitutional regime ultimately render the Austinites intellectually inert curiosities with little if any enduring historical significance? The new Constitution does create the

66. Reformers’ attempts strictly to regulate lawyers’ fees ended in failure in 1787. See Bloomfield, supra note 29, at 55-56. Charles McKirdy suggests that Austin’s anti-lawyer tracts gave the Bay State legal profession a “solidarity” that it did not have before the attacks. Shays’s Rebellion and especially the Federal Constitution “reinforce[d] professional ties.” McKirdy, supra note 24, at 182.

67. See infra Section V.B.

68. For the traditional class-based explanation of Shays’s Rebellion that views it as a conflict between eastern creditors and western farmer-debtors, see Szatmary, supra note 38. Leonard Richards’s less convincing revisionist study replaces eastern creditors with government bondholders (many legislators themselves) lobbying for higher taxes, and finds rebels emerging from a broader cross-section of society. Richards’s study continues, however, to make economic harm—here in the form of higher taxes—the primary motivation for the rebellion. Leonard Richards, Shays’s Rebellion: The American Revolution’s Final Battle (2002). See generally Charles Beard, An Economic Interpretation of the Constitution of the United States (1913). For similar explanations of anti-lawyer sentiment, see Friedman, supra note 38, at 94; Chroust, Dilemma, supra note 29, at 58; McKirdy, supra note 24, at 138-41.
impression of law and order emerging triumphant after 1787. Drafted primarily by lawyers, the document has at critical points a distinctly legalistic timbre, purporting to “establish Justice” and “insure domestic Tranquility” by way of laws administered by men “of the learned profession” and operating, if not “independent of the society itself,” then certainly far removed from the “people themselves.”69 One can plausibly describe American legal history after ratification in a manner that emphasizes the progressive expansion of law, lawyers, and legalism throughout American society.70 Once supreme arbiters of law and fact with discretion to render verdicts “in Direct opposition to the Direction of the Court,”71 juries increasingly found themselves confined by legal formality to resolving factual issues only.72 Legal professionals—lawyers, judges, and legislators—grew in power and tightened their hold on legal institutions, legal literature flourished, and, in the end, a persistent formalism that American law has never since shaken triumphed over any countervailing “instrumental” currents that may have surfaced during the antebellum period.73 The crystallization of Classical Legal Thought in the last quarter of the nineteenth century and extending into the twentieth, appropriately completes the progressive, legalizing narrative that marks the historiography in this area.

This tidy narrative, however, must negotiate with some considerable contrary tendencies. The radical Jacksonian codifiers come to mind, as does the image of William Lloyd Garrison burning the United States Constitution, having adjudged it a “Covenant with Death, an Agreement with Hell!”76 Historians now recognize, moreover, that a number of

69. U.S. CONST., pmbl.; THE FEDERALIST No. 61 at 122, No. 35 at 234, No. 51 at 322 (Kramnick ed., 1987); see also ROBERT FERGUSON, READING THE EARLY REPUBLIC 75-76 (2004).
70. For influential works that lend support to this legalizing narrative, see FRIEDMAN, supra note 38; NELSON, supra note 4; TOMLINS, supra note 7; WILLIAM M. WIECZ, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT (1998); Morten Horwitz, The Rise of Legal Formalism, 19 AM. J. LEGAL HIST. 251 (1975). For works that articulate a similar legalizing narrative in the colonial period, see DAVID KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS (1979); MANN, supra note 51; Murrin, supra note 57.
72. See generally NELSON, supra note 4.
73. See Horwitz, supra note 70.
75. See JUDITH N. SHKLAR, LEGALISM (1964).
76. See COOK, supra note 38; PAPKE, supra note 38, at 24-50.
dissenting groups in the years after 1787 (including both "plebeian" and "middling" Antifederalists, and radical Jeffersonian Republicans) whose historical significance scholars had previously discounted, in fact exerted substantial political and intellectual influence in the early national and antebellum periods. 77 Finding inspiration in this historiographical turn, this Article will contend that Austin and the popular movement for which he spoke did not simply expire by the wayside of Madison’s constitutional juggernaut, nor did it quickly yield to legalism’s slithering expansion across the institutional landscape in the nineteenth century. To the contrary, Austin’s powerful critique points to a defining dimension of post-Revolutionary legal culture whose influence on American attitudes toward the law would extend straight through to the Civil War.

Our investigation of Austin and the spirit of '86 in the coming pages will shed important light on the intellectual origins of Antifederalist thought. 78 Indeed, Austin himself became an influential opponent of the Constitution in Massachusetts and his writings in this regard drew on principles articulated in his anti-lawyer essays. And just as the Antifederalists laid the intellectual groundwork for a “dissenting tradition” that would continue to play an important role in American public life in the decades after ratification, 79 so too did the Austinites. Apparently by popular demand Austin republished his 1786 essays in 1819, noting in his prefatory remarks that since their original publication the essays had “retained a peculiar celebrity” through the years. 80 No wonder. Unmistakable intellectual affinities linked the Austinites to the radical Jeffersonian law reform movements that shaped state and, ultimately, federal politics in the 1790s and 1800s. 81 One historian finds that Austin’s 1786 attack on lawyers and their laws paved the way for the eventual abolition of common law pleading in Massachusetts. 82

Further evidence of the spirit of '86's intellectual consequences in American life after ratification lay, surprisingly enough, in the post-Revolutionary professional elite’s incorporation of antilegalistic ideals

77. See SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSIDENT TRADITION IN AMERICA, 1788-1828 (1999); ELLIS, supra note 32; MILLER, supra note 38, bk. II.
78. See infra Section V.B.
79. See CORNELL, supra note 77.
80. See Surrency, supra note 38, at 245.
81. See ELLIS, supra note 32 (analyzing radical law reform in Massachusetts, Kentucky, and Pennsylvania).
82. NELson, supra note 4, at 72. After ratification, John Gardiner would go on to introduce major law reform legislation in Massachusetts, parts of which resonated with Austin’s proposals. GAWALT, supra note 27, at 83; McKirdy, supra note 24, at 189-92. Nineteenth-century Bay State lawyers acknowledged that Austin’s critiques became “probably instrumental in introducing simple and economical methods of procedure into the practice of law in Massachusetts, which have served as an example to other states.” 1 AMORY, supra note 27, at 189. For other reform successes in the Jeffersonian period, see ELLIS, supra note 32, at 155-56, 183, 229 (describing reformers’ achievements in Kentucky, Pennsylvania, and Massachusetts).
into their reflections on American law and jurisprudence. As laid out in the last two Sections of Part V, early national gentlemen jurisprudents, Jacksonian codifiers, establishmentarian antebellum legal writers, and corporate lawyers all came partially to co-opt and domesticate parts of the subversive ideology to which Austin had originally given such forceful expression in 1786. The burgeoning legal system and its professional lawyer class could survive the American revolution against the law only by substantially assimilating the rebels’ critiques. 83

Probably the most powerful antebellum expressions of antilegalism traceable to the spirit of '86, however, came from radical Jacksonian democrats, reformers, and philosophers outside the legal profession. 84 Animated by an unbounded egalitarian commitment to the sovereignty and perfectibility of the individual, widely read Jacksonian writings demonstrate irrefutably that the idea of dispensing with law itself, which defined the spirit of '86, remained a live intellectual option in American life well into the late antebellum period. The availability of this option, moreover, may help to explain antebellum Americans' increasing willingness to consider dispensing with the law that, by some accounts, made all others possible, the most fundamental law of all: the law of union.

II. TALE OF A BOSTON WHIG

Benjamin Austin, Jr. was born in Boston on November 18, 1752, in the revolutionary generation’s final brood. 85 Austin’s father enjoyed notable success as a merchant and provincial councilor. 86 The senior Austin befriended Samuel Adams in the 1760s and Benjamin Jr. apparently found himself rubbing elbows with Boston radicals from a very young age. 87 After completing his courses at Boston Latin School, Austin chose not to go on to college, instead joining his father’s business. Local political issues, however, beckoned him shortly thereafter. In 1779, the Boston town meeting elected him clerk of the market in which capacity Austin superintended the public market and probably arbitrated related disputes. In one historian’s estimation, Austin ultimately became “perhaps the most important political force behind mechanic protectionism” in the post-

83. See infra Sections V.D, V.E.1.
84. See infra Section V.E.2.
85. No collection of Austin’s papers exists, and he has received very little biographical attention from historians. The lion’s share of his published writings are either specifically cited or referenced herein. The author is in the process of finding and compiling unpublished materials for publication in a single volume. Unless otherwise noted, the general biographical information set out in this Part comes from 1 WAKELYN, supra note 38, at 10-12, and Edward W. Hanson, Benjamin Austin, AMERICAN NATIONAL BIOGRAPHY ONLINE, http://www.anb.org (last visited Feb. 3, 2013).
86. 1 AMORY, supra note 27, at 188.
87. 4 WRITINGS OF SAMUEL ADAMS, 1778-1802, at 132-33 (Harry A. Cushing ed., 1908).
Revolutionary period. 88 In this connection, however, Austin stood opposed to the “bulk of Boston’s mechanics,” who would eventually affiliate with the Federalist Party. 89

Throughout the 1780s and 1790s, Austin displayed a certain “fearlessness in assailing whatever was opposed to his particular views of public policy.” 90 He went on to serve in the state senate in 1787, from 1789 to 1794, and again in 1796. He vociferously opposed ratification of the Constitution, and affiliated with the Jeffersonians in the 1790s and 1800s, first moving among the more radicalized contingent then, following Jefferson himself, apparently moderating his views. Under the name “Old South,” Austin criticized the Federalist party in a number of newspaper essays later compiled in a pamphlet entitled Constitutional Republicanism in Opposition to Fallacious Federalism. 91 He continued publishing essays in the Boston papers on a variety of political issues well into his sixties, his assertive and piquant style never failing to stir up hornets’ nests. 92 No one stood “more universally and more deeply despised [by the Federalists] than Austin.” 93

Although he published a great deal more during his lifetime, Austin’s historical legacy rests mainly on the thirteen essays he published between March 9 and June 22, 1786 in the Boston Independent Chronicle, which he collectively titled “Observations on the Pernicious Practice of the Law.” 94 Historians who mention Austin usually reference these essays, but


89. Id. For the brief correspondence between Austin and Thomas Jefferson on the issue of protectionism (one letter each), see NATIONAL UTILITY, IN OPPOSITION TO POLITICAL CONTROVERSY: Addressed to the Friends of American Manufactures (Boston, Rowe & Hooper 1816).

90. 1 AMORY, supra note 27, at 188.

91. BENJAMIN AUSTIN, CONSTITUTIONAL REPUBLICANISM, IN OPPOSITION TO FALLACIOUS FEDERALISM (Boston, Printed for Adams & Rhoades 1803). During this period, Austin advocated “a full range of reforms, from rotation of offices to expunging the national debt” and “himself benefited from the concept of rotation of offices when President Jefferson appointed him commissioner of loans for Boston in 1803.” Hanson, supra note 85.

92. Austin came to have increasing influence over the editorial decisions at Independent Chronicle, Boston’s only republican newspaper, as the early national period proceeded. While Thomas and Abijah Adams served as the Chronicle’s main proprietors, Austin would ultimately become the Chronicle’s “chief writer and financial benefactor.” JEFFREY L. PASLEY, “THE TYRANNY OF PRINTERS”: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 108 (2003); see also id. at 217.

93. Letter from Christopher Gore to Rufus King (Mar. 26, 1806), in 4 LIFE AND CORRESPONDENCE OF RUFUS KING 511 (Charles King ed., New York, G.P. Putnam’s Sons 1897). During the first decade of the nineteenth century, Austin’s mouth almighty drew him into some explosive controversies with tragic outcomes. In 1806, he became embroiled in a conflict with the Federalist Thomas Selfridge, after calling Selfridge a “damned Federalist lawyer” in the papers. Selfridge rejoined with verbal retaliations and, in response, Austin’s eighteen-year old son Charles, defending his father’s honor, caned Selfridge one day on State Street. Whereupon Selfridge pulled out a pistol and shot the younger Austin dead, producing great controversy and a highly publicized trial. A jury acquitted Selfridge at trial, which presumably did nothing to improve Austin’s view of the Massachusetts justice system. See TRIAL OF THOMAS O. SELFRIDGE, ATTORNEY AT LAW (Boston, Russell & Cutler 1807).

94. Shortly after Austin published his last essay installment, the Independent Chronicle printers
two factors have led to misunderstandings of them. First, a number of historians have relied on a “corrected and amended” version of the essays published in 1819, compiled and edited by Austin over thirty years after the event itself. In this edited release, Austin not only softened his rhetoric, but also deleted entire paragraphs and discussions, many quite revealing. To truly capture the thrust and significance of Austin’s arguments, we must return to the original sources that so many professional historians have managed to overlook: the newspapers themselves. The peculiar stylizations liberally employed in these original prints—primarily italics and capital letters—conveyed important emphasis and meaning, and will therefore be retained here.

Second, historians have almost invariably treated Austin’s writings as monological pronouncements when, in fact, they operated within a larger debate in the Boston public sphere. Austin’s critique of law and lawyers in 1786 proved remarkably controversial, provoking strong editorial responses on all sides of the issue. The record reveals a number of colorful pseudonymous characters and diverse viewpoints popping up in the Independent Chronicle, The Massachusetts Centinel, and other Boston-area papers, opposing, championing, or otherwise commenting on Honestus’s writings. We cannot understand the importance of Austin’s writings or why he wrote what he did without also understanding the larger context within which he operated, including to whom and to what claims his arguments responded. Not surprisingly, Austin’s primary antagonists in these newspaper debates made the law their vocation. Those debates therefore reveal as much about post-Revolutionary Bay State lawyers as they do about the popular revolution against them. Neither can be properly understood, however, without first becoming familiar with the Massachusetts bar’s professional evolution over the course of the eighteenth century.

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95. See, e.g., Auerbach, supra note 38, at 152 n.24; Ellis, supra note 32, at 350; Horwitz, supra note 5, at 317-18; Warren, supra note 24, at 219 n.1. The revised essays are reprinted in Surrency, supra note 38.

96. For example, he omitted paragraphs excoriating the lawyers’ use of replevin procedures to the detriment of “honest” creditors, and a controversial discussion of a bill of costs that he reproduced in his June 1, 1786 essay in the Independent Chronicle. Compare, e.g., Surrency, supra note 38, at 249-52, 292-96, with Honestus, Indep. Chron., Mar. 9, 1786, at 2, and Honestus, Indep. Chron., June 1, 1786, at 2.

97. One exception is Charles McKirdy’s Ph.D. dissertation, which analyzes many of the lawyers’ responses to Austin. McKirdy, supra note 24, at 157-87. McKirdy, however, does not analyze the writings of Austin’s supporters. Other exceptions are Fredric Grant’s short but excellent articles. See Grant, Jr., Benjamin Austin, Jr.’s Struggle, supra note 38; Grant, Jr., Observations, supra note 38.
III. MASSACHUSETTS LAWYERS IN THE EIGHTEENTH CENTURY

Fewer than a hundred lawyers existed in Massachusetts at the time Austin lodged his attacks in 1786. That these practitioners wielded legal power incommensurate with their numbers seems clear enough. Any power that the profession had acquired, however, had come out of a long historical struggle dating back to the founding of Massachusetts Bay. The Puritans had so distrusted lawyers that the General Court initially banned them entirely.98 The brief reigns of Dudley and Andros resulted in qualified acceptance of lawyers under the new charter, but in 1701, in an act testifying to the persistence of the old Puritan hostilities, the General Court expressly permitted litigants to represent themselves and to seek the assistance of non-lawyers. It also set an uncomfortably low cap on attorneys' fees.99

Against such headwinds, the profession could only grow slowly and haltingly in the early eighteenth century. The low fee cap sent the best-trained men looking for other sources of income, leaving the day-to-day practice to the pettifoggers. By 1730, however, a number of new arrivals, all London-trained barristers, began quickly ascending through the provincial ranks to royal officialdom. Their examples demonstrated that, notwithstanding the low fees, the "conscientious practice of law" could serve as a stepping-stone to royal favor.100 Patronage gave the profession a sense of dignity and public respect it had never before experienced, which in turn attracted many more practitioners into its folds. An extraordinary process of Anglicization ensued.101 By mid-century, helped along by the conferral of titles and positions, Suffolk County lawyers had attained a strong enough sense of professional identity to begin a concerted campaign of excluding those men they deemed unqualified or unworthy from representative participation in court proceedings. The Suffolk County Bar Association, created in 1758, implemented more rigorous admission and apprenticeship requirements. Many running within the nascent legal elite agreed not to participate in any cases brought by non-lawyers.102

Anglicization became more conspicuous after mid-century. The profession, for example, began formally distinguishing between "barristers" and "attorneys," along the lines established in England. The new Chief Justice of the state's high court, Thomas Hutchinson, faced
with a bar divided over his controversial appointment, decided in 1762 to curry favor by “cloak[ing] the entire profession in exterior dignity... requiring distinct gowns for judges, barristers, and attorneys.” By all accounts, the lawyers lapped it up and, on the eve of the Stamp Act crisis, we find a bar in Massachusetts composed primarily of Tories (with a few “regime Whigs”) donning wigs and gowns, captivated by English common law formalities, writ procedures, manners, and cultural distinctions. And yet from the very first moments of the resistance movement, many in the younger brood began nimbly moving into positions of intellectual and political leadership. The Stamp Act crisis caused a remarkable libertarian transformation among these practitioners. More than a few began to appropriate radical Whig rhetoric to advance the colonial cause. A similar turn occurred among lawyers in New York, Maryland and Virginia.

In the short-term, the Revolution seems to have given the profession a popular and political clout that it had never before experienced on American shores. The legal system itself, however, suffered a number of significant setbacks during the Revolution. At the precise point at which Massachusetts lawyers sat at the apex of their political prestige they faced major practical challenges. Books of business shrank substantially due to court closures. Sizable losses in loyalist defections and general attrition dramatically decreased the bar’s numbers. But those lawyers that remained continued the work of consolidating and distinguishing the profession. By 1768, the Essex County Bar Association had enacted its own minimum fee schedule in contravention of unrepealed state law. In 1780, the Suffolk Bar Association began charging law students a minimum fee for their required three-year apprenticeship, which the Essex and Middlesex associations followed in 1783.

Beginning in 1780, legal business started to increase substantially and, by 1783, a virtual litigation explosion had commenced in the state of Massachusetts. Mounting debt, both public and private, fueled the litigation fires. As the war wound down, France and Britain inundated the

103. Murrin, supra note 57, at 562.
104. POCOCK, supra note 53, at 216.
105. Anglicized to their core, many in the older generation remained loyalists and most fled the country. See Chroust, Dilemma, supra note 29, at 48-50.
106. Murrin, supra note 57, at 568.
107. See DILLON, supra note 59; ROEBER, supra note 49.
108. From 1774 to 1780, the so-called “Berkshire constitutionalists” in Western Massachusetts, unwilling to submit to a government that did not have the people’s express constitutional sanction, protested the provisional state government by forcing the closure of many courts. The constitutionalist movement ended with the adoption of the state constitution in 1780. See TAYLOR, supra note 25, at 4, 75-101.
110. GAWALT, supra note 27, at 21, 60.
111. Id. at 29.
state with their manufactures, resulting in an immoderate spending spree and severe trade imbalances, all made worse by inflationary pressures caused by excessive paper money issuances. Meanwhile, the ballooning public debt produced crippling taxes. Creditor litigation began to overwhelm court dockets. To take one particularly dramatic example, whereas in 1780 the Worcester country Court of Common Pleas had 246 cases on its docket, by 1785 it had nearly 3000. The surge in legal business attracted many new faces into the field—many perceived as "pettifoggers"—which prompted further efforts by the established legal elite to restrict admission through heightened educational requirements. With bench and bar now intermingled (most post-Revolutionary judges came from within the profession), courts reinstated the English practice of elevating some practitioners to the rank of barrister, and new rules empowered the state’s high court to further regulate the admissions of lawyers to practice. More than a few began to accumulate considerable wealth.

Enjoying increased institutional power after the Revolution, the state legislature’s lower house stood as the legal profession’s most direct threat in the 1780s, closely overseeing judicial culture and often directly interfering in matters normally handled by courts. Where Tocqueville would later suggest that the American legal profession provided a needed check on legislatures, many post-Revolutionary republicans believed the checking should run the other way. Consequently, the assembly generally opposed the profession’s moves toward exclusivity and self-regulation during this period. The lawyers, however, evaded legislative control with considerable agility in the 1780s. In 1784, the profession chaperoned a bill through the legislature barring sheriffs and deputy sheriffs from serving as legal counselors. The Suffolk county bar reinforced this measure by ordering its lawyers not to solicit any business outside their offices. Responding to constituents, the legislature sought in 1785 to break the lawyers’ growing monopoly, requiring the courts to permit litigants to plead their own cases or seek the “assistance of counsel as they shall see fit to engage.” But the lawyers cleverly thwarted the law’s design by arguing that the term “counsel” as employed in the statute meant a professional lawyer only, which judges, most lawyers themselves, happily enforced. The legislature made further attempts to loosen

112. TAYLOR, supra note 25, at 104.
113. GAWALT, supra note 27, at 29.
114. ld. at 44-45.
115. ld. at 48.
117. MASS. ACTS AND RESOLVES, supra note 99, at 476.
118. GAWALT, supra note 27, at 60.
admission standards. Yet the courts continued refusing to admit to practice those applicants lacking proper training.\textsuperscript{119} That the lawyers themselves had begun to populate the state legislature produced a conflict of interest that men such as Austin greatly feared.\textsuperscript{120} By 1786, a legal profession that purported to uphold the law seemed to Austin and his followers to have commandeered it for themselves.

IV. AUSTIN AND THE SPIRIT OF ’86

The surge in litigation activity increased the lawyers’ visibility—and power. The profession’s efforts to monopolize the practice through rigorous admission standards and private “associations,” its privately legislated fee structures, and its members’ adeptness in evading legislation designed to control them—that all this might have irked a few lay observers who had lived through the American Revolution remains unsurprising. Republican ideology and anti-English sentiment, however, converged to give Americans a new conceptual vocabulary with which to understand and criticize the profession, its activities, and its laws: the rhetoric of anti-aristocracy.

Colonial America, to be sure, never had a landed hereditary aristocracy protected by law as in England.\textsuperscript{121} Hierarchical social distinctions not dissimilar to those characterizing English society did exist in British North America, most prominently the distinction between gentlemen and commoners.\textsuperscript{122} A psychology of deference and dependence sustained a regime of communal hierarchicalism for generations. The revolutionary experience and the ideas it spawned, however, imported into American culture a far-ranging egalitarianism that eschewed all outward displays of superiority or “distinction”—in manner, dress, or other externals—and rejected deference as an anti-republican mode of social relation.\textsuperscript{123} Republican ideology, Gordon Wood writes, “destroyed aristocracy as it had been understood in the Western world for at least two millennia.” By 1780, a new and emotionally charged fault line had emerged in American society: The “principal antagonists” in this divide, Wood observes, “were no longer patriots vs. courtiers but had become democrats vs. aristocrats.” \textsuperscript{124}

\textsuperscript{119.} Id. at 60-61.
\textsuperscript{120.} Honestus, \textsc{Indep. Chron.}, May 11, 1786, at 1.
\textsuperscript{121.} For a time in the eighteenth century, Virginia may have served as one partial exception. See Holly Brewer, \textit{Entailing Aristocracy in Colonial Virginia: “Ancient Feudal Restraints” and Revolutionary Reform}, 54 \textit{Wm. & Mary Q.} 307 (3d ser. 1997). Patricia Bonomi takes issue with earlier historians’ characterizations of New York’s “great landholders” as an aristocracy in the English sense. \textsc{Patricia Bonomi, A Factious People} 180 (1971).
\textsuperscript{122.} \textsc{Wood, supra} note 38, at 24.
\textsuperscript{123.} Id. at 240-41.
\textsuperscript{124.} Id. at 241.
Hostility to all things aristocratic thus stands as one of the distinguishing features of post-Revolutionary American culture, particularly in Massachusetts. Gradually extending itself to virtually every form of social, cultural, and political elitism, the concept of an aristocracy functioned negatively to define the early American identity as categorically distinct from the English. In this way it reinforced the anti-English nativist sentiment that marked popular attitudes during the post-Revolutionary period and would later animate Austin’s writings. The final break from England represented a symbolic break with aristocracy itself. But political independence did not eradicate the aristocratic menace. It continued to pose a perceived threat from within. Bostonian fears of a creeping aristocracy found expression in the outcry against the Society of the Cincinnati (whose biggest chapter resided in Massachusetts) during the first half of 1784.125 Boston’s Independent Chronicle, in which Austin would two years later publish his anti-lawyer essays, served as the leading editorial force against the Cincinnati in New England. In January of 1784, the Chronicle began reprinting Aedanus Burke’s Considerations on the Society or Order of the Cincinnati, the most widely disseminated attack on the Cincinnati.126 This produced an eruption of commentary through the spring of 1784.127 Commentators feared that the Cincinnati would ultimately forge a “complete and perpetual personal distinction” between itself and the “Plebeians.”128 They worried that members would insinuate themselves into assemblies through “address, ingenuity, perseverance and prowess,” and thereby organize a “political monster” capable of exacting large payments of commutation from the public fisc. The “order” thus needed to be “crushed in embryo.”129 Even prominent Massachusetts statesmen—including Elbridge Gerry, Stephen Higginson, and John Adams—viewed the Cincinnati as a serious threat to republican values, in Adams’s words, “the first step taken to deface the beauty of our temple of liberty.”130

But no sooner had public anxiety over the Cincinnati begun to subside
than another aristocratic threat had surfaced. Boston elites apparently engaged in lavish spending in the early 1780s and had no compunction about publicly displaying their luxurious lifestyles. By the mid-1780s, as men of lesser means had begun to suffer under the burden of increasing taxes and debts, the Boston gentry seemed to “wallow[] in luxury and amusement.” Austin and his family friend Sam Adams took particular umbrage at the establishment of the so-called Tea Assembly or “Sans Souci Club” in late 1784. Perceived as the “exclusive domain of the newly parading gentry,” the club met every other week for card playing and dancing. Innocuous enough. But according to Austin (writing as “Candidus” in 1785), the people considered the club a “very dangerous and destructive institution” that, while perhaps accepted in the “long, established Courts of Europe,” stood diametrically opposed to the republican values that, in Austin’s view, defined the new nation. In this public dispute about private card games the American identity itself hung in the balance. “We, my countrymen,” Candidus announced, “have a character to establish.”

A. Law and Aristocracy

Although we find much about the Cincinnati and the Sans Souci in the Boston papers from 1784 to 1785, very few comments specifically directed at lawyers surfaced during this time. And yet the sheer number of lawsuits pending on court dockets in 1785, coupled with increasingly aggressive litigation tactics, doubtless triggered tensions among litigants and their friends. Up until 1787, the law permitted creditors to keep a debtor in jail indefinitely and, by the time Austin published his first essay attacking the Bay State justice system, hundreds languished in prisons, often forced to work to pay off their debts. Court dockets exploded with foreclosures, insolvencies, and replevin actions for the recovery of seized personal property. Historians have asserted that cash-strapped “agrarian debtors” in Western Massachusetts rose up against the lawyers in 1786 in

132. Id. at 422-23 (quoting Candidus); see also Candidus, INDEP. CHRON., Jan. 27, 1785, at 1. Austin’s good friend Samuel Adams probably helped to compose the essays attributed to Candidus.
133. One commentator in 1784 did, however, make some portentous comments, complaining about the growing complexity of the property tax code: “a man must have the memory and knowledge of a lawyer to know when he is wrong and when he is right.” INDEP. CHRON., Sept. 30, 1784, at 1. For other pre-Honestus critical commentary on lawyers in the Boston papers, see Trade, MASS. CENTINEL, Nov. 16, 1785, at 2; Slap Dash, MASS. CENTINEL Nov. 19, 1785, at 2; Rollin, MASS. CENTINEL, Jan. 18, 1786, at 2.
134. See supra note 113 and accompanying text. That so many lawyers had remained loyalists probably helped forge a link between the profession and the now-reviled mother country that would have further exacerbated hostilities. See Chroust, Dilemma, supra note 29, at 48-50.
something like a class war. \textsuperscript{136} The suggestion, however, that only debtors as a class felt the lawyers' pinch in the months preceding Austin's essays does not bear scrutiny. As we shall see, creditors also had good reason to oppose the profession's litigation practices, and Austin spilled a great deal of ink discussing why. \textsuperscript{137}

Against this volatile background, the newspaper debates over the legal profession began with a seemingly innocuous comment in a piece appearing on January 26, 1786 in the \textit{Independent Chronicle}. A writer calling himself the "Free Republican"—apparently Benjamin Lincoln—here recorded a vindication of the legal profession, claiming in a lengthy piece addressing the need for constitutional checks and balances in a republican society, that "as the science of the law is intricate and perplexing, and cannot be obtained but by long and steady application, professors and practicers of it seem a necessary order in a free republic." \textsuperscript{138} All other things being equal, this small comment, inserted at the end of the piece, did not on its face seem particularly provocative or controversial. But it proved more than enough to antagonize the thirty-three-year old Austin, who began scribbling out notes and essays to ensure that the Free Republican did not have the last word on this issue. Austin had recently assumed a greater visibility within the Boston artisan community and, throughout 1785, published provocative pieces in the Chronicle under the names "Candidus" (against the "Sans Souci Club"), "Friend to Commerce" (on trade matters), and "Brutus" (against the resettlement of refugee Tories). \textsuperscript{139} In the early 1780s, Austin had attempted to malign local lawyers for colluding with British agents, but appears to have ended up the object of criticism himself. \textsuperscript{140} Now circumstances had changed. The litigation boom had helped produce renewed hostility toward courts, lawyers, and legal process among debtors, creditors, farmers, artisans, and merchants alike. Most importantly, Austin detected some of the same attributes in lawyers that he had seen in the Cincinnati and the Tea Club—except that the legal profession, as Austin planned to argue, posed a far more dire threat to the fledgling republic than did the others.

Observers later made the allegation that one John Gardiner, an English-

\textsuperscript{136} See, \textit{e.g.}, \textsc{Nelson}, \textit{supra} note 4, at 69.
\textsuperscript{137} See \textit{infra} Section IV.C.
\textsuperscript{138} The Free Republican, \textsc{Indep. Chron.}, Jan. 26, 1786, at 1 (emphasis added); \textit{see also} William Michael Treanor, \textit{The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment}, 94 \textsc{Yale L.J.} 694, 705 n.59 (1984) (noting that Benjamin Lincoln wrote under the name "Free Republican"). A politician and officer in the Continental Army, Lincoln later played a prominent role in suppressing Shays's Rebellion.
\textsuperscript{139} \textsc{Amory}, \textit{supra} note 27, at 188; \textit{see} Candidus, \textsc{Indep. Chron.}, Jan. 27, 1785, at 1; A Friend to Commerce, \textsc{Indep. Chron.}, Sept. 1, 1785, at 1, Oct. 20, 1785, at 2; Brutus, \textsc{Indep. Chron.}, Nov. 10, 1785, at 2, Jan. 12, 1786, at 1; \textit{see also} \textsc{Wakelyn}, \textit{supra} note 38, at 10-12.
\textsuperscript{140} \textsc{Wakelyn}, \textit{supra} note 38, at 10-12.
trained barrister whose son the Suffolk Bar Association had rejected and
who had thereafter waged public attacks on all the county bar associations,
originally hatched the idea for a newspaper assault on lawyers. On this
account, Gardiner allegedly relayed the idea to Samuel Adams who, after
working up a few drafts, charged Austin with finalizing and publishing the
essays. Gardiner himself credibly denied the suggestion, even as he
admitted having little veneration for members of the Massachusetts legal
profession.\textsuperscript{141} Gardiner’s well-known indictments of the bar associations
may very well have inspired Austin. But whatever Austin’s connection to
either Gardiner or Adams in this regard, no real dispute exists that Austin
himself conceived, wrote, and published the essays appearing in the
\textit{Independent Chronicle} in the spring of 1786.\textsuperscript{142}

On March 9, 1786 Austin fired his opening shots, arguing that
republicanism, far from necessitating the legal profession, actually
required its eradication. Honestus would accept nothing less than the
profession’s total and permanent “annihilation” in Massachusetts.\textsuperscript{143} “The
cure,” he later wrote, “must be radical!”\textsuperscript{144} Over the next four months
Austin published twelve additional essays expounding on these themes
and rebutting the claims of his many opponents. Austin’s essays caused at
least as much stir as the Cincinnati controversy two years earlier and
resulted in substantial town meeting and convention activity to implement
his proposed reforms.\textsuperscript{145} At the time, readers and respondents invested
Austin’s impassioned assault on lawyers with immense legal, political and
historical significance. For them the fate of the nation seemed to hang in
the balance. In the words of “Old Rock,” “the cause now before the people
is perhaps as solemn and important as any that has ever been brought
before them.”\textsuperscript{146} Indeed, at least one respondent suggested that Austin had
a divine sanction: “His pen has been guided by some superior intelligence;
the voice of God, and the voice of the people have been in conjunction.”\textsuperscript{147}

Why did Austin and his choir of supporters consider this matter so

\textsuperscript{141.} Barebones, \textit{AM. HERALD} (Boston), June 26, 1786, at 3; \textit{see also} I AMORY, \textit{supra} note 27, at
188; Grant, \textit{Benjamin Austin, Jr.’s Struggle, supra} note 38, at 23. Gardiner would go on to introduce
major law reform legislation, parts of which resonated with Austin’s proposals. GAWALT, \textit{supra} note
27, at 83; McKirdy, \textit{supra} note 24, at 189-92.

\textsuperscript{142.} He apparently even researched court records when preparing his essays. He acquired,
for example, a Bill of Costs ordering a litigation defendant to pay an amount (with court costs) far in
excess of the original debt alleged, even as the court’s liability judgment relieved the defendant of over
half that debt. It is possible that Gardiner, an attorney, provided Austin with this document. Austin
later reproduced its contents in one of his essays, infuriating his lawyer opponents. Honestus, \textit{INDEP.
CHRON.}, June 1, 1786, at 2. He redacted the Bill of Costs from the 1819 republication. Surrency, \textit{supra}
note 38, at 250-54.

\textsuperscript{143.} Honestus, \textit{INDEP. CHRON.}, Mar. 9, 1786, at 2.

\textsuperscript{144.} Honestus, \textit{INDEP. CHRON.}, Apr. 13, 1786, at 1.

\textsuperscript{145.} \textit{See supra} notes 22, 24-27 and accompanying text.

\textsuperscript{146.} Old Rock, \textit{INDEP. CHRON.}, May 11, 1786, at 2.

\textsuperscript{147.} Perseverance, \textit{MASS. CENTINEL}, June 17, 1786, at 2.
momentous? What nerve had Honestus struck? What exactly did the Austinites find so profoundly offensive about the Massachusetts legal profession in the revolutionary spring of 1786? Austin’s overarching contention, and one echoed time and again by his supporters, asserted that the legal profession had become an unrepublican aristocracy that, wielding a monopoly on the legal knowledge necessary to prosecute and defend disputes in the justice system, threatened to destroy the liberties of the people forever. Interestingly, the “Free Republican,” against whom Austin had targeted his first essay, may have unwittingly planted the link between lawyers and aristocrats in Austin’s head. As noted, the previous writer had somewhat casually referred to the profession as a “necessary order.” A few weeks later, we find Austin also applying the term to the legal profession but, in contrast to the previous writer, squeezing it for all its fearsome anti-republican connotations, repeating it over and again, and putting it in scare quotes to draw readers’ attention to it. The term would have had considerable resonance for readers of the Boston papers in light of the controversies over the Cincinnati and the Tea Club—also deemed anti-republican “orders.” Austin knew very well that his audience would recoil at any suggestion of a distinct “order” boasting social, cultural, or political superiority. His innovation lay in extending the post-Revolutionary critique of aristocracy to claims of legal superiority and suggesting that such claims struck at the taproot of the republican experiment. “If we are willing to bend under the aristocratical tyranny of this ‘order,’” Austin wrote, “all the boasted acquisitions of our independence are ‘sounds and nothing else.’”

Austin’s supporters instantly latched on to his anti-aristocratic conceptual framework, pairing it with foreboding images of English legal culture. “Root and Branch” worried that if the people did not act quickly, the lawyer aristocrats would burrow themselves into the Republic’s very foundations. The people, he wrote, should fear “[a]ll orders and combinations of men . . . but when they become so daring, as to set themselves as an order and are absolutely established by the tacit consent of the people—farewell the liberties of our republic.” Like the Cincinnati,

148. By “Austinites,” I mean: (1) the many individuals who published writings in the Boston papers in support of Austin during the Spring and Summer of 1786 (many of whom have been or will be cited in the Article); (2) other contemporaneous readers who supported Austin in this regard, the existence of whom we can reasonably presume based on the intensity of the debates and on the evidence of anti-lawyer agitation at Massachusetts town meetings and the like (see supra notes 22, 24-26 and accompanying text); and (3) the Shaysites whom, as set out below, contemporaries linked to Austin’s supporters and whose anti-lawyer sentiments bore clear affinities with Austin’s own. As noted in the Introduction, moreover, post-Revolutionary antilegalist currents did not confine themselves to Massachusetts; they swept through many other areas of post-war America. See supra note 27. These other resisters outside of Massachusetts also qualify as participants in the movement to which Austin gave expression.

149. Honestus, INDEP. CHRON., Mar. 23, 1786, at 1.
the profession therefore had to be "annihilated in its infancy." Another Austrinite, "Modestus," had the Chronicle reprint a London article describing a procession of the "Gentlemen of the Black Robe" in protest against the House of Commons. The image called up the dramatic conflict between lawyers and the people that Austin’s critiques threw into bold relief. "[A]gainst their annihilation," Modestus editorialized, the Massachusetts "order" would soon stage a similar "procession."

Austin depicted the legal profession as standing ominously apart from the people and thus outside of popular control. Bay Staters had accused the Cincinnati of establishing an imperium in imperio and Austin now indicted the legal profession on the same grounds. The profession, Austin wrote, "establishes a perpetual power (vastly superior to the Judges . . . ) over which the people have no control: There being no rotation or choice of members . . . in time they become so involved in the very vitals of government, that it will be out of the power of the people to remove them." Increasingly populated by the lawyers themselves, the legislature already seemed incapable of restraining the profession’s practices. Austin drew special attention to the bar associations’ evasions of the maximum fee statute. "The fee-table is treated like an old almanac," he complained. "They have so established certain rules among themselves (as a combined body) that the state may go on to regulate; but the ‘order’ will ever find means to augment their Court charges."

Austin feared that the multiplying bar associations would conspire, secretly in "bar-meetings," to join together and thereby establish a "combined body" with "perfect aristocratical influence" throughout the judicial system. This would permit members to "establish any mode of judiciary process they think proper and, under sanction of law, the vilest impositions may be practiced." The result? Enslavement of the people. With judges and practitioners in cahoots, the lawyers’ "STAR CHAMBER tyranny" would reduce the people to bondage, for "when a people cannot appeal with safety to the laws of their country, they are absolute..."
slaves.” Did imprisoned debtors, laboring away to pay their creditors (and ultimately the lawyers themselves), not find themselves essentially in a state of bondage? After their long “struggle for freedom,” would the American people permit themselves to become “SLAVES to the assuming dangerous power of this ‘order’”? The Austinites also excoriated the lawyers’ large fee exactions, which enabled legal practitioners to amass substantial personal wealth while most people suffered. Not only had the lawyers commandeered the justice system. They also purported to put it up for sale, “rendering the laws a mere business of traffic” and the judicial system corrupt. Consequently, the “order” daily grew rich while the general community “as rapidly” became “impoverished.” The lawyers’ fee bounties had placed them on the “pinnacle of luxury and dissipation.” Austin seems to have imagined the lawyers luxuriating in opulent drawing rooms with members of the Tea Club. Supporters elaborated on these themes with revealing historical allusions. Writing in support of Austin, “A Friend to the Publick” linked law’s “fattened” practitioners to the corrosive “luxury” that had destroyed Rome. In her “youthful state,” he wrote, Rome had “lived in credit and [was] renowned for arms,” but she later “fell a victim to luxury, that fatal disease of the body politic, by not resisting but indulging herself in it.” Sensing a symbiotic relationship between lawyers and debt, the writer hoped that “by industry and frugality we may be able to wipe off our national and domestic debt” so as to obviate the need for the “order” and thus enable men to labor free and secure. Writing in support of Austin, “Old Rock” similarly criticized the profession’s acquisitiveness, a quality rightly condemned, he pointed out, by St. Paul, Homer, Lycurgus and Socrates. Money, and money alone, this writer sardonically observed, served as “the noblest principle that actuates the Generality of lawyers, so noble and ‘open-hearted’ as to pillage and plunder all their country.” The writer advised Massachusetts legislators to pay heed to Lycurgus, history’s “ablest law-maker,” who banished money from his realms for centuries producing the “grandest and happiest nation recorded in the annals of mankind.”

Before Austin could write and publish his second essay installment an organized opposition to his stated objectives had already started to coalesce. By all appearances most, if not all, of Austin’s antagonists practiced law in Massachusetts, though like Austin they wrote under

158. Honestus, INDEP. CHRON., June 1, 1786, at 2; Mar. 23, 1786, at 1.
159. Honestus, INDEP. CHRON., Apr. 20, 1786, at 1.
pseudonyms. In a way, the lawyers made claims no less daring than Austin’s. Their basic argument asserted that free republics, in order to exist at all, required lawyers. “Advocates,” wrote one, “exist naturally in free governments.” In seeking to demonstrate the republican “necessity” of the profession, the lawyers also invoked history, highlighting the great classical lawyer-statesmen. Prominent lawyer, judge, and future Governor, James Sullivan wrote in this vein under the name “Zenas.” Greece had the unimpeachable Demosthenes, Sullivan wrote, Rome the estimable Cicero, and “the liberty of Rome fell but with the lives of her Lawyers.” Sullivan contended that the great Massachusetts lawyers fit squarely in the tradition laid down by the classical orator-statesmen. Adumbrating the profession’s history in early Massachusetts, Sullivan contended that Bay State lawyers had ultimately “fought and suffered to establish their country’s liberty” during the Revolution and then, to cap their republican achievements, masterminded the Massachusetts Constitution. The professional legal mind, Sullivan insinuated, had stitched itself into the republic’s very architecture. Americans thus had no “power” to abolish lawyers, he argued, “without overturning the constitution.”

Pursuing a similar theme, “A Lawyer” spotlighted respected figures within the Massachusetts bar, including James Otis, Oxenbridge Thatcher, and John Adams. Could the people reasonably charge these venerable patriots, intellectual architects of the Revolution, with harming the country, as Honestus suggested? Perhaps, at the end of the day, the people needed to look in the mirror. For no set of lawyers could enslave a people not already politically enervated and therefore susceptible to enslavement, at which point “no arm can save them” anyway. A people “ripe for slavery,” the Lawyer wrote, “cannot in the nature of things be free.”

Austin’s adversaries conceded some bad apples, the aberrant “pettifoggers” in the profession, and indeed, like the barristers and serjeants at law in England, the recognized leaders of the profession had historically sought to purge the practice of these perceived hacks. The lawyers insisted, however, that Austin had immoderately angled to throw the baby out with the bath water. Writing in the Massachusetts Centinel, one Austinite cleverly turned the tables: Why should the “Sons of

165. Zenas, INDEP. CHRON., Apr. 27, 1786, at 1.
166. Amory, supra note 27, at 189.
168. Zenas, INDEP. CHRON., May 11, 1786, at 2. Since the lawyers had invoked the Massachusetts Constitution to justify the profession’s existence, Austin cleverly rejoined by arguing that the same Constitution—namely, Article XI of the Massachusetts Declaration of Rights—actually required the profession’s eradication. Honestus, INDEP. CHRON., Apr. 20, 1786, at 1; see also MASS. CONSTITUTION, Declaration of Rights, art. XI (1780) (“Every subject of the commonwealth... ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”).
Massachusetts,” he queried, be made to tolerate the entire profession simply because a few honorable practitioners exist?  

History, another writer insisted, could not redeem the profession, for what relevancy did the “rude, unenlightened, uncultivated state” of ancient Greece or Rome have to the “present system of jurisprudence in this country”?  

Rome did not represent any republican golden age, as the lawyers had insinuated. Indeed, in those ancient times, “any daring fellow had it in their power to make slaves of the people.” Modern-day Massachusetts republicans, on the other hand, remained “too well informed to be deprived of their dear bought rights by any daring fellow whatever.”  

For his part, Austin expressed alarm that members of the “order” had publically endorsed the principles of Roman government, whose “Comitia Centuriata” had ruled that the “richest class should have everything at their disposal” and that the “PEOPLE SHOULD BE RARELY CALLED TOGETHER, UNLESS FOR MATTERS OF SMALL MOMENT.”  

The lawyers’ historical arguments only confirmed their anti-republican motivations and aristocratic conceits. If the “order” had its way, “like the Plebians of Rome, the people will be obliged to choose a PATRON from among them.” Moreover, while Austin did not deny that patriot lawyers had engaged in “respectable” conduct during the imperial crisis and Revolution, he maintained that the “practice then and now is so opposite in almost every instance.” Whatever its history, the profession had become a “dangerous institution” in the post-Revolutionary years. Recognizing that republican principles required the profession’s immediate and permanent “annihilation” flowed not from an understanding of “Justinian or Theodosius” but rather from “the experience of every man within this State.”  

B. A Disposition Unfriendly to the Law Itself  

That Honestus provoked a strong response from Bay State lawyers, whose very livelihood his essays expressly aimed to eliminate from society, remains unsurprising. The lawyers, however, argued that Austin’s claims had much broader implications—over and above the legitimacy of the profession itself. For the legal system to function at all, as Sullivan had
insisted, it required the professional legal mind. Responding to the uproar that Austin had aroused, Caleb Strong—a lawyer and state senator who would go on to serve as a delegate to the Constitutional Convention, a U.S. senator, and Governor of Massachusetts—concluded that Austin’s essays represented much more than just an animosity toward lawyers. The assaults on lawyers, Strong wrote on June 24, 1786, “originate more from a Disposition unfriendly to regular Government and the Law itself than from the Conduct of those who practice it.” Other lawyers similarly accused the Austinites of seeking to abolish “law itself.” Passages in Austin’s and his supporters’ essays do substantiate this allegation.

“Legal impositions are the worst species of tyranny,” Austin declared at one point. “Every act which is passed, so far from relieving the people, serves only as a link in the grand chain of TYRANNY.” Elsewhere Austin apparently backed away from these categorical claims. In one essay, he stated that his goal lay in setting the “law” on a more egalitarian foundation, so that all people, whether rich or poor, could “ever be on an equality, while they are appealing to the JUSTICE of their country.”

The lawyers made this impossible. Driven not by an honest sense of justice but by the selfish interests of their clients and, above all, by the desire to receive “a large reward,” the lawyer “warp[ed] the laws to answer his particular purposes,” introducing a “multiplicity of needless and almost unintelligible words” and “mystical phrases.” The law had thus become the “mere pageantry of the profession, calculated to perplex the jury and deceive the wondering crowd.”

But the plot thickens. For Austin went on to assert that the problem’s crux lay not only in the lawyers’ “pernicious practices,” but in the fact that the “order” had introduced the “whole body of English laws” into the

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179. Sullivan’s claim had a deeper historical basis. In his influential study of the Western legal tradition, Harold Berman maintains that one of the tradition’s principal characteristics lay in entrusting the administration of legal institutions to a “special corps of people who engage in legal activities on a professional basis.” HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 8 (1983).

180. Letter from Caleb Strong to Nathan Dane (June 24, 1786), in 16 CLIFFORD SHIPTON & JOHN SIBLEY, SIBLEY’S HARVARD GRADUATES 96, 96 (1972) (emphasis added); see also GAWALT, supra note 27, at 63 (noting that, ultimately, “it was the system of law rather than individual lawyers that aroused animosity”).


182. See supra notes 41-43 and accompanying text.


187. Honestus, INDEP. CHRON., May 18, 1786, at 1. Austin made the further claim that, set in the practical context of Massachusetts debt litigation in which debtors rarely disputed their accounts, hardly a case existed that “required any material law question to be agitated.” The common causes, which “deferred from term to term,” and which “cost so much money[,] are in no respect intricacies of law.” And yet the lawyers made them so. Id.
American justice system. Laws deriving from England’s “aristocratical institutions” and “applicable to Kings, Lords and Commons,” Austin wrote, had no place in “our young Republic.” “We may as well adopt the laws of Medes and Persians.”188 The common law seemed to the Austinites so vast, indefinite, and contradictory that a case for almost any conclusion could be made through a careful selection of instances. The “fly art” of aristocrats, the common law thus defied both logic and common sense. The “grand artillery” of precedents “brought from Old English Authorities” served to “embarrass all our judiciary causes” by permitting the lawyers to “cull and select precedents to answer every purpose: the omnipotence of their laws can reconcile all contradictions.”189 Thus, while the common law effectively “perplex[ed] the mind,” it could never “inform the judgment” and, indeed, its “numerous volumes . . . arranged in formidable order” only operated to “batter down every plain, rational principle of law.”190 Ill-suited to the state’s “particular circumstances,” even the ancient liberties set out in Magna Carta did not perforce apply in Massachusetts.191 As Austin viewed it, the common law could not exist without the lawyers, and the lawyers could not exist without the common law. The “gentlemen of the bar” had a vested interest in establishing a legal regime that necessitated the professional legal mind and thereby precluded ordinary litigants from speaking for themselves. The “aristocratical” common law effectively achieved both objectives.

Austin had a simpler republican alternative in mind that would render professional lawyers superfluous and qualify all citizens personally to participate in the justice system on equal footing. In lieu of the impenetrable complexity and confusion introduced by the lawyers and their laws, Austin proposed a regime predicated on “fundamental principles of law”—a “system of laws of OUR OWN, dictated by genuine principles of Republicanism, and made easy to be understood by every individual in the community.”192 But of what did such “fundamental principles of law” consist? By all appearances Austin used this phrase to refer to basic “principles of right and wrong” as ascertained by a common moral sense universally possessed.193 The phrase “fundamental principles of law,” in other words, served as a proxy for individual conscience and common-sense judgment. The legal profession, Austin emphasized, “is no way essential to this knowledge.”194 Lawyers and their laws, for Austin, had no legitimate purpose in a free republic for “every man of common

188. Honestus, INDEP. CHRON., Mar. 23, 1786, at 1.
189. Id.
190. Id.
abilities can easily distinguish between right and wrong.” The trial by jury, which Austin eulogized at length, grew directly out of the common sense principle. If the “fundamental principles of law” did not stand “level with the common understanding,” he wrote, then the “trial by jury, which consists of twelve men taken indiscriminately from the people, is the greatest absurdity in nature.”

Austin’s elevation of common sense over common law seems to have drawn on Scottish ethical philosophy, which had proven quite influential among members of the revolutionary generation. Against Locke’s suggestion that all men begin as blank slates, Scottish philosophers such as Francis Hutcheson had argued that man had an innate moral sense that pronounced immediately on the character of observed actions, approving virtue and disapproving vice. Hutcheson’s fellow Scot, Thomas Reid, coined the phrase “common sense,” which Thomas Paine later employed as the title of his influential revolutionary pamphlet. For Reid, certain basic aspects and relations among things in the world did not fall within the realm of reason or philosophy, let alone law books; instead, simple common sense, possessed by everyone, perceived truth or commanded belief by an instantaneous, instinctive, and irresistible impulse. Reid, writes one historian, thus “democratized the intellect by insisting that the ordinary man could be as certain of his judgments as the philosopher was.” A comparable egalitarian epistemology marked Austin’s conception of so-called “fundamental principles of law,” which he considered an integral part of every individual’s moral constitution.

On all the foregoing points, Austin and his followers again ran up against significant resistance from Bay State lawyers. Writing as “Zenas,” James Sullivan felt that Austin’s alternative jurisprudential vision lacked a proper understanding of law, legal history, and liberal political philosophy. One could easily fantasize about a primitive state of nature, where simple common virtue sufficed to resolve disputes among men. If men were “angels,” Sullivan wrote, then “neither laws nor government would be necessary.” But reality, not fantasy, should guide men’s reasoning on such issues. While conscience might point men to justice, their “inherent

195.  Honestus, INDEP. CHRON., May 11, 1786, at 1. Austin vigorously defended the jury’s “right to judge both law and evidence in all cases submitted to them.” Surrency, supra note 38, at 301. Indeed, he maintained that “[l]aw and evidence are one and indivisible.” Id. at 298.

196.  For a convincing, though controversial, account of Jefferson’s intellectual debt to the Scottish ethical philosophy as evidenced in the Declaration of Independence, see GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE (1978).

197.  See generally 1 COLLECTED WORKS OF FRANCIS HUTCHESON (Bernhard Fabian ed., 1990); 1 WORKS OF THOMAS REID 141, 147, 148 (William Hamilton ed., 1994). Reid’s seminal work INQUIRY into the Human Mind was first published in 1764.


199.  This came a year and a half before James Madison famously uttered a substantially identical line. See THE FEDERALIST NO. 51, supra note 69, at 319 (James Madison).
passions” and “proneness to ambition and avarice” invariably prevent “voluntary submission” to it.200 Thus, “men possessing separate property have found it necessary to establish government for the preservation of it.” “[C]oercive power,” Sullivan declared, “must be lodged somewhere to compel justice.”201 To deny this reality instigated an unwinnable fight with “the high author of the human race.”202 Sullivan here illuminated a key point of philosophical contention between the Austinites and the lawyers—their contrasting views of human nature. The Austinites had a Scottish-inspired faith in the common man’s moral compass and his natural inclination to conform to it without legal sanction or coercion. The lawyers, on the other hand, shared Hobbes’s pessimistic view of human nature, which they employed to justify centralized coercive legal authority.

But Sullivan took the argument even one step further. The simplest justice systems, he continued, far from promoting liberty, as Austin suggested, usually constituted “the work of a despot.”203 Blackstone had made the same argument.204 Formalistic legal complexity, Sullivan asserted, increased in “exact proportion to the quantity of freedoms enjoyed by the subject.”205 Signaling an important post-Revolutionary intellectual shift among American lawyers that would crystallize in the aftermath of Shays’s Rebellion, Sullivan used the terms “freedom” and “liberty” to refer primarily to private property. The purchase, ownership, and transfer of property and credit necessitated a profusion of laws to correspond to the complexity of the transactions themselves. These correlative processes, coupled with “the imperfection of language,” meant that most modern laws escaped the intellectual grasp of “illiterate men.”206 This fact, in turn, necessitated legal professionals who, through long study, could cultivate an understanding of common law doctrine. In light of these practical realities, if no men “made a profession in the knowing of the law,” Sullivan queried, how would the “poor man, the weak man, the widow, the orphan” defend themselves against “the opulent, the cunning and the strong”?207 Whatever label society attached to them, “[a]dvocates exist naturally in free governments.”208 Here again the whole line of

201. Id. (emphasis added).
202. Id.
204. See 3 BLACKSTONE, supra note 2, at 325-30.
207. Id.
208. Id.
argument—that liberty in a complex society required complex laws and therefore professional lawyers to make sense of them—derived from a passage in Blackstone's *Commentaries*.209 And, indeed, no other legal writer influenced the lawyers of '86 more than Blackstone. The Austinites saw the world through an entirely different cultural prism. If Austin had any knowledge of Blackstone, he had little regard for it. Saul Cornell may shed some light on the difference in the distinction he draws between "the Latinate culture of the law" and the "popular Protestant plain style."210 For his part, Austin deemed Sullivan's assertion that freedom and property somehow required a complex and confusing legal regime almost too fanciful to dignify a response, the artful argument of a lawyer defending his comrades, not the truth. Lawyers in particular, rather than society generally, produced legal complexity, and they did so to serve their own interests, not the people's. "[W]e may as well say that we can have no merchants without first introducing an 'order' of stock-jobbers; the fair principles of commerce are known, without the finess, 'cunning,' and craft of the Exchange Alley."211 Lawyers and their prolix laws did not secure property as Sullivan suggested, but rather endangered it, through replevin actions, foreclosures, and extortionate fees, including court costs.212 Only "fundamental principles of law" properly applied in a free republic, Austin maintained, for only such principles remained accessible to all men equally—"level with the common understanding."213

C. Custom Versus Law

For whom, and to whom, did Austin purport to speak? Austin claimed to represent a very broad swath of post-Revolutionary society—pretty much everyone except the lawyers. Austin characterized the lawyers' pernicious practice as a "matter of general complaint," a threat to "every individual in the community." References to the "people" and the "publick" at large pervade Austin's and his supporters' writings.214 All saw themselves as speaking both to and for the "people."215 Certainly

209. 3 BLACKSTONE, supra note 2, at 325-30. Indeed, at the behest of a reader, the *Independent Chronicle* reproduced this entire text on the front page on June 1, 1786. To Honestus, INDEP. CHRON., June 1, 1786, at 1.
211. Honestus, INDEP. CHRON., Apr. 20, 1786, at 1.
212. Id.
214. See, e.g., Honestus, INDEP. CHRON., Mar. 9, 1786, at 2; Old Rock, INDEP. CHRON., May 11, 1786, at 2.
215. See, e.g., Cousin German to Honestus, INDEP. CHRON., Mar. 30, 1786, at 2; Truth, MASS. CENTINEL, Apr. 1, 1786, at 1.
Austin empathized with the many poor or financially strapped farmers sued on their mortgages and other debts. "How many debtors now languish in prison," he wrote, "whose misfortunes are increased by Court impositions?" Court costs and the bar associations' self-legislated fee structures put men of lesser means at a distinct disadvantage in litigation matters. "Can the poor (who cannot pay any of this 'order')," Austin queried, "receive the equal advantage with the rich, when such a body of men exist, who stand ready to speak on any subject and like mercenary troops can be hired to support any cause for the consideration of a large reward?" Clearly, as it stood, the rich fellow could overpower the poor one not by the soundness of his argument or the justice of his demands, but "by the greatness of his gifts to lawyers." In a justice system cleansed of lawyers and their confusing laws, Austin concluded, rich and poor alike would stand on a level playing field while "appealing to the JUSTICE of their country."

But although he sometimes appealed to debtors and the poor, Austin himself identified as a "mechanic"—albeit one quite unafraid to rock the boat within the community—and merchant. Austin directed considerable intellectual energy into protecting the interests of merchants and creditors from law and lawyers—an important aspect of his writings that historians have too often overlooked and which challenges the historiographical tendency to link the Austinites' hostilities toward lawyers to class struggle. Austin felt that well-intentioned creditors suffered the wrath of law and lawyers in unique ways. The "order" had exploited "every accidental circumstance which an unprincipled person [i.e., debtor] might have, by the lenity and indulgence of an honest creditor," and stood ready "to strike up a bargain (after rendering the property in a precarious state) to throw an honest man out of three quarters of his property."

As a class, particularly vis-à-vis farmers, merchants generally acted as creditors. At the same time, the record suggests that we ought to exercise caution in drawing bright-line distinctions between debtor and creditor classes in post-Revolutionary Massachusetts. In Worcester county (one of the busiest counties in the state), for example, parties often found

219. See A Mechanick, MASS. CENTINEL, Apr. 12, 1786, at 2; A Mechanick, MASS. CENTINEL, Apr. 8, 1786, at 1. The term "mechanic" referred to artisans of all kinds.
220. See PASLEY, supra note 92, at 108. Austin apparently enjoyed considerable financial success in his business endeavors. Id.
221. The historical record directly contradicts William Nelson's assertion that Austin "showed an utter lack of respect for the vital economic interests" of creditors. NELSON, supra note 4, at 71.
222. Honestus, INDEP. CHRON., Mar. 9, 1786, at 2.
223. GAWALT, supra note 27, at 29.
themselves in webs of litigation wherein a debtor in one case might sue as a creditor in others. Recent scholarship demonstrates that Massachusetts litigants sued for recovery of debts did not necessarily constitute a “weak yeomanry” but rather a “special class” of litigants caught between their own creditors and debtors, often quite solvent on paper though without sufficient specie or other tangible valuables to pay accounts.\footnote{Jonathan M. Chu, Debt Litigation and Shays’s Rebellion, in IN DEBT TO SHAYS 81, 82 (Robert A. Gross ed., 1993).} The transformation of debt structures in the 1760s from book accounts to promissory notes, which by the 1780s traded at a “dazzling and confusing rate,” meant that legal relations became increasingly impersonal as litigation on these notes multiplied.\footnote{Id.; see also MANN, supra note 51 (analyzing this change in Connecticut).} Debtor-defendants short on cash benefited from delay, as it gave them time to seek funds and put off the payment of court costs due at the conclusion of a case. During the pendency of a case, costs and fees remained manageable for many defendants, who sat on the sidelines and routinely took default judgments. Evidence suggests that plaintiffs’ lawyers would often pay the appeal bond to keep the case alive, for payment of their own fees depended on obtaining some recovery.\footnote{Chu, supra note 224, at 93.} It appears, then, that lawyers and debtors had something of a “symbiotic relationship” based on a shared interest in prolonging the appeals process.\footnote{Contingency fee arrangements, also known as “champerty,” were controversial and considered improper, if not altogether illegal. Austin’s newspaper opponents denied that respectable lawyers pursued such arrangements. But the temptation certainly existed and, if we take Austin’s word for it, the practice remained quite prevalent. Honestus, INDEP. CHRON., Mar. 23, 1786, at 1.} The legal system about which Austin complained actually tended to benefit debtors more than creditors, particularly the debtors with wherewithal who sued as creditors in other cases and thus, with their lawyers’ help, might play the procedural peculiarities in one case off the other. Because of such litigation shenanigans, many creditors preferred to stay out of court.\footnote{Chu, supra note 224, at 93.} \footnote{Id. at 96.} \footnote{Honestus, INDEP. CHRON., Mar. 9, 1786, at 2.}

Bay State lawyers played on both sides of credit transactions, primarily with a mind toward getting their own bills paid. But Austin maintained that aggressive lawyers representing clients who indisputably owed money or property had engaged in particularly objectionable tactics. He voiced specific concerns about lawyers’ use of replevin procedures, “arbitrarily adopted, so as to render futile all attachment whatever.”\footnote{Honestus, INDEP. CHRON., Mar. 9, 1786, at 2.} Even after a “legal seizure” based on undisputed debt and where the creditor attached “the identical parcel of goods for which the person was indebted,” the “creditor stands exposed . . . to have his doors burst open and the property
torn from his possession without sufficient security.” 230 In the lawyers’ hands the laws thus did not suffice to “protect a creditor in his legal demands,” and the replevin procedures “tend[ed] to increase greatly the influence and authority of the lawyers.” 231 Apparently, lawyers felt less compunction employing the replevin procedures as against British creditors than American ones. Emphasizing that Americans remained essentially a “commercial people,” Austin worried that the lawyers’ unfair property seizures would harm the nation’s “commercial reputation” and “mercantile character,” souring transatlantic trade relations to the detriment of all. 232 The “mercantile part of the community,” he emphasized, “are much interested in this particular.” 233

Austin’s sympathies with mercantile interests extended well beyond his opposition to replewins. His primary reform proposal—that parties submit their disputes to mutually agreed-upon “referees” rather than courts—seemed to have drawn on the arbitration procedures commonly adopted by colonial merchants in the eighteenth century, of which Austin must have had some awareness. Colonial merchants, particularly in New York, had traditionally used informal arbitration procedures so as to avoid dilatory court procedures, the “solemnities of the law,” and, above all, lawyers. 234 Merchants eschewed the adversarialism that marked legal proceedings. “All controversies,” declared the New York Chamber of Commerce in 1768, “are antagonistic to commerce.” 235 Merchants viewed the mutual submission to binding arbitration as a matter of common courtesy and decorum—a matter of good faith and fair dealing. As one put it, “it is invariably lookd [sic] upon as a point of justice and propriety to submit to the referees.” The idea of challenging an arbitration award—an “appeal” from a legitimate judgment by your neighbors—greatly offended mercantile sensibilities. Merchants avoided all such litigiousness. No merchant would “in decency” appeal the referees’ disposition, as that would run “contrary to all practice.” Challenging “the award of people in Commerce” in a court and thus throwing the matter into “Expensive endless Law,” epitomized “ill Grace.” 236

In England, Lord Mansfield labored long and hard in efforts to bring the

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230. ld.
231. ld.
232. Honestus, INDEP. CHRON., June 1, 1786, at 2.
235. Quoted in Auerbach, supra note 38, at 33.
merchants’ informal customary justice system into the folds of the common law court system so as to exert some modicum of control over it. At least in part, he succeeded. In the American colonies, however, independent mercantile practices persisted longer. In New York during the eighteenth century, for example, practicing merchants themselves “finally decided the bulk of the mercantile cases with little, if any, control by the courts.” Merchants in other seaport cities presumably proceeded in like fashion.

Tensions between the lawyer-dominated legal system and the merchant arbitration system intensified during the early part of the imperial crisis. When John Morin Scott, a pillar of the New York legal profession, ran for the New York assembly in 1768, merchants seized upon the occasion to attack the legal profession in some revealing ways. They blamed the lawyers, who had allied themselves with the landed gentry, for the rent rebellions of 1766. The merchants’ “venomous broadsides,” writes one historian, “called the attention of the voters to the fact that New York was a commercial city owing its prosperity to merchants and not to men of law.” Scott lost the election, a testament to the strength of the mercantile appeal. But only a few years later, Isaac Low again called on New Yorkers to choose between merchants and lawyers: “the Word of a reputable Merchant is in all Places as good, and in this City will go much further than that of a quibbling Lawyer, even if he had never been proved to have departed from a sacred Regard to Truth.”

The modern alliance between the legal profession and commercial concerns tends to obscure our understanding of their conflict-ridden history, which appears to have intensified considerably in the decade after the Revolution. Austin’s writings suggest that the conflict extended into post-Revolutionary Massachusetts, even as only a few years prior Bay State lawyers had raised some of their great constitutional arguments defending merchants against smuggling charges.
Austin warned against placing mercantile disputes in “the hands of lawyers,” whom he deemed “unacquainted with the customs of merchants.”244 Neither lawyers nor judges possessed the competence to resolve merchant accounts. Rather a “body of merchants are ever considered the most eligible to settle commercial disputes.”245 “[H]ow many disputed accounts” tied up in the courts, Austin asked, could have been promptly “settled by three merchants who are acquainted with mercantile concerns”?246 Courts and lawyers served only to “throw the [merchants’] most simple demands into confusion.”247 Austin aimed, moreover, to extend the mercantile model of employing referees intimately familiar with community-based customs and usages to other sub-communities, such as farmers who could also “have most of theirs settled in this manner.”248

Austin’s opponents did not expressly object to offering litigants the option of arbitration. But as to Austin’s proposal that such arbitrations have binding effect, “Twig of the Branch” and others rejoined that it would deprive the people of their “most sacred right”: a trial by jury.249 Austin himself did not directly answer Twig’s allegation, except to deny having ever “disputed” the trial by jury or urged “compulsory references.”250 It appears, however, that neither Austin nor his followers clearly distinguished between arbitration referees and juries as a functional matter. Thus even as Austin repeatedly proposed binding “reference” procedures in lieu of litigation, “Old Rock” could claim that “[i]t is manifestly the aim of that celebrated writer [Honestus]” to have all disputes “equitably decided by that glorious tribunal, that grandest and best birthright of Americans, a jury,” so that lawyers could no more “impede the course of justice, and notoriously cheat and delude the honest citizen.”251 Both arbitral referees and juries, in the Austinites’ view, removed cases from the reach of common law doctrine, lawyers, and

resolve trade grievances through peaceful means and thereby preserve amicable commercial relations with the mother country. See generally THOMAS M. DOERFLINGER, A VIGOROUS SPIRIT OF ENTERPRISE: MERCHANTS AND ECONOMIC DEVELOPMENT IN REVOLUTIONARY PHILADELPHIA (1986); ARTHUR M. SCHLESINGER, THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763-1776 (1918).

244. Honestus, INDEP. CHRON., Mar. 23, 1786, at 1.
247. Honestus, INDEP. CHRON., May 11, 1786, at 1; see also Honestus, INDEP. CHRON., Apr. 20, 1786, at 1.
251. Old Rock, INDEP. CHRON., May 11, 1786, at 2. These remarks seem to jibe with the findings of recent historical scholarship, which suggest a more experimental approach to jury composition in the eighteenth century, including more frequent use of merchant juries and “struck” juries. See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 17-24 (2006).
Knapp: Law's Revolution: Benjamin Austin and the Spirit of '86

2013] Knapp 315
courts, all of which unnecessarily perplexed and protracted legal procedures, and instead tied dispute resolution to the common moral sense of neighbors and brethren.

V. THE SPIRIT OF '86 IN THE FLOW OF AMERICAN LEGAL HISTORY

A. Law's Revolution

Austin published the final installment in his essay series assailing the Massachusetts legal system on June 15, 1786 and, shortly thereafter, left the country on an extended visit to England and Europe.252 In August Shays's Rebellion broke out. Commentators in the papers immediately began blaming Honestus—that “high and mighty promoter of disorders”—for inciting the uprising.253 Austin’s essays, wrote one commentator, had “introduced” the disorder “against the sacred constitution of this State.” The writer likened Honestus to “Satan.”254 Opponents imagined Austin in England celebrating the “overthrow of civil liberty” with loyalist defectors.255 Austin’s absence surely enabled these damning perceptions to grow unabated in the final months of 1786. But when Austin arrived home at the turn of the year, he promptly began publishing essays in his own defense, denouncing the rebellions and disclaiming any role in causing them, but refusing to retract any of his previous contentions with regard to the legal system and profession.256 The “people in general,” he maintained, had approved the movement to abolish lawyers and the common law.257

So did Austin’s essays impel the Shaysites to wage what one historian has called the “American Revolution’s Final Battle”?258 The Massachusetts rebellion in 1786 had many causes, and we do history no favors by trying to lay the episode at the doorstep of one man. But clearly Austin’s widely disseminated writings ranked as one significant factor in

252. It is unclear when precisely Austin left the country. The possibility exists that he left after the uprisings began in anticipation that he would be blamed. The timing of his travels, which coincide almost perfectly with the most intense period of rebellion (returning right after Governor Bowdoin dispersed the rebels), does seem conspicuous in this regard. See Honestus, INDEP. CHRON., Jan. 11, 1787, at 2.
253. Markwell, MASS. CENTINEL, Sept. 9, 1786, at 2. Indeed, months before open rebellion broke out, Austin’s opponents worried about the inflammatory impact of his essays. Viewing Massachusetts in a vulnerable condition, “in a state of political fever,” “Lelius” accused Austin of “blow[ing] up the coals of dissention” and “raising a civil war in the heart of our distracted Commonwealth,” when the duty of “every honest citizen” under these precarious circumstances was to “calm the minds of the Publick, to promote industry and honesty, to pay off their own private debts.” The writer feared a coming “anarchy.” Lelius, MASS. CENTINEL, May 10, 1786, at 2.
254. Of Satan and Honestus, MASS. CENTINEL, Jan. 20, 1787, at 4; see also Suffolk, INDEP. CHRON., Jan. 18, 1787, at 1.
255. Markwell, MASS. CENTINEL, Sept. 9, 1786, at 2.
256. See Honestus, INDEP. CHRON., Mar. 8, 1787, at 2; Honestus, INDEP. CHRON., Jan. 25, 1787, at 2; Honestus, INDEP. CHRON., Jan. 11, 1787, at 2.
258. RICHARDS, supra note 68.
the articulation of grievances that led to the uprisings. The Shaysites certainly shared the Austinites' hostilities toward lawyers and the legal system. They rioted at courthouses and loudly denounced lawyers.259 The lawyers actually experiencing the situation, moreover, did not clearly distinguish between the Austinites and the Shaysites. They viewed the events of '86 as one continuous rebellion against law and courts that threatened to rend the society asunder.260 Unfortunately the major monographs on Shays's Rebellion either ignore or give short shrift to the revealing connections between the Austinites and the Shaysites.261 The prevailing explanations for the rebellion instead rest chiefly on materialistic premises: crushing debt and/or taxes primarily fueled the rural discontent leading to the rebellion. Austin's involvement suggests deeper ideological causes arising directly out of the revolutionary experience for which historians have failed to account: namely, an inter-class egalitarian hostility to lawyers and formal legal institutions understood as unrepublican aristocracies.262

Writing almost a half-century after Austin, Tocqueville famously depicted American lawyers as the "connecting link between the great classes of society."263 They "belong to the people by birth and interest," he wrote, "and to the aristocracy by habit and taste."264 Tocqueville's comments suggest that early American lawyers, while perhaps curbing the excesses of democracy, also labored under divided loyalties. The history of the Massachusetts legal profession in the eighteenth century bears the point out. On the eve of the imperial crisis, the profession stood as one of the most Anglicized and aristocratic-leaning classes of men in colonial America. The Revolution split the profession into two camps—patriots

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259. 1 JOHN BACH MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR 306-09 (1927); see also The Spirit of the Times, MASS. CENTINEL, Oct. 25, 1786, at 2.

260. See ADAMS, supra note 37, at 73-74; THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS 162 (Boston, Ticknor & Fields 1859).

261. The most recent interpretation is RICHARDS, supra note 68, which emphasizes burdensome taxes imposed by a government bond-holding elite. Austin does not get so much as an index entry in Richards's study. Nor does he receive any mention in Christian Fritz's recent examination of the rebellion. FRITZ, AMERICAN SOVEREIGNS 80-116 (2008); see also id. at 84-89 (discussing economic grievances). For the traditional class-based interpretation, see SZATMARY, supra note 38. Szatmary does mention Austin and hostilities toward lawyers among western farmers. Id. at 42-43. One short article points out that "hatred against lawyers" played a major role in the rebellion. Matz, supra note 38, at 5, 7-8. William Nelson, who recognizes the link, does not seriously investigate its implications, and incorrectly suggests that only "agrarian debtors" took issue with the legal profession. NELSON, supra note 4, at 69, 5.

262. William Nelson vaguely asserts that the Shaysites rebelled based on the notion that "access to justice was one of the rights of man for which the War for Independence had been fought," but elaborates no further on the ideological component and otherwise spotlights class and economic factors. NELSON, supra note 4, at 5, 69-71.

263. 1 TOCQUEVILLE, supra note 116, at 352.

264. Id.
and loyalists. But even those lawyers who turned toward whiggery could only go so far. James Otis’s early lunges and reversals in response to the Stamp Act crisis provide a revealing glimpse into the conflict-ridden mind of the Massachusetts lawyer in the crucible of imperial resistance. As it happened, the Revolution divided not only the legal profession but the American legal mind itself: In the spring of 1786, the bar’s divided consciousness displayed itself for all to see—not primarily in courthouses or law offices but in the Boston newspapers.

Eager to claim credit for American independence, Austin’s lawyer opponents nevertheless seemed unable to break their bands of dependence with English legal culture. James Sullivan’s near-verbatim reliance on Blackstone illustrates the point. The lawyers of ’86 fancied themselves libertarian Whigs even as they enforced a Tory’s jurisprudence. If Lockean rights and liberties adorned the lawyers’ rhetoric, the spirit of Hobbes possessed their logic. Given man’s “proneness to ambition and avarice,” as Sullivan argued, “coercive power must be lodged somewhere to compel justice.” In the years after independence, Massachusetts lawyers had come to fear the “spirit of ’76”—in particular the idea of unmediated popular sovereignty and the threat it posed to private property. As early as 1778, Theophilus Parsons—a newly minted Bay State lawyer and future Chief Justice—evidenced deep misgivings about the open-ended conceptions of popular liberty flowing from the perceived devolution of power to the people after independence. Parsons stressed the need for positive legal constraints on natural liberty going forward and advised entrusting only “men of education and fortune” with the responsibilities of constitutional governance. “[W]e are to look further than to the bulk of the people, for the greatest wisdom, firmness, consistency and perseverance.” At the same time, Parsons, like so many others in the profession, purported to cherish and protect the capacious liberties for which radical revolutionary republicans, from Samuel Adams to Benjamin Austin, had fought.

268. PARSONS, supra note 260, at 362, 369.
269. Id. at 369.
270. See A Twig of the Branch, INDEP. CHRON., May 4, 1786, at 1. Later during the ratification debates, Parsons assured his Antifederalist adversaries that juries, whose verdicts he emphasized did not constitute “law,” would retain discretion to check congressional “usurpation.” 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 94 (Jonathan Elliot ed., J.B. Lippincott Co., 2d ed. 1888). Parsons referred to John Dudley—the New Hampshire farmer-turned-judge who instructed his juries to ignore the common law in favor of “common sense,” see supra note 33—“the best judge I ever knew in New Hampshire,” BLOOMFIELD, supra note 29, at 57 (quoting Parsons). A complicating factor here lay in the shifting definitions of “liberty” and...
The Austinites, of course, recognized no genuine divisions in the American legal mind—only hypocrisy. To be sure, the lawyers’ rhetoric may have emitted a whiff of libertarianism, but their practices and laws established them as aristocrats in fact. The lawyers employed a republicanized vocabulary, Austin suggested, precisely in order to perpetuate their professional monopoly and thereby subvert republican values. Years later Tocqueville would observe a similar insidious tendency in the profession. Through the courts, the Frenchman wrote, the lawyers, even as they “belonged to the people,” also “controlled democracy” and, acting “imperceptibly” upon the legal system, finally “fashioned it to suit [their] own purposes.”

The profession’s capacity to exert legal power seemingly independent of the people themselves led the Austinites to conclude that it had grown into an aristocracy that, if not nipped in the bud, would eventually destroy the republic.

As a potent early expression of the anti-aristocratic idea, Austin’s 1786 essays shed critical light on the origins of an ideological tradition that would shape American politics straight through the Jacksonian period. Twenty years earlier, Austin’s anti-aristocratic ideology would have carried little appeal. But by the 1780s, when Austin wrote, a resistance to all things “aristocratical” reached deep into the catacombs of the American mind. That lawyers offended this new egalitarian sensibility tells us something important about the sensibility itself. For Austin’s anti-aristocratic critique of lawyers, as we have seen, extended far beyond robes, wigs, or other cultural conceits. The Austinites took particular umbrage at the profession’s claimed epistemological monopoly. The “order of the black robe” represented, above all, an aristocracy of knowledge.

The sudden extension of post-Revolutionary egalitarianism into matters of intellect and epistemology seems to mark something peculiar about the historical moment in 1786. Indeed, we find at least one of Austin’s followers throwing in a critique of doctors and ministers, both of whom this writer also considered knowledge monopolists, for

See TOCQUEVILLE, supra note 116, at 358.

See Honestus, INDEP. CHRON., Mar. 9, 1786, at 2.

For an insightful analysis of how the Jacksonian politicians, particularly Van Buren, employed the language of aristocracy to describe the Whig opposition, see GERALD LEONARD, THE INVENTION OF PARTY POLITICS 177-92 (2002).

WOOD, supra note 38, at 8, 241-42.

For a valuable work that views the “American revolution in the law” as an epistemological revolution, see STIMSON, supra note 71. Stimson, however, does not explore its more radical manifestations. This epistemological revolution also represents an important origin of an “anti-intellectual” tradition in American life Richard Hofstadter masterfully traced. See RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE (1963). Austin, however, does not get so much as an index entry in Hofstadter’s otherwise masterful volume.
good measure.\textsuperscript{276} The lawyers, though, had struck a much deeper nerve, for they had purported to monopolize a field of knowledge seemingly integral to the young republic’s identity.

The Revolution, if we take Thomas Paine’s word for it, had made law America’s “king.” And yet early in its reign, according to the Austinites, America’s new monarch had become something of a tyrant.\textsuperscript{277} The emergence of this perception stands as one of the most fascinating and historically seminal intellectual events to occur in post-Revolutionary America and one too often overlooked by legal historians. In part this Article has concerned itself with explaining how and why it happened. Certainly, maneuvering lawyers had much to do with creating the popular equation of law with tyranny. These “pernicious practitioners” had “warp[ed] the laws to answer [their] particular purposes,” introducing a “multiplicity of needless and almost unintelligible words” and “mystical phrases.”\textsuperscript{278} But one key to understanding Austin’s larger significance lies in the recognition that the Austinites did not clearly distinguish between the lawyers and the law on which they relied: the common law. The common law not only made the lawyers’ epistemological monopoly possible; it \textit{embodied} the monopoly. The Austinites wanted nothing to do with its aristocratic “artificial reason,” for it made a mockery of republican common sense.

In evaluating the implications of Austin’s ideas in their own time, however, we cannot ignore the views espoused by the common law’s defenders—the throng of lawyers who rose up against Honestus in the spring of ’86. We learn something important about the Austinites’ larger historical significance by listening closely to their adversaries. And, as we have seen, the lawyers of ’86 believed that Austin and the movement he spearheaded represented not merely a popular repudiation of the legal profession or the common law but an underlying hostility to “the Law itself.”\textsuperscript{279} What can we make of this claim? When directly confronted with it, Austin demurred. Passages in his writings—as well as the distinctly anti-authoritarian spirit that animated the movement against courts, lawyers, and the common law in 1786—lent support to the lawyers’ assertion.\textsuperscript{280} Yet we also must account for Austin’s professed commitment...
to an alternative justice system governed by so-called “fundamental principles of law.” The difficulty arises from Austin's equivocation on this phrase, for he simultaneously pleaded these “fundamental principles” as alternatives to law itself (that is, as a proxy for each individual’s moral constitution) and as a defense to the accusation of unqualified antilegalism. Certainly, as a matter of optics, Austin would have had good reason not to concede the lawyers’ allegation in public, which might have played right into the hands of his antagonists, who aimed to depict Honestus as a dangerous anarchist. A deeper explanation for Austin’s apparent equivocation, however, may lie in the Janus-faced attitudes toward “law” that prevailed among many post-Revolutionary Americans who often seemed simultaneously to cling to and recoil from it.

A key passage in Paine’s widely read Common Sense forecasted the tension. Paine purported to make “the law” America’s “king,” placed a “crown” thereon, and proclaimed that this new king would “reign above” the people. But in the very next breath he urged that “lest any ill use should afterwards arise,” law’s crown should “be demolished and scattered among the people whose right it is.” Paine thus first enthroned “law” and then proceeded effectively to destroy it. To function authoritatively, law had to “reign above” the people; but to comport with republicanism, it had to remain at one with them. Along roughly similar lines, Austin claimed to base his alternative regime on “fundamental principles of law” and defended the people’s right to “appeal with safety to the laws of their country.” But in substance the justice system he imagined—bereft of common law, courts, and lawyers, relying only on each individual’s moral sense of “right and wrong” and perhaps a shifting pluralistic overlay of unwritten community-specific customs unrecognized at law—looked little like any legal system that post-Revolutionary Americans could have known. The dispute resolution models that Austin proposed, moreover, each rested on judgment by one’s neighbors and brethren—for Austin, the embodiment of pure “equity”—rather than on courts or legal rules contrived by a professional elite, and each offered a self-conscious alternative to legal process.

We have, then, rhetorical nods to “fundamental principles of law” belying a substantive hostility to law itself. But if Austin did in fact harbor hostility to legal systems as such, whence did it derive? The foregoing


282. Paine, supra note 60, at 29.

analysis has suggested a few of its intellectual sources: anti-aristocratic ideology, Scottish common sense epistemology, a custom-based (rather than rule-based) ethic, a nativistic rejection of the English legal heritage, and a pragmatic assessment of how lawyers and legal systems adversely affected the interests of ordinary people. Yet at the root of all these factors, I think, lies a more critical ideological wellspring from which the antilegalistic spirit of '86 ultimately flowed—a wellspring to which Paine had previously gestured: Revolutionary republicanism’s ideal of self-rule, its fetishization of the people themselves as the only legitimate locus of authority in matters of law and government. 284 This utopian ideal of republican self-rule purported to resolve the age-old conflict between liberty and authority by merging the latter into the former, rendering each person a “participant in the authority by which he was ruled.” 285 At bottom, the Austinites desired “laws” that not only derived from the people, but *remained* with them inalienably. 286 The explosion of town meetings that accompanied the publication of Austin’s writings as well as the convention activity and court blockades that ensued during Shays’s Rebellion dramatically enacted and reified this desire. 287 In short, Austin and his partisans envisioned a justice system in which the people held the law in their *own* hands and literally ruled themselves.

The Austinites’ resistance to the idea of representation, conceived as delegating discretionary legal authority to a “few men” and deemed by Austin himself the “aristocratic” party’s peculiar machination, speaks volumes about their underlying conceptions of republican self-rule. 288 Historians have long observed that the American Revolution generated a deep distrust of the representative mechanism in government that intensified in the 1780s, as evidenced not only in the period’s literature (newspapers, pamphlets, sermons) but also in the people’s persistent appeals to alternative “extra-legal” bodies during this period—committees, conventions, town meetings, and crowd action. 289 The underlying desire for “institutional immediacy,” to exert self-rule in its most direct and unadulterated form, resulted in what Gordon Wood calls a “disintegration of representation” in the decade after 1776. 290 Post-Revolutionary

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284. *See generally Fritz, supra* note 261.
287. *See supra* notes 22-26 and accompanying text. For the Shaysites, writes Christian Fritz, “court closings did not overthrow the Massachusetts government but legitimately interposed the authority of the people—as the ruler—to temporarily suspend policies that were inherently wrong if not unconstitutional.” *Fritz, supra* note 261, at 101.
ideological understandings in this regard drew on a long republican intellectual tradition from Aristotle to Harrington that operated with an implied hostility toward representation. The tradition received a modern articulation in Rousseau, who in 1762 advanced the claim that sovereignty, by its very nature, could not be represented. The moment a people decided to “pay deputies and stay at home,” Rousseau declared, “it is no longer free; it no longer exists.” Any law that “the people has not ratified in person is void; it is not law at all.” In the years after independence, it does appear that most Americans came to accept some form of representation as a practical expedient in large, dispersed communities. But in at least two ways, Critical Period radicals, and the Austinites in particular, conducted a kind of backdoor assault on the idea.

First, the Austinites sought to make elected representatives into mere mouthpieces for the people through binding legislative “instructions.” The “grand prerogative of the PEOPLE,” Austin wrote, lay in the “right of instructing” their representatives. Without the power directly to bind representatives so that each did precisely as their constituents wished at all times, the “aristocratic” impulse would soon obliterate “every shadow of REPUBLICANISM.” Yet instructions in the way Austin envisioned them embodied something of a paradox: they presupposed the existence of representation, while denying any independent authority to
representatives. Binding legislative instructions, stated one of Austin’s allies on this issue, enabled the people to exercise legislative authority at once “personally” and “representationally.”

Second, the Austinites indirectly attacked the representative mechanism itself by seeking to abolish the legal profession. As middlemen who had inserted themselves between the people and the law, holding the former for ransom, lawyers epitomized representation’s most fearsome anti-republican aspects. Austin seems to have viewed lawyers and legislative representatives as one and the same, complaining about lawyer-dominated legislatures and lobbying to cleanse the assemblies of all who ran among that “order.” Unable to attack the concept of representation directly due to practical exigencies, the Austinites assailed representatives. In both of these backdoor assaults on the representative mechanism, the ideal of direct self-rule continued powerfully to shape American attitudes toward the law in the post-Revolutionary period.

Such anti-authoritarian ideals, however, also posed a grave threat to the lawyers’ whole enterprise. The Austinian challenge forced post-Revolutionary legal establishmentarians to articulate new and revealing defenses of the law in a republican society. From the perspective of law’s defenders in 1786, the agitation for instructions, for the “annihilation” of legal representation, and the underlying republican desire for a legal system predicated on direct self-rule, all rested upon a jurisprudential fallacy. Coercive authority had to be lodged somewhere to compel obedience to the law. If the lawyers of ’76 had felt compelled to reject Blackstone and instead embrace Locke in order to justify increasing resistance and ultimately revolution, the lawyers of ’86—Caleb Strong, John Quincy Adams, James Sullivan, and many others—began to find certain fundamental principles of law and government enunciated in the Commentaries quite germane and useful. The idea of the people ruling themselves directly, according to Blackstone, stood diametrically opposed to law itself. “[T]his devolution of power, to the people at large,” he wrote, in reference to Locke, “repeals all positive laws whatsoever before enacted.” No human laws could withstand this “devolution” for it would ipso facto “destroy all law” and “render all legal provisions invalid.”

298. See Honestus, INDEP. CHRON., Mar. 23, 1786, at 1 (“Can we suppose the Republic to be free from danger, while this ‘order’ are admitted so abundantly as members of our Legislature?”).
299. See generally FRITZ, supra note 261. For an insightful essay exploring the deep tensions between democracy and representation, see Hanna Fenichel Pitkin, Representation and Democracy: Uneasy Alliance, 27 SCANDINAVIAN POL. STUD. 335 (2004).
300. For the earlier rejection of Blackstone in favor of Locke, see James Wilson, Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (1774), in 2 THE WORKS OF JAMES WILSON 721-46 (Robert McCloskey ed., 1967) [hereinafter WILSON WORKS].
301. 1 BLACKSTONE, supra note 2, at 157.
302. Id.
Blackstone shared Hobbes’s view that only authority made law and that the people could not personally possess the requisite authority vis-à-vis themselves without becoming ensnared in a jurisprudential contradiction. The lawyers of ’86 concurred.

Paine’s casual identification of law itself with the “people whose right it is” had obscured an underlying paradox that the debates between Austin and his interlocutors in the Critical Period’s eleventh hour thrust into the light of day: Government by the people and government under law—self-rule and law-rule—could not comfortably co-exist. In practical reality, enthroning law as America’s new “king” required the people’s subordination to legal authority. The American Revolution’s humanized ideal of “law” so enthusiastically embraced by the Austinites—popular self-rule—actually took everything out of law that made law legal. Radical post-Revolutionary republicans might purport to merge law with liberty, to render the law coextensive with the people’s will voluntarily given, but at the moment of direct contact law self-destructed for want of an authority properly constituted. It became revolution. The professional legal mind’s increasingly acute awareness of the legal paradox of self-rule resulting from the radicals’ provocations in 1786 goes to the heart of the Critical Period crisis in its final phases and, as we shall see, sheds important light on the motivations behind the movement for a new Constitution, which began gathering steam shortly thereafter.

B. A Counterrevolution Contested

A minor backlash did apparently ensue against the Austinites in the wake of Shays’s Rebellion. But it would not last long. While it may

303. For an insightful discussion of this jurisprudential tension, see Frank Michelman, Law’s Republic, 97 YALE L.J. 1493, 1499-1501 (1988); see also FRITZ, supra note 261, at 291 (noting that the idea of a “rule of law” is “inconsistent with the notion [held by many post-Revolutionary Americans] that a sovereign people could not be bound even by a fundamental law of their own making”). Christopher Tomlins’ work is particularly alive to these and similar tensions. TOMLINS, supra note 7 (noting conflicts between “legal discourse” and revolutionary republicanism’s discourse of “police” in the early republic); see also Christopher Tomlins, Republican Law, supra note 281, at 541. Recent scholarship treating “localized law” in the post-Revolutionary Carolinas as an expression of popular sovereignty proceeds virtually untouched by this tension. See EDWARDS, supra note 7, passim.

304. Bay State lawyer Fisher Ames evidenced his own awareness of the legal paradox of self-rule in March of 1787. Revolutionary elites, he wrote, had “expected a government by laws, and not by men” but were “chagrined to see that the feelings of the people were not only consulted in all instances, but that in many they were allowed to legislate.” 1 WORKS OF FISHER AMES 13 (Boston, T.B. Wait & Co. 1809). The elites who had convinced themselves that law would be the “supreme power” in the newly independent nation experienced “absolute despair when they found that not only individuals, but conventions, and other bodies of men, unknown to the constitution, presumed to revise, and in effect repeal, the acts of the legislature.” Id. at 13-14.

305. By all appearances, only a small number of articulate lawyers and elite “friends of government,” rather than a broad cross-section of the citizenry, participated in this backlash. Indeed, in May of 1787, Austin—whom it was generally known had written the anti-lawyer essays, see A Mechanick, MASS. CENTINEI, April 8 1786, at 1 (referring to Honestus as “Ben”)—found himself elected to the state senate for the first time and a few months later had assumed a prominent role
have temporarily put an end to the spirit of '86's physical manifestations, Governor Bowdoin's militia left the underlying ideological dispute between the Austinites and the lawyers untouched. By September of 1787, moreover, anti-aristocratic revolutionary republicans in all the states faced a new threat that compelled them to close ranks: the new Constitution. In many respects, the ratification debates in 1787 and 1788 extended and elaborated upon the exchanges that Austin and his lawyer-interlocutors had begun in 1786. American historians have made much about the emergence of popular sovereignty as the governing political paradigm in lieu of parliamentary sovereignty during and after the Revolution. Actually the men spearheading the movement for a new national constitutional framework proceeded on many of the same Blackstonian premises employed by Austin's opponents a year prior. They responded to the rebellious spirit of '86 and to the legal paradox of self-rule that it had laid bare with the impulse toward law and not liberty. “[W]hat is to afford us security against the violence of lawless men?” Henry Knox wrote to George Washington in October 1786 referencing the Shaysites. “Our government must be braced, changed or altered to secure our lives and property.” Knox and others involved in the movement for a new Constitution implicitly recognized the ideological underpinnings and jurisprudential implications of the Massachusetts uprisings. After the Revolution, Knox recollected, many Americans had entertained the idea that “we were not as other nations requiring brutal force to support the laws.” The Bay State rebellions had disabused Knox and other “men of reflection, & principle” in Massachusetts of this notion. Such men had now become “determined to endeavor to establish a government which shall have the power to protect them in their lawful pursuits . . . .” Benjamin Franklin put the matter in slightly different terms: “We have been guarding against an evil that the old states are most liable to, excess of power in the rulers, but our present danger seems to be the defect in obedience in the subjects.” The Massachusetts uprising, as George opposing the proposed Constitution. On March 1, 1787, after the “suppression” of Shays's Rebellion, a lengthy essay appeared in the Independent Chronicle criticizing Austin's earlier writings as “subversive of all order and regularity” and setting out a point-by-point refutation of them. Tully, INDEP. CHRON., March 1, 1787, at 1. The author's felt need to refute Austin almost a year after his essays first appeared, and after Shays’s Rebellion, demonstrates the continuing appeal of Austin's writings. Around the same time, Fisher Ames noted that “the people” continued to “arraign . . . the exactness and multiplicity of the laws, and the constitution itself.” I WORKS OF FISHER AMES, supra note 304, at 12.

306. See, e.g., WOOD, supra note 131, at 344-89.
308. Id. at 301.
309. Id. at 300.
310. Id.
Washington concluded, had provided indisputable “proof” that “mankind left to themselves are unfit for their own government.”

For his part, James Madison believed that the “turbulent scene in Massachusetts” had “done inexpressible injury to the republican character in that part of the U. States.” In his “Vices of the Political System of the United States,” written days before he departed for Philadelphia in 1787, Madison identified the core problem under the Articles of Confederation requiring rectification: “want of sanction to the laws, and of coercion in the Government.” For a sanction, Madison revealingly wrote, “is essential to the idea of law, as coercion is to that of Government.” The impulse toward law caused by the unsettling events in Massachusetts coincided with a sharp turn in the intellectual tides among “men of reflection, & principle” against popular sovereignty’s more radical—and antilegal—articulations. Madison attributed the problems infesting state government lawmaker—including their excessive “mutability” and “injustice”—to one chief cause: “the people themselves.” “Here the ways divide,” wrote Bay State lawyer Fisher Ames in March of 1787: one path, rule by the people, would lead to “anarchy”; “the other, by the wise and vigorous assertion of lawful authority, will lead to permanent power and general prosperity.”

In February of 1787, Pennsylvanian Benjamin Rush carefully qualified the idea born of the revolutionary experience that “the sovereign and all other power is seated in the people.” Rush felt the idea “unhappily expressed. It should be all power is derived from the people. They possess it only on the days of election.” Judge Alexander Contee Hanson of Maryland made a similar point in June of 1787 as the secret convention proceeded in Philadelphia. “All power indeed flows from the people,” he wrote in the Maryland Gazette, “but the doctrine that the power actually at all times, resides in the people, is subversive of all government and law.” For law to serve its function, the people had to transfer authority to the legislature until the next election so as to render themselves, in the words of another Maryland writer, “bound by the laws that shall be so

313. Letter from James Madison to Edmund Pendleton (Feb. 24, 1787), in 2 THE WRITINGS OF JAMES MADISON 316, 319 (Gaillard Hunt ed., 1900).
314. Id. at 363.
315. Id. at 366.
316. 1 WORKS OF FISHER AMES, supra 304, at 17.
318. [Aristides], To The People of Maryland (June 9, 1787), in REPRESENTATIVE GOVERNMENT AND THE REVOLUTION 118, 125 (Melvin Yazawa ed., 1975).
made.” Blackstone had not only survived the American Revolution. He now found himself enlisted in a momentous effort to restrain its republican aspirations.

And yet if the men of '87 waged a counterrevolution of sorts, it rested on yet another impressive feat of rhetorical massage by the American legal elite—this in large part necessitated by the formidable opposition that appeared during the ratification debates. The law-minded Federalist persuasion could not entirely ignore the revolutionary ideological heritage and its appealing, if ultimately fallacious, conceptual identification of law with the people. Hamilton, Madison, and their intellectual brethren thus continued to sing the praises of republicanism—even as their constitutional theory stretched the concept almost beyond recognition. The legal paradox of self-rule created a puzzle for those constitutional lawyers in 1787 committed to establishing a national government by law while somehow assuaging resistant revolutionary republicans committed to government by the people: How to create a government whose authority in some way derived from the people—that is, that did not exist, in Madison’s words, like a despot entirely “independent of society itself”—but which in fact precluded the people from ruling themselves? Or, again: How to republicanize government by the few? Writing as Publius, James Madison purported to offer a “republican remedy for the diseases most incident to republican government.” The “people,” he insisted, would by the ratification mechanism put their stamp of approval on the constitutional framework and would thereafter elect representatives. Lawmaking itself, however, could not authentically effectuate the people’s will or otherwise directly involve ordinary citizens without exposing the national republic to systemic risk. In order to prevent liberty from devouring itself, Publius famously declared, the American system of government had ultimately to rest on the “total exclusion of the people in their collective capacity from any share” in the lawmaking process.

Who, then, would properly fashion and administer the law under the new Constitution if not the people? “[T]he man of the learned profession,” of course. Not the people themselves, argued Publius, but rather “some temperate and respectable body of citizens” whose “wisdom may best discern the true interest of the country” and who thus might “suspend the

319. WOOD, supra note 131, at 370 (quoting MD. J., Feb. 23, 1787).
320. See WOOD, supra note 131, at 562 (noting that Federalists employed “the most popular and democratic rhetoric available to explain and justify their aristocratic system”). Other instances of similar rhetorical manipulation occurred during the Revolutionary period. See ROEBER, supra note 49 (Virginia); Murrin, supra note 57 (Massachusetts).
322. THE FEDERALIST NO. 10, supra note 69, at 128 (James Madison).
323. THE FEDERALIST NO. 63, supra note 69, at 373 (James Madison).
324. THE FEDERALIST NO. 35, supra note 69, at 234 (James Madison).
blow meditated by the people against themselves.”

The “public voice,” Publius insisted, “pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for that purpose.” Only laws made and administered by a “small number” of men capable of refining, enlarging, and, if necessary, contradicting the people’s wishes could properly “establish Justice” and “insure domestic Tranquility” in the new nation.

Publius thus made both lawyers and representation—the Austinites’ two bêtes noirs—essential components of the new Constitution. Madison’s transformative intellectual innovation, however, lay in the assertion that the representative mechanism—that is, the alienation of legal authority—served not as a mere practical expedient or “necessary evil,” as men possessed of the spirit of ’86 might have conceded, but instead as the sine qua non of American republicanism. One cannot overstate the significance of this assertion. In the space of a few paragraphs, Madison had coerced the concept of republicanism into a 180-degree turn. For “there can be nothing further from the republican principle than the idea that a select body of persons can represent, impersonate, or stand for a body of autonomous citizens and claim that when it governs them, they are governing themselves.”

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critical pre-Constitutional intellectual origins of Antifederalism for which historians have failed to account. Indeed, Austin himself opposed ratification with abundant energy, becoming a prominent figure in the movement against the new Constitution in Massachusetts and leveraging this prominence into a political career that extended straight through the Jeffersonian period. In 1788, he published a number of essays in the *Chronicle* under the pseudonym “Candidus,” criticizing the proposed Constitution. Austin here emphasized the “old republican” themes that marked many other Antifederalist writings. Americans, he contended, had too quickly concluded that more “energy in government” would solve its financial problems. Austin insisted that the country instead needed “industry and frugality.” It needed virtue, not law. Rejecting Publius’s rhetorical manipulations, Austin sought above all to keep alive the authentic republicanism inherited from the Revolution on which his earlier law reform essays had drawn. Along with other notables opposing ratification, Austin suggested that the new Constitution’s centralized representative legal framework would destroy the people’s inalienable right to rule themselves.

Indeed, it would not go too far wide of the mark to assert that the whole thrust of the Antifederalist critique reflected an Austinian hostility to the legal elite. Opponents of ratification demeaned the Constitution as the “work of lawyers.” “Beware of the lawyers,” wrote one New York Antifederalist editor.

330. Saul Cornell’s important book on Antifederalism richly traces a tradition forward from 1788, but spends precious little time analyzing its pre-Constitutional origins, all but ignores hostilities toward the legal profession, and does not make mention of Austin’s 1786 essays. See CORNELL, supra note 77. Cornell’s more recent work, however, does hint at Austin’s significance in this regard. Cornell, supra note 210, at 306-08.

331. See, e.g., Candidus, INDEP. CHRON., Jan. 3, 1788, at 3; Candidus, INDEP. CHRON., Dec. 20, 1787, at 2; Candidus, INDEP. CHRON., Dec. 6, 1787, at 1. Austin’s good friend Samuel Adams probably also had a hand in these essays. See 4 THE COMPLETE ANTI-FEDERALIST 123 (Herbert J. Storing ed., 1981).

332. 4 THE COMPLETE ANTI-FEDERALIST, supra note 331, at 124.

333. Candidus, INDEP. CHRON., Dec. 6, 1787, at 1; see also POCOCK, supra note 53, at 40-43, 270 (distinguishing between virtue and law, republicanism and “jurisprudence,” in eighteenth-century Anglo-American political ideology).

334. See WOOD, supra note 131, at 520-24.

335. During the 1790s, under the name “Old South,” Austin attacked the “aristocratical” Federalist party in a number of essays later compiled in a pamphlet. See BENJAMIN AUSTIN, CONSTITUTIONAL REPUBLICANISM IN OPPOSITION TO FALLACIOUS FEDERALISM 16, 20 (Boston, Adams & Rhoades 1803).

336. For an insightful article that views the ratification debates in similar terms, see Cornell, supra note 210; see also TOMLINS, supra note 7, at 60-98.

337. WARREN, supra note 24, at 218. I do not mean that none of those men opposing the Constitution practiced law. A few did, though most were black sheep. Patrick Henry, for example, had virtually no legal education and could only gain admission to the Virginia Bar after significant struggle with his examiners. See ROBERT MEAD, PATRICK HENRY 96-97 (1957). The anti-lawyer sentiment tended to emerge from the “middling” and “plebeian” ranks, which coalesced into the central driving force behind the movement opposing the new Constitution. See generally CORNELL, supra note 77.
diabolical system of slavery, the New Constitution, one half were lawyers . . . to whose wicked arts we may chiefly attribute the adoption of the abominable system." The same commitments to direct self-rule, local customs, common sense, and community decision-making displayed in Austin's writings animated much of the Antifederalist literature. Where the Federalists sought to create a government of laws and not men, the Antifederalists, fearful of distant rulers and abstract rules, sought to protect local communities from law's reach. Antifederalists specifically objected to Publius's attempts to alienate legal authority through representation intended to refine and enlarge rather than faithfully reflect the people's desires. While few Antifederalists argued in favor of abolishing representation altogether, most envisioned an essential equivalency between agent and principle. "Brutus," for example, asserted that the very term "representative" meant that the person chosen for this purpose "must be like the people." Proper representatives, by definition, must strictly "declare the minds of the people," for "if they do not know, or are not disposed to speak the sentiments of the people, the people do not govern, but the sovereignty is in a few." Antifederalists continued to agitate in favor of the people's right to instruct their representatives, and some insisted that the Constitution memorialize it. Opponents of ratification also vigorously advocated for a specifically enumerated constitutional guarantee to a jury trial in civil matters—a "jury trial of the vicinage." For the Antifederalists, as for the Austinites before them, the jury trial right amounted to a right to have one's case tried by equals based on custom and common sense—that is, pure "equity"—rather than law. Most saw this as the only alternative consistent with republicanism.

The foregoing analysis suggests an interpretation of America's constitutional founding that departs from Charles Beard, the "neo-Federalists" and the "neo-progressives" alike. The Critical Period crisis

338. A True Antifederalist and No Lawyer, DAILY ADVERTISER (N.Y.), Mar. 4, 1789, at 2. For other examples of the Antifederalists' negative views of lawyers as a class, see 3 THE COMPLETE ANTI-FEDERALIST, supra note 331, at 56 ("Montezuma"), 60 ("A Democratic Federalist"), 205 ("Aristocrates"); 6 THE COMPLETE ANTI-FEDERALIST, supra note 331, at 85 ("A Countryman"); see also Chroust, Dilemma, supra note 29, at 52.


340. 2 THE COMPLETE ANTI-FEDERALIST, supra note 331, at 369, 379.

341. 3 id. at 117 ("Philadelphensis"); 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 761 (Washington, Gales & Seaton, 1834); see also Fritz, supra note 261, at 148.

342. 2 THE COMPLETE ANTI-FEDERALIST, supra note 331, at 148 ("Centinel"), 230-31 ("Federal Farmer").

343. 3 id. at 60 ("A Democratic Federalist").

344. See CORNELL, supra note 77, at 60, 66-67.

345. Beard's influential book, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), argued that economic considerations—namely the desire by the political and economic elite to protect their property interests—served as the primary motivation behind the movement for the new Constitution in 1787. For the critical "neo-Federalist" in constitutional
culminated in a revolution against law itself that, in the period’s eleventh hour, suddenly exploded forth out of the volatile soils of revolutionary republicanism, anti-English nativism, and common sense epistemology, culminating in Shays’s Rebellion. The American revolution against the law, in turn, helped trigger the movement for a new Constitution whose exponents aimed permanently to establish the rule of law and rule by the few at the national level by, among other things, constitutionalizing lawyers and representation. The Federalist persuasion, however, had to contend with significant resistance, and the Antifederalist opposition to ratification continued partially to embody the legally subversive spirit of ’86 to which Austin’s writings had given voice.346

But if Critical Period antilegalism played some role in provoking a legal counterrevolution and continued to find expression in the resistance to that counterrevolution, then the question remains: Did the spirit of ’86 survive the triumph by unanimous ratification of Madison’s new constitutional regime? If we can plausibly link the Aucturites’ intellectual fate to the fate of their Antifederalist successors—and the foregoing analysis suggests we can—then glimpses of an affirmative answer begin to emerge. Historians have ably refuted the idea that ratification represented the Federalists’ triumph over their adversaries.347 The Bill of Rights by itself stands as a testament to enduring Antifederalist influence in American life and a ringing refutation of the Federalists’ assertion that they had spoken for “We the People” in Philadelphia. In the twentieth century Americans have come to consider the Bill of Rights a fundamental part of our constitutional law. Seen from a different perspective, however, the perspective from which Austin and certain Antifederalists viewed it, the Bill of Rights marked out spaces where law could never go.348

The Antifederalists exerted influence in other ways. Partisans for the Constitution wrote and acted as political animals, engaged simultaneously scholarship, see ACKERMAN, supra note 266. For prominent recent “neo-progressive” works, see BOUTON, supra note 327.; HOLTON, supra note 327.; and GARY NASH, The Unknown American Revolution (2006). See also CORNELL, supra note 77. As previously noted, against Beard’s earlier economic interpretation, neo-federalist scholarship essentially seeks to remake Madison and Hamilton (writing as Publius) as democratic innovators, but ignores the discursive context—namely, that Antifederalist opposition—in which each man wrote. See supra note 273. Neo-progressiveism, on the other hand, reasserts Beard’s economic motivations behind the movement for a new Constitution and emphasizes the historical agency of non-elites and opposition figures. The neo-progressives, however, have not recognized the essentially antilegalistic dimensions of Shays’s Rebellion and Antifederalism. 346. For an interpretation of the constitutional founding that resonates with parts of the foregoing analysis, see TOMLINS, supra note 7, at 60-73.


348. Writing as Candidus, Austin criticized the Constitution as “destitute of the basis of freedom, A BILL OF RIGHTS... which exposes every man, within these states, to be drugged hundreds of miles, to a Federal judicial court.” Candidus, INDEP. CHRON., Dec. 20, 1787, at 2. Austin contended in 1786 that the Massachusetts Declaration of Rights required the abolition of lawyers. Honestus, INDEP. CHRON., Apr. 20, 1786, at 1.
in an act of constitutional creation and construction. Publius knew he had a formidable opposition, sculpting arguments and molding rhetoric with Antifederalists in mind often to anticipate or preempt the opposition’s assertions. The result? The Federalist essays, together with James Wilson’s influential speeches in and after 1787, created a theoretical architecture riddled with deep tensions—effectuating the people’s “total exclusion” from lawmaking while championing their irresistible and ever salutary sovereign power; vesting supreme legislative power in the federal government, while dividing it on so many levels as to render it virtually nugatory; promising a firm and stable structure of national authority subject to change only by orderly constitutional amendment procedures under Article V, while invoking the people’s revolutionary right to alter or abolish the Constitution whenever they wished. In significant respects, the voice and presence of the Antifederalists, including Austin, caused these constitutional contradictions. The Antifederalists conceded at best only a pyrrhic victory to law’s partisans in and after 1787. They permitted law to prevail only when they could understand it as (i) specifically precluded from reaching certain areas of human life and subject to jury review, (ii) sliced, diced, and set at war with itself (through federalism and divided government) and (iii) rendered constitutionally provisional by periodic electoral rejuvenation and continually vulnerable to revolutionary amendment or revocation. “The people could stay loyal to the Constitution,” as one historian has put it, “only if they felt it was structurally disloyal to itself.”

C. Jeffersonian Legal Radicalism

Recent works have capably mapped out the influence of Antifederalist thought beyond ratification. The historiographical focus on politics and constitutionalism, however, means that existing scholarship largely elides the peculiarly jurisprudential strains of post-ratification American dissenting thought. The evidence suggests that the spirit of ’86 made a considerable imprint on American attitudes toward the law that would

349. For the seminal work on “constitutional construction” as a mechanism for constitutional change, see Keith Whittington, Constitutional Construction: Divided Power and Constitutional Meaning (1999).
350. See Maier, supra note 347, at 468; Rakove, supra note 347, at 16-17; Wood, supra note 131, at 563.
352. In this respect, we cannot forget that during the Philadelphia Convention, Federalists-to-be had Antifederalists-to-be, such as George Mason and Elbridge Gerry, in their midst.
354. Cornell, supra note 77.
endure long after the constitutional founding.\textsuperscript{355} Our examination of the early national period in this regard must acknowledge at the outset that Austin himself maintained a vigorous public life throughout the period and continued to champion the republican anti-authoritarian ideals that animated his earlier anti-lawyer writings. For example, John Quincy Adams tells us of a 1792 Boston town meeting wherein participants discussed a proposed police force for the town.\textsuperscript{356} Serving as a state senator at the time, Austin took the floor and argued that a police force would “destroy the liberties of the people” and would constitute “a resignation of the sovereignty of the town. . . a link in the chain of aristocratic influence.”\textsuperscript{357} According to Adams, “seven hundred men” supported Austin, all of whom “looked as if they had been collected from all the jails on the continent, with Ben. Austin like another Jack Cade at their head.”\textsuperscript{358} In a demonstration of Austin’s continuing influence, republican liberty prevailed over coercive legal authority at this town meeting. Austin and his supporters decisively defeated the measure—this despite the impressive “popular eloquence” displayed by “Sullivan and Jarvis and Otis” (all preeminent Bay State lawyers) at this meeting.\textsuperscript{359}

Austin and his partisans in 1786 must also be counted as key forbears to the popular law-reform movements that convulsed state politics in the early national period. Radical Jeffersonian reformers continued to reject as unrepublican the professional lawyer class, the common law, and formal legal institutions, advocating instead for a regime of self-administered arbitration without law, lawyers, or judges.\textsuperscript{360} Jefferson’s attack on the federal judiciary in 1801 spurred the radicals to increasingly extreme

\textsuperscript{355} The two primary studies that explore these strains after 1787 are MILLER, supra note 38, Book II; and ELLIS, supra note 32. Published posthumously, Miller’s book remains provocative though undocumented and underdeveloped, and it fails to recognize Austin’s seminal significance. Ellis’s analysis confines itself to the Jeffersonian period.

\textsuperscript{356} 1 WRITINGS OF JOHN QUINCY ADAMS 113 (Worthington C. Ford ed., 1913); see also BOSTON, JANUARY 30, 1792. SPEECH OF THE HON. BENJAMIN AUSTIN, JR., ESQ. AT FANEUIL-HALL, . . . WITH RESPECT TO THE POLICE OF THE TOWN (Boston, B. Edes & Son 1792).

\textsuperscript{357} 1 WRITINGS OF JOHN QUINCY ADAMS, supra note 356, at 113.

\textsuperscript{358} Id.

\textsuperscript{359} Id.

\textsuperscript{360} ELLIS, supra note 32 (Kentucky, Massachusetts, and Pennsylvania); REID, supra note 30 (New Hampshire); ROEBER, supra note 49, at 230-251 (Virginia); G.S. Rowe, Jesse Higgins and the Failure of Legal Reform in Delaware, 1800-1810, 3 J. EARLY REPUBLIC 17 21-22 (1983); Jeffrey K. Sawyer, Distrust of the Legal Establishment in Perspective: Maryland During the Early National Years, 2 GA. J. S. LEGAL HIST. 1 (1993). Massachusetts yeoman William Manning’s unpublished manuscript “The Key of Libberty” (1798) provides powerful evidence that the spirit of ‘86 continued to possess Bay State farmers in the 1790s. See Samuel E. Morison, William Manning’s The Key of Libberty, 13 WM. & MARY Q. 202 (1956). An avid reader of the Independent Chronicle in the 1780s and 1790s, Manning’s pamphlet empathized with the Shaysites, criticized lawyers, bemoaned the monopoly on knowledge wielded by “the few,” and proposed to create a “Society of Laborers” to combat the pernicious influence of the aristocratic Society of the Cincinnati, which he linked to the Federalist party. Id. at 212, 221, 223-34, 227, 230, 242, 248.
positions on jurisprudential questions. Not surprisingly, Austin himself published some important essays during this period criticizing the federal judiciary. He argued that it had "become too complex for the comprehension of the citizens" giving "scope to a particular profession" whose members made it their chief aim to put the people and their property "under the control of that baneful, unqualified instrument generally denominated Common-Law." 361 If not promptly dismantled—and here Austin directed his statements to President Jefferson—this "extensive machine" would "reduce the people to the most abject state of servitude" by generating lawyers "in tenfold proportion to other professions."362

Comparable dissenting voices appeared in republican newspapers outside of Massachusetts during Jefferson's presidency—in particular William Duane’s Philadelphia paper Aurora—and in jurist Hugh Henry Brackenridge’s popular satirical commentary.363 In the last political pamphlet he wrote, published in the Aurora in 1805, Thomas Paine argued in favor of arbitration over courts and lodged a nativistic attack on the English common law that recalled Austin’s earlier invectives. The “tyrannical” Norman-imposed common law, Paine wrote, served only to “waste time, embarrass causes and perplex juries,” its Latin and French jargon calculated “to mystify, by not being generally understood, and therefore [to] serve the basic purpose of what is called law, whose business is to perplex.”364

But Delawarian Jesse Higgins’s widely disseminated 1805 pamphlet, Samson Against the Philistines, also serially published in the Aurora,

362. Id.
363. See, e.g., AURORA GEN. ADVERTISER (Phila.), Feb. 9, 1805, at 2; Jan. 31, 1805, at 1; Jan. 30, 1805, at 1; and HUGH HENRY BRACKENRIDGE, MODERN CHIVALRY pt. II (Claude M. Newlin ed., 1937), “Down with all law,” one of Brackenridge’s backcountry antilegalists cried, “and give us a free government, ‘That every man may do that which is right in his own eyes.’” Id. at 386; see also supra note 360. Brackenridge participated in a literary critique of the law within a post-Revolutionary tradition masterfully explored by Robert Ferguson. See ROBERT FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984). The preeminent Pennsylvania attorney, Horace Binney reported that Brackenridge, who served on the Pennsylvania high court, in fact “despised the law, because he was utterly ignorant of it, and affected to value himself solely upon his genius and taste for literature, both of which were less valued by everyone else.” “Talk of your Cokes and Littletons,” Brackenridge apparently stated to Binney one day in open court, “I had rather have one spark of the ethereal fire of Milton than all of the learning of all the Cokes and Littletons that ever lived.” CHARLES CHAUNCEY BINNEY, THE LIFE OF HORACE BINNEY 40 (Philadelphia, J.B. Lippincott Co., 1903). Reform sentiment in Pennsylvania after reached a fever pitch midway through Jefferson’s presidency over the case of merchant Thomas Passmore. Passmore’s insurer adversaries appealed his favorable arbitration award to the state supreme court, whereupon Passmore publicly malign ed the insurers. This incident led to a contempt order against Passmore, as well as fines and prison time. This resulted in legislative attempts to impeach the Passmore judges (including Brackenridge); these attempts ultimately failed but sparked significant public debates regarding reform of the legal system, with Duane’s Aurora playing a leading role. See ELLIS, supra note 32, at 166-67; see also JEFFREY L. PASLEY, supra note 92, at 299-304 (2001).
364. 2 THE COMPLETE WRITINGS OF THOMAS PAINE, supra note 60, at 1003-04.

http://digitalcommons.law.yale.edu/yjlh/vol25/iss2/3
stands as the period’s key literary achievement.65 The tract denounced the legal profession—whom the author deemed a “national aristocracy”—courts, legislators and the common law, all of which Higgins believed only obstructed “free enquiry” into the true principles of justice.66 Instantiating a trend among the Jeffersonians, Higgins reached back to pre-Norman Anglo-Saxon customs for guidance, finding in the early feudal system a “liberty and equality partaking in republicanism.”67 In a chapter entitled “Origin of Trial by Jury,” Higgins made the historical claim that law per se did not exist among the Saxons, only honest judgment by one’s equals. At the moment of decision, therefore, no authority obtained in Saxon justice. The “rude unlettered men” of northern Europe, the pamphlet emphasized, “submitted to no superior to judge them.”68 Cherished rights to property and personal security, Higgins urged, did not ultimately rest on the exertions of learned lawyers or on legal precedent. For such rights originally flowed from the “uniformity of decisions of men acting as referees without judges or lawyers,” men who could “neither read nor write.”69 True justice required neither lawyers nor law but “equality,” “character,” and “honesty.”70 The pamphlet displayed unmistakable affinities with Austin’s earlier writings.71 To render the administration of justice “speedy, convenient and cheap,” Higgins proposed a system of arbitration without lawyers, judges, or common law—a “mode of trial” wisely recommended by “the merchants of the capital cities,” and “most convenient among a free, enlightened and commercial people.”72

D. The Austinian Critique and the Birth of American Jurisprudence

The full extent of the spirit of ’86’s cultural legacy, however, cannot be truly appreciated until we recognize the extent to which antebellum American lawyers drew on the antilegalistic principles and ideals first articulated by Austin. In contrast to the lawyers of ’86 who went head-to-head with the Austinites on all points, subsequent lawyers took their cue from Publius’s triangulations and increasingly began to assimilate aspects

366. Id. at 67, 24.
367. Id. at 5.
368. Id. at 6.
369. Id. at 26.
370. HIGGINS, supra note 365, at iv, 6, 37.
371. It remains unclear whether Higgins or his publicist, William Duane, felt any conscious connection with Benjamin Austin or “Honestus” in particular. Certainly Austin maintained political prominence in Jeffersonian Massachusetts, and his writings circulated in Philadelphia. See supra notes 27, 361. Nearly every historian that mentions Austin’s attack on lawyers in 1786 in the next breath discusses Higgins’s Jeffersonian-era writings. See, e.g., HATCH, supra note 27, at 26-28; HORWITZ, supra note 5, at 148-49; WARREN, supra note 24, at 219-22
372. HIGGINS, supra note 365, at iii, iv, 31, 32.
of the Austinian critique. Indeed, whereas the lawyers of '86 sought to legitimate legal complexity with reference to a complex society, early national lawyers and legal writers came to eschew both legal complexity and formalism with nearly as much vigor as the Austinites did. Perhaps most striking in this regard are the ideas of America's first bona fide jurisprudent, James Wilson, who delivered his seminal Lectures on Law in Philadelphia in the early 1790s.

Once considered something of a forgotten founder, Wilson's jurisprudence has received increased attention from constitutional historians in recent years. Revolutionary pamphleteer, eminent Pennsylvania lawyer, and one of Washington's first appointees to the Supreme Court, Wilson had apparently felt the sting of post-Revolutionary anti-lawyer sentiment on a very personal level. Because of his prominent role defending Tories in treason cases, a militia of angry Pennsylvania democrats famously attacked Wilson's home in 1779. Anti-law agitation may have been experiencing an upsurge in Wilson's home state at the time he delivered his law lectures. Wilson felt compelled to spotlight in his lectures "the general prejudice against the professional character of the bar" in post-Revolutionary America.

Remarkably, while he never expressly advocated abolishing the legal profession (let alone law itself), Wilson incorporated into his jurisprudential vision virtually every other principle that Austin had enunciated in 1786, even appropriating some of the same phraseology. An anti-Blackstonian streak marked nearly every aspect of Wilson's legal and constitutional thinking, and his Revolutionary-era writings arguably gave birth to American legal nativism. Like Austin, Wilson had a pronounced aversion to legal complexity, lamenting "the obscure, and confused and embarrassed periods of a mile, with which the statute books are loaded and disgraced." "[S]implicity and plainness and precision should mark the texture of the law," he wrote. "It claims the obedience—it should be level
to the understanding of all." In this connection, Wilson shared Austin’s goal of humanizing law by grounding it in a faculty belonging to all men, a “common sense” or “conscience” that apprehended “right and wrong” and thereby fixed the “rules of virtue.” Neither priests nor politicians, nor lawyers or judges, could lay exclusive claim to Wilson’s common moral sense, for this common moral sense ultimately constituted “the business of all men” diffusing itself “through every part of life.” Without it society became “a fabric destitute of order.”

Wilson extolled human custom as the most republican mode of law creation, for custom organically imported voluntary personal consent—for Wilson the sine qua non of any legitimate legal obligation—via unmediated practical action, thus grounding rules in “experience as well as opinion” and investing legal forms with human substance. Wilson conceived custom as the “essential common law principle” in the American context. English jurists from Coke to Blackstone had previously posited a link between custom and common law but never searchingly and never based on the humanistic republican rationales employed by James Wilson. By recasting the common law as the “law of experience” predicated on the “free and independent man” and thus dissociating it from both authority traditionally conceived and from arcane rules and formalities, Wilson helped rehabilitate it against the radicals’ attacks at a moment when it might have met its permanent demise on American shores. Wilson’s jurisprudence Americanized the common law by accommodating rather than repudiating its critics.

Wilson’s overriding jurisprudential aim lay in reconciling the American “love of law” with its “love of liberty” and, indeed, rendering them indistinguishable within American legal culture. In both common sense and custom Wilson believed he had effectuated this communion. And yet he also acknowledged that a difference existed between customary practices and law, for he shared Austin’s belief that mercantile disputes should be decided speedily in separate forums applying community-

378. 1 WILSON WORKS, supra note 300, at 62.
379. Id. at 136-37, 132, 212, 142. Born and educated in Scotland and highly influenced by the Scottish enlightenment, Wilson had devoured Thomas Reid at university, and Reid’s ethical influence here remains quite transparent. Robert McCloskey, Introduction, in id. at 8, 33.
380. 1 WILSON WORKS, supra note 300, at 135, 136.
381. Id. at 136.
382. Id. at 102 (emphasis added).
384. 2 WILSON WORKS, supra note 300, at 560; 1 id. at 81.
385. Id. at 72.
386. E.g., id. at 102 (“This mode of promulgation points to the strongest characterisstick of liberty, as well as law. For a consent thus practically given, must have been given in the freest and most unbiased manner.”).
specific customs and usages rather than the "niceties of the law." The question thus remained: How precisely did common sense and custom exert their influence on the law and the legal system? Customs arose from common practical action and personal consent in everyday experience, and common sense diffused itself "through every part of life." But how did each, if not become law, then at least find legal expression? Doctrinal tests existed to determine a custom's legal validity in a court of law, but Wilson did not apparently find them relevant. Nor did Wilson trust judges or lawyers to bring customary experiences and common sense to bear on judicial and legislative proceedings, suggesting that both a "prejudice of education" and an inflexible fixation on precedent often led the lawyers astray. Rather, he saw the ordinary lay jury—"twelve men untutored in the study of jurisprudence"—as the most appropriate conveyors of common sense and custom into the justice system.

Wilson conceived of the jury as the embodiment of pure self-rule—a direct expression of the people's native sovereignty unmediated by representation. When tried before one's neighbors, he wrote, a defendant "might, with almost literal propriety, be said to try himself." As such, juries retained discretion—"supreme, arbitrary, absolute, uncontrollable"—to override law and lawyers in accordance with the dictates of common sense and custom. The jury operated as an "abstract of the people" moving within its own sovereign and independent sphere, addressing itself not to law per se but to the "transactions of life." Where lawyers and judges cleaved closely to formal rules and precedents, juries could legitimately disregard such legalities, for "[e]very verdict rests on its own peculiar circumstances, without precedent and without example." At the same time, legislative or judicial efforts to confine the jury's "tremendous jurisdiction" would ultimately fail, for "[t]he native uprightness of their sentiments will not be bent under the weight of

387. 2 id. at 489
388. 1 id. at 394, 135.
389. See 1 BLACKSTONE, supra note 2, at 76-79. One suspects that Wilson would have found Blackstone's test—which included the requirements that a custom be "reasonable," immemorial, and "compulsory"—repugnant.
390. 1 WILSON WORKS, supra note 300, at 138; 2 id. at 564-65.
391. 2 id. at 541.
392. Id. at 509 (emphasis added).
393. Id. at 541 (Juries served as "the ultimate interpreters of the law" with the "power to overrule the directions of the court."). Wilson noted that, in exceptional circumstances, a court "dissatisfied" with a jury verdict could grant a new trial on motion of the losing party. On Wilson's view, however, this did nothing to impair the jury's "tremendous jurisdiction" for another jury would still decide the case as "the ultimate interpreters of the law" with the "power to overrule the directions of the court." Id. at 541-42.
394. 1 id. at 332.
395. 2 id. at 527.
precedent or authority.” The jury verdict as understood by Wilson thus had a peculiar quality: it determined the outcome of legal proceedings but, having neither precedential support nor prospective authoritative force, did not constitute law. Hence, while Wilson did intimate that both custom and common sense somehow “promulgated” the law and that juries formed a “constituent part of courts” acting “according to the law,” in vital respects his jurisprudence ultimately rendered each legally unmanageable.

In his jurisprudential configuration of common sense, custom, and juries, James Wilson sought to preempt all further revolutions against the law in America by integrating revolution into the law. This conclusion rests only partly on inference from the evidence, for in his three-pronged jurisprudential configuration Wilson expressly sought to incorporate what he called “the revolution principle” into American law—to merge law with liberty and thereby make revolution itself American law’s distinguishing feature. Analytical philosophers might question whether Wilson actually accomplished this ambitious act of theoretical communion. His own belief that he had done so, however, marked the birth of American jurisprudence.

E. Law’s Revolution in Antebellum America

Wilson helped spawn a peculiar jurisprudential style among early national legal writers struggling to define the nation’s legal identity—including Nathaniel Chipman, Zephaniah Swift, St. George Tucker, and Hugh Henry Brackenridge, among others—whose jurisprudence also absorbed parts of the radical critique. The spirit of ’86’s peculiar impress on American attitudes toward the law, however, would extend its influence far beyond the early national period. Significantly, in 1819 Austin himself republished his anti-lawyer essays, and over the next few

396. Id. at 541. Wilson might very well have conceived of the Supreme Court, in its reviewing capacity, as occupying a “space” similar to the space occupied by juries, but on a national level—a “jury of the country.” STIMSON, supra note 71, at 132. The links Wilson invoked between jurors’ common moral sense and “Supreme” power, and his use of the term “constitutional” to describe both the fundamental limitations applicable to American government and law, and the common person’s “power of moral perception,” remain highly suggestive in this regard. 1 WILSON WORKS, supra note 300, at 103, 133. By this account, Austin, whose enunciation of an egalitarian ethical epistemology embodied by juries preceded Wilson’s own by over five years, may shed important light on the intellectual origins of judicial review.

397. 1 WILSON WORKS, supra note 300, at 102; 2 id. at 542, 501. For a theoretical discussion of custom as “anti-law,” see DAVID BEDERMAN, CUSTOM AS A SOURCE OF LAW 51-53 (2010).


399. Knapp, supra note 351.


401. Surrency, supra note 38.
decades recognizable manifestations of the ideas set out therein appeared both within the legal profession and, more powerfully, outside the profession among radical Jacksonian reformers, writers, and intellectuals. The latter strain has particular significance here because it establishes that the idea of eradicating law itself—the very essence of the spirit of '86—remained a live intellectual option in American life well into the late antebellum period.

1. Reform from Within: Codification and Legal Science

Historians have credibly suggested that post-Revolutionary antilegalism and the antebellum codification movement formed part of a single reform tradition within American legal culture spanning the period from the 1780s to the Civil War. We must recognize at the outset, however, that the codification movement began in something like a compromised position relative to Benjamin Austin's or Jesse Higgins's earlier thoroughgoing critiques. It appears that certain intellectual descendants of the post-Revolutionary radicals became lawyers. This had significant implications for the codification movement's objectives and evolution over time. First, none of the antebellum codifiers called for the total abolition of the legal profession as an institution, as Austin had done. Calls for informal extra-legal arbitration or "referee" proceedings, moreover, substantially declined among the codifiers, as did the fixation on juries as mechanisms of popular resistance to law and legal formalities—this at a time when lay juries found themselves increasingly barred from passing on legal issues. Most reformers contented

402. See, e.g., COOK, supra note 38; Gordon, supra note 38; see also TOMLINS, supra note 7, at 196 (noting "rich veins of popular antilegalism within American culture" in the early republic). While he did not emphasize the point, Austin did at one point in his essays suggest a "concise code of laws" as an alternative to importing the "grand artillery" of confusing and complex English statutes and law books. Honestus, INDEP. CHRON., May 18, 1786, at 1.

403. Jesse Higgins appears to have been a key transitional figure in this regard. While not a lawyer himself, the great extent of Higgins's legal learning distinguished him from prior law reformers. He recommended that all Americans read Blackstone, Wilson, and Tucker, so that every man could become his own lawyer. HIGGINS, supra note 365, at 69-71. For another work emphasizing a similar theme, see PUBLICOLA, NEW VADE MECUM, OR, A POCKET COMPANION FOR LAWYERS (Concord, New Hampshire, Hews & Goss 1819). This "every man his own lawyer" literature grew after the Civil War, though it apparently did little to slow the profession's growth. See, e.g., JOHN G. WELLS, EVERY MAN HIS OWN LAWYER AND BUSINESS FORM BOOK (New York, B. W. Hitchcock 1867).

404. During the Jacksonian period, some state legislatures did abolish qualifying exams for admission to the bar. See Maxwell Bloomfield, William Sampson and the Codifiers: The Roots of American Legal Reform, 1820-1830, 11 AM. J. LEGAL HIST. 234, 250 (1967).

405. According to one influential interpretation, in the early national and antebellum periods, the merchant community forged an alliance with the legal profession pursuant to which the judiciary would issue pro-commercial decisions so long as the merchants turned away from arbitration and toward the courts to settle their disputes. HORWITZ, supra note 5, at 144-55. On the narrowing of jural discretion in the nineteenth century, see generally NELSON, supra note 4. But see Millon, supra note 71, at 147-52 (noting continuing jural discretion well into the nineteenth-century, particularly in criminal cases).
themselves to regulate the law rather than dispense with it. Codes, in short, seem to have presupposed a functioning legal system with courts, lawyers, and legal rules—the very things that the Austinites had aimed to annihilate. Yet particularly in the three decades after Irish émigré and labor lawyer William Sampson’s address to the Historical Society of New York in 1823, something akin to the spirit of ’86 obviously possessed the radical codifiers—in their strident invectives against the common law; in their efforts to simplify law and legal knowledge so as to render them “level to the understandings of all” (Sampson’s words); and in their preference for broad principles of natural justice over law’s “useless forms and obsolete maxims and rules.”

The codification movement’s goals and jurisprudential commitments, however, experienced significant changes over time. Political and intellectual currents in the age of Jackson, for example, moved prominent codifiers in markedly more radical directions. Where pre-Jacksonian codifiers such as Sampson had adopted the Napoleonic Code (which four French lawyers had drafted) as their model and proposed to memorialize in a “judicial code” immutable universal principles of natural justice, the Jacksonians’ enthusiasm for democracy and faith in the common man produced a conceptual identification of law with popular will that shaped the thinking of influential reformers. “All American law,” the fiery Bay State codifier Robert Rantoul declared, “must be statute law,” for only “[s]tatutes enacted by the legislature, speak the public voice.” Jacksonian reformers carried forward an egalitarian republican ideal within American legal culture, including an anti-aristocracy mantra (now applied specifically to hidebound common lawyers rather than to the profession as a whole) with a clear Austinian heritage. A professional epistemological fortress built by and around intellectual aristocrats, the common law, whether English or American, had no place in America for Rantoul. Indeed, since unelected judges made it in the first instance, and since no ordinary man could discern what it commanded until “after the judge has decided,” the common law did not qualify as law in the first

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406. The leading study on the codification movement is Cook, supra note 38.
407. William Sampson, Sampson’s Discourse, and Correspondence With Various Learned Jurists, Upon the History of the Law 6, 7, 31, 87, 88 (New York, Gales & Seaton 1826); see also Cook, supra note 38, at 3-18, 106-07; Robert Rantoul, Memoirs, Speeches and Writings of Robert Rantoul, Jr. 279-81 (Boston, J. P. Jewett & Company 1854).
408. See Bloomfield, supra note 404.
410. This conceptual identification resulted in a largely successful movement for the popular election of judges at the state level. See Friedman, supra note 38, at 111, 323.
412. The rhetoric of anti-aristocracy pervaded Rantoul’s writings. See Rantoul, supra note 407, passim. It is conspicuously absent from Sampson’s. See Sampson, supra note 407, passim.
instance.\textsuperscript{413}
And yet after the Field Code’s enactment in 1848, which itself dealt a considerable blow to the common law tradition by abolishing the distinction between suits at law and suits in equity, the codifying impulse began moving further and further away from its revolutionary republican roots. In part, this resulted from the significant intellectual cross-fertilization that occurred between the common law’s defenders and the codifiers within the profession, so that eventually little daylight existed between the two camps.\textsuperscript{414} As early as 1837, none other than Joseph Story—the great judicial champion of the common law—had conceded that some codification might benefit Massachusetts.\textsuperscript{415} But where the early Jacksonian reformers sought to codify the people’s will \textit{in lieu} of the common law and in the process to abolish the latter, later codifiers—apparently taking their cue from Story—now proposed to codify the \textit{common law itself}. Consequently, while originally born out of the impulse toward simplicity, the codifying project became much more complex, formalistic, and comprehensive in scope as the antebellum period proceeded.\textsuperscript{416}

The preeminent late antebellum codifier David Dudley Field illustrates the shift in its final phases. On the eve of the Civil War in 1859 we find Field angling to codify not simply a “few and general principles” in a pocketbook code as Sampson had, but fully “two million” common law rules and promising countless more to accommodate modern society’s luxuriant foliage.\textsuperscript{417} In Field’s hands, moreover, codes began taking on some of the common law’s essential attributes as articulated by its American apologists. To answer the establishmentarians’ allegation that a fixed code could never foresee every future transaction and thus could not adapt to changing conditions as the common law could, Field and others emphasized that codes would remain open-ended works-in-progress, to be periodically revisited, revised, and augmented to adapt to an expanding commercial society.\textsuperscript{418} And who would draft and re-draft over and again this massive new code, this “CODE AMERICAN”?\textsuperscript{419} Not the people, nor even their representatives—at least not primarily. As Field and his

\begin{itemize}
\item \textsuperscript{413} \textit{RANTOUL, supra} note 407, at 280.
\item \textsuperscript{414} \textit{See} Gordon, \textit{supra} note 38, at 456.
\item \textsuperscript{416} So-called “partial” codification—treatises, hornbooks, and case reports—further expanded the available legal literature as the nineteenth century proceeded. \textit{See FRIEDMAN, supra} note 38, at 538-49.
\item \textsuperscript{417} 1 \textit{DAVID DUDLEY FIELD, SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD} 528, 526-27 (A.P. Sprague ed., New York, D. Appleton 1884); \textit{see also id.} at 522-23 (contending that “[t]he more perfect the civilization, the more complete the law”).
\item \textsuperscript{418} \textit{Id.} at 511, 526-27.
\item \textsuperscript{419} \textit{Id.} at 515.
\end{itemize}
brethren saw it, only legal experts—the judges and lawyers themselves—could properly accomplish this Herculean jurisprudential task, which Field enthusiastically labeled “legal science.” If all went as planned, the legislature would simply rubberstamp the codes. Although the “instincts of republicanism” favored codification, for Field the people themselves apparently no longer embodied ultimate legal sovereignty in America. Instead, he confidently pronounced, “the law is our only sovereign.”

Historians have often conceptualized antebellum legal history in terms of a conflict between two opposing camps within the profession—the common law’s defenders and the codifiers. This construct creates a misleading impression, however, for as early as the 1840s these groups had begun to converge around a shared commitment to law as a science. This convergence rested not only on the codifiers becoming more moderate over time but also on the common law’s defenders becoming somewhat more radicalized. To a considerable extent, antebellum legal establishmentarians appropriated their opponents’ simplifying jurisprudential objectives and, in their digests, treatises, articles, and speeches waxing on American law and legal science, arguably beat the codifiers at their own game. Indeed, no sooner had the first glimpses of an authentically American common law started to take shape based on native case decisions after the War of 1812 than establishmentarians such as David Hoffman, Joseph Story, and James Kent rose up to attack it as too complex and hence contrary to the premises of legal science.

Antebellum legal science championed broad principles of law over rules of law—a distinction that had significance for the Austinites. Science literally replaced law itself as the jurists’ guiding jurisprudential light. Joseph Story, for example, bemoaned the “ponderous volumes” on the

420. Id. 517, 529; see also id. at 499 (“Justice is attainable only through lawyers.”).
421. FRIEDMAN, supra note 38, at 352.
422. 1 FIELD, supra note 417, at 510.
423. Id. at 530.
424. See, e.g., HORWITZ, supra note 5, at 258; MILLER, supra note 38, bk. II.
425. See COOK, supra note 38, at 204, 209.
426. See, e.g., HOFFMAN, A LECTURE, INTRODUCTORY TO A COURSE OF LECTURES 16 (Baltimore, J.D. Toy 1823); 1 KENT, COMMENTARIES ON AMERICAN LAW 442 (New York, O. Halsted 1826); WARREN, supra note 24, at 522. Hoffman carried on the Scottish common sense “anti-intellectual” jurisprudential tradition inaugurated by Austin and further developed in Wilson. Id. at 15-17, 43. Kent famously recollected that, when confronting cases in the early national period, “I saw where justice lay and the moral sense decided the court half the time.” MEMOIRS AND LETTERS OF JAMES KENT, L.L.D. 159 (William Kent ed., Boston, Little, Brown 1898) [hereinafter KENT, MEMOIRS].
427. Austin himself rarely used the word “law” in a positive appraisal without the word “principle” in front of it. See AUSTIN, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW, supra note 94, passim. James Kent recollected, “I might once and a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case.” KENT, MEMOIRS, supra note 426, at 159.
428. James Gould, Law School at Litchfield, 1 U.S. L.J. 400, 402 (1822). Gould specifically contrasted the concept of “science” with the “authoritative rules and dogmas” exhibited in “our books.” Id.
"groaning shelves of jurists." To avoid getting "buried alive . . . in the labyrinths of the law" and to buck "rigid, severe, and uncompromising" rules of law, Justice Story endorsed importing broad equitable principles—"principles of universal or natural justice"—into common law cases so as to adopt "the most enlarged and liberal principles of decision." Where in England equity arose literally as the common law's rival—in one historian's words, "a system of anti-law"—in America it appears to have served as the conceptual foundation for the common law and evolved as an integral part of it prior to the Civil War. This curious intermingling of law with its historical rival within the solvent of legal science reflected an assimilation of the radical post-Revolutionary critique.

This argument does require some restraint, however, for both the establishmentarians and the codifiers within the profession ultimately employed the antilegalistic ideals of simplicity and equity to advance highly legalistic ends. Story and his brethren worried about the "popular cast" of American institutions, which they believed produced "too warm a zeal for untried theories." The law stood as "the last barrier between the people and universal anarchy or despotism," and lawyers "sentinels upon the outpost of the constitution," protecting the country against "visionary legislators" and "artful leaders." Antebellum establishmentarians aimed to make law into a "science" predicated on broad principles level with the common comprehension, precisely in order to legitimate a professional legal elite specially trained to discern those principles and thereby to establish that law ultimately flowed not from the people but from reason. Antebellum legal science as employed by both camps within the

429. Story, supra note 415, at 237;
431. Friedman, supra note 38, at 22 (emphasis added); see also Wood, supra note 131, at 291-304. Many other early national and antebellum jurists similarly collapsed the distinction between law and equity in the name of legal science. See Pearson, supra note 400, at 57-60. In a similar vein, scholars have also noted that prominent early national and antebellum jurists rejected the very idea that precedent should determine the outcome of legal disputes. See id. at 60-66; Horwitz, supra note 5, at 24-25. The retreat from precedent converged with the jurisprudential emphasis on principle to form what Karl Llewellyn would later call the "Grand Style" of early nineteenth-century legal reasoning, which had antebellum lawyers and judges justifying their opinions with reference to broad considerations of "principle" and "policy," and deemphasizing precedential legal authority so as to satisfy the "felt demands of justice." Karl Llewellyn, The Common Law Tradition 36 (1960).
432. Austin's earlier essays placed great emphasis on "equity" and "principles of equity." He sought to abolish lawyers so as to clear the way for equity rather than law to ground decision-making. Austin himself seems to have posed equity as an alternative to the English common law, but in at least one respect—namely his depiction of the jury trial (a creature of the common law) as the embodiment of pure equity—he forecasted the subsequent intellectual intermixture. Honestus, Indep. Chron., May 18, 1786, at 1. Antifederalists and Jesse Higgins carried on this conceptual identification of jury trials with equity. See 3 The Complete Anti-Federalist, supra note 331, at 60 ("A Democratic Federalist"); Higgins, supra note 365, at 5, 6.
433. Story, supra note 415, at 228, 229.
434. Id. at 230, 228.
profession thus greatly contributed to the rise of legal formalism prior to the Civil War—a trend that Austin, Wilson, and Higgins would have vigorously opposed.435

2. Reform from Without: Antinomian Individualism in the Age of Jackson

To view the history of antebellum legal thought and culture through the eyes of the lawyers only, however, unduly confines our scope of vision and totally elides some of the most historically significant dissenting voices with roots in the post-Revolutionary radical reform tradition to appear during the antebellum era. These voices came generally from outside the profession where the Jacksonian zeitgeist lifted anti-aristocracy sentiment to its post-Revolutionary apex, generating a deep and sustained criticism of the law in many ways more radical than anything that came before. The individualistic spirit of the age sent many Americans looking for new realms of individual liberty beyond law’s reach. Over a century before F.A. Hayek’s writings, Jacksonians had begun to envision a spontaneous, self-regulating social order bereft of law as their governing normative paradigm. The first edition of The Democratic Review declared that law stood opposed to democracy and championed instead the “principle of FREEDOM” which would by itself produce “the best possible general result of order and happiness from the chaos of characters, ideas, notions and interests—human society.”436 The judiciary proved remarkably willing to ratify and even expand upon this idea in an emerging laissez-faire jurisprudence that broadened the spaces in which individuals could freely rule themselves without threat of extrinsic legal intervention.437

The progressive faith in the sovereignty and perfectibility of the individual that marked Jacksonian intellectual life spawned an antilegalistic ideology capable of idealizing old Saxon justice in the manner of Jesse Higgins; conceiving of lawyers and formal legal institutions as contrary to the “tendency” of the times and therefore moribund; and otherwise producing a self-conscious intellectual opposition to law itself that, in many respects, outdid Austin himself.438

The “disorganizing, anarchical spirit” that filled the air in the 1830s led to considerable popular rioting and popular convention activity in numerous

435. HORWITZ, supra note 5, at 257.
436. Introduction, 1 U. S. MAG. & DEMOCRATIC REV. 1, 6 (1837).
437. Justice Taney’s opinion in Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837), marks one key moment in this judicial trend, which came to fruition in the late nineteenth century in what legal scholars call Classical Legal Thought. See WIECEK, supra note 70. See infra Conclusion.
states.\textsuperscript{439} Apparently without any sense of threatening the social order, radical Jacksonians revolted against virtually every form of legal or institutional restraint imposed upon them from without.\textsuperscript{440} While publicly critical of such popular subversions of the legal order, Jackson himself personified the subordination of law to individual character—an "anarchic hero" who without compunction thrust ahead with his decisions unaffected by popular support for a national bank, the Supreme Court's judgment in favor of the Cherokees, or virtually any other legal norm or dictate inconsistent with his instincts.\textsuperscript{441}

The decline of Calvinism and the rise of perfectionism within antebellum culture seemed to render law's traditional justifications—human vice and depravity—entirely anachronistic and inapplicable. The southern Jacksonian politician, ex-lawyer, and writer P.W. Grayson set out one penetrating and influential critique of the law that reflected these perfectionist currents in their early stages. Circulating widely within the emergent labor organizations in the seaport cities, Grayson's \textit{Vice Unmasked} (1830) contended that the "MACHINERY OF LAW" degraded man's true "moral essence"—that is, his natural inclination to make the "good of others" the natural object of his own "self-love."\textsuperscript{442} Law severed

\begin{footnotes}

440. KOHL, supra note 438, at 163 ("The party of Jackson, ignoring Whig cries that they were seeking to subvert all law, attacked the American legal system throughout the 1830s and '40s.").

441. Grimsted, supra note 438, at 367. In diametric contrast to Europe, wrote one articulate defender of Jacksonian vigilantism, "in America the individual is all and society nothing . . . all aspects of the law are subordinated to individual right, which is the basis and essence of the republic." See id. at 366. Such views, however, met with significant Whig opposition. Horace Greeley's New York Tribune, for example, declared in 1842 that "the essence of freedom consists in the supremacy of abstract law over personal will." See KOHL, supra note 438, at 165. For an insightful discussion of the conflicts as well as the convergences between Jacksonian Democrats and the Whigs as to the place of law in a democratic society, see id. at 145-85.

\end{footnotes}
man's existential connection to others by cordonning off his property and rights, subordinating him to rules and then instigating quarrels about the application of those rules. The very existence of coercive legal authority, Grayson maintained, implied "human infirmity" and, indeed, "vice in almost all its forms." In something like a self-fulfilling prophecy law itself perpetuated those evils. Free individuals—particularly "here in these free states of America"—instinctively resisted legal force no matter the rectitude of purpose. Authority extrinsically constituted, Grayson wrote, had never in history succeeded in bending free human beings to its dictates and usually produced just the opposite result—discontent, resentment, and resistance. Indeed, Grayson emphasized that law delivered its greatest insult to man's moral essence when it forced him to act morally. Laws that "lashed" individuals into "the practice of the plain principles of right" made humans into mere machines and alienated man from his true moral self. In the instant of its coercive operation, law thus denied man the capacity to rule himself. Grayson's solution? "The repeal of all law." Only then could humans truly rule themselves. Only then could humans truly be themselves.

Grayson's secularized antinomianism anticipated Emerson and the Transcendentalists whose widely read writings provided additional philosophical grounding for Jacksonian antilegalism. Transcendental philosophy and the reform sentiment it generated extolled individual character, conscience, and self-reliance over legalism, collectivism, and all other coercive (or potentially coercive) social institutions. "No law can be sacred to me," Emerson wrote, "but that of my nature." For Emerson law imposed the collective "will" of representatives on one's own and therefore violated the individual's divine right to dictate his own rules. "Good men must not obey the laws too well." Individual character, Emerson believed, superseded all law—the state existed as but a "shabby imitation" of the individual. The wise man needed "no statute book, for

443. GRAYSON, supra note 442, at 21.
445. GRAYSON, supra note 442, at 28.
446. Id. at 29.
447. GRAYSON, supra note 442, at 20, 15, 21, 28, 29.
448. Id. at 159. "That which must be done," Grayson revealingly wrote, "is to . . . bid [Americans to] no longer worship the cold prescriptions of policy, for the warm principles of justice—to free his soul from the fetters of authority—to remit and exalt him to himself—to let him seek, by the light of his conscience alone, in the joyous, genial climate of his own free spirit, for all the rules of his conduct." Id. at 168.
449. 1 WORKS OF RALPH WALDO EMERSON 47 (Boston, Houghton, Osgood & Co. 1880) (final emphasis added).
450. Id. at 169.
451. Id. at 175.
he has the lawgiver.” The “appearance of the principal to supersede the proxy” rendered all law, government, and therefore representation, alien and irrelevant. “The tendencies of the times,” Emerson wrote, “favor the idea of self-government, and leave the individual, for all code, to the rewards and penalties of his own constitution.”

These anti-institutional intellectual orientations continued to find public expression well into the 1840s. In 1846, the editors of The Democratic Review confidently predicted that law and lawyers would soon wither away forever in America. An article entitled “Prospects of the Legal Profession in America” depicted legal institutions as obsolescent in a progressive democratic society committed to individual freedom. The democratic faith’s commitment to enlarging “the power of individuals” and thereby leaving “every man, as far as possible, to his own discretion,” had since Jefferson’s presidency substantially narrowed the government’s ability legally to interfere in the individual’s pursuits, the article observed. The inverse relationship between the individual and the law, and the whole “tendency” of American society toward the former’s ultimate supremacy, meant that over time the “sources of litigation”—which could only “spring from a violation, alleged or real, of some existing law”—would simply dry up. Addressing the laws of debtor-creditor relations, the article contended that since the “instinct of individual independence is fatal to any... extensive system of commercial credit,” a new system predicated on the “combined honesty and sagacity” of borrowers would eventually emerge whereupon creditors would never again have occasion to seek “legal protection or assistance.”

As to the fate of lawyers in America, the editors wrote that the “individualization of our people” had resulted in “an overthrow of the ancient dignities and eminence of the legal profession,” whose members had therefore degenerated into mere “clerks.” In a society where “[e]veryman’s love of his own rights makes him respect the rights of others” and where “the people are denied no important rights,” the lawyer could never again boast a distinguished position. Indeed, “the great mass of [the lawyer’s] pure law learning might be erased from his mind

452. Id. at 176. 453. Id. at 175. 454. Id. at 178 (emphasis added). 455. Prospects of the Legal Profession in America, 18 U.S. Mag. & Democratic Rev. 26 (1846). 456. Id. at 27, 28. 457. Id. at 27. 458. Id. at 28. A truly “independent man,” after all, could never be “bound by an obligation to his neighbor.” Id. 459. Id. 460. Id.
without materially impairing his interest as a companion, or his usefulness and value as a citizen.” 461

The Review’s unqualified faith that the sequence of events it envisioned—including the extinction of all law and lawyers—would soon enough come to fruition is quite remarkable. The editors equated the emergence of the self-reliant individual to replace legal institutions with the emergence of “Truth” itself, a manifest destiny. This irresistible cultural tendency drawing Americans away from a society governed by law and lawyers, the editors concluded, would “never quiet until it has vindicated its entire and absolute supremacy.” 462

CONCLUSION: THE LAW OF UNION AND THE DEATH OF RADICALISM

Benjamin Austin rose up in the revolutionary spring of 1786 to oppose the legitimacy of law, lawyers, and legal institutions in a free republic, and many Americans followed him. If Austin’s proposals seemed radical to his adversaries, Honestus did not deny the charge. To the contrary, he proudly proclaimed, “The cure must be radical!” 463 The temptation exists to write the Austinites off as backward-looking agrarians, at best the “less thoughtful reformers,” and perhaps to tie their historical fates to the Shaysites’ and call it a day. 464 We might conclude that the spirit of ’86 produced a temporary outburst among discontented debtors whose triggering conditions the Constitution subsequently cured or substantially ameliorated; and that, in any event, after ratification American government’s increasing ability to “compel recalcitrant minorities to obey rules of law they found objectionable” rendered the Critical Period’s radical spirits forevermore insignificant in American political and cultural life. 465 Alternatively, we might attempt to domesticate Austin’s unsettling critiques by postulating an alternative legal framework or consciousness within which he operated. 466 Apparently taking Thomas Paine’s assertion

461. Id. at 29.
462. Id. at 28. In an article on the women’s movement, Putnam’s Magazine concluded that it was “too late” for women to retrieve “dignity” by recourse to the “learned professions”: “Democracy has so shattered the dignity of the professions . . . and laid them open to every undisciplined vagabond . . . that it is idle any longer to regard a man as respectable simply because he is a lawyer . . . .” 1 PUTNAM’S MAG. 279 (1853). For other writings in The Democratic Review criticizing legal institutions in the 1840s, see The Abuses of Law Courts, 21 U.S. MAG. & DEMOCRATIC REV. 305 (1847); Law Reform, 21 U.S. MAG. & DEMOCRATIC REV. 477 (1847).
464. NELSON, supra note 4, at 69, 173.
465. Id. at 173; see also TOMLINS, supra note 7 (tracing the rise and triumph of “legal discourse” over competing discourses in the early nineteenth century).
466. See Steven Wilf, The First Republican Revival: Virtue, Judging, and Rhetoric in the Early Republic, 32 CONN. L. REV. 1675, 1687 (1999) (claiming that Post-Revolutionary antilegalism is “better labeled popular legalism.”); see also WILF, supra note 12, at 152 (explaining that Austin did not represent “simple antilegalism” but rather a “critique concerned with the integrity of law that focused on the openness of legal knowledge”).
that in America “the law is king” quite literally, an influential strain in the legal historiography suggests that at precisely those moments in early American history when authoritative legal institutions have come into question, weakened, disintegrated, or disappeared—those exceptional moments when existing governmental authority gets “scattered among the people whose right it is”—Americans have nevertheless continued positively to invest themselves in law and to find legitimate justifications in it.467

But Austin and the popular movement for which he spoke in 1786 suggest that an orientation adverse to law itself did exist at a seminal

467. The chief progenitor of this approach, John Philip Reid has produced an immense body of scholarship that conforms to this basic pattern. Reid argues in his influential study of revolutionary-era Boston mobs, for example, that the rioters acted pursuant to so-called “whig law,” whose legitimacy derived from control of local legal and political institutions. John Philip Reid, In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution, 49 N.Y.U. L. REV. 1043, 1090 (1974). Reid’s argument reads like a legal brief defending the recalcitrant Bay State whigs—probably, however, the losing brief. He applies something like a logarithm to endow crowd action in revolutionary Boston with a “legal” sanction: “[W]hat was unlawful to the tory,” he categorically asserts, “was law for the whig.” Id. at 1044. In the crucible of imperial resistance, law apparently became “whatever could be plausibly argued and forcibly maintained.” Id. at 1087. Reid seems to equate the whigs’ perception of “political necessity” with “whig law.” Reid, In A DEFIANT STANCE 99 (1977). A close reading of Reid’s work, however, suggests that his use of the term “law” here is seriously misleading. First, Reid’s interest apparently lies only in whether the American whigs sincerely thought their actions lawful as a subjective matter, not whether “whig law” was “truly ‘law.’” Id. at 92. Second, and more problematically, while Reid’s work abounds with assertions that the whigs did subjectively consider their mobs and riots lawful, Reid makes the remarkable admission that in order to make these assertions he must “put words . . . into mouths that might not have employed them.” Id. at 163. Reid suggests, for example, that John Adams thought the Boston Tea Party was lawful, even though Adams never used the terms “legal” or “lawful” or “law” to describe it; he characterized it rather as “necessary.” Id. at 99. Indeed, sometimes the evidence directly contradicts Reid’s suggestion that revolutionary whigs thought they acted under positive legal sanction, such as when Joseph Hawley argued that Lanesborough rioters had withdrawn from the “positive laws of society” and acted pursuant to “the law of nature.” Reid, In a Defensive Rage, at 1062. Reid states that Hawley’s state-of-nature theory “should not distract us” but never clearly explains why. Id. Laura Edwards runs into similar problems in her own attempts to expand the definition of what constitutes “law” in early American history. Edwards, supra note 7, at 12 (suggesting that social relations among local Carolinians, as well as the non-legal “body of knowledge” on which they drew, including religion, popular writings, and cultural traditions, “constituted localized law,” even though Carolinians themselves never apparently conceived it as such). For other works generally conforming to this trend of finding law and legal justification in ostensibly extra-legal or political activity, see Hendrik Hartog, Pigs and Positivism, WIS. L. REV. 899 (1985) (concluding that New York pig keepers had a legal right to let their animals roam the streets despite court rulings criminalizing the practice); Reid, The Irrelevance of the Declaration, in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 46, 88 (Hendrik Hartog ed., 1981) (“Far from being a statement of abstract, natural principles, the Declaration [of Independence] is a document of peculiarly English constitutional dogmas [that is, positive law].”); KRAMER, THE PEOPLE THEMSELVES 24 (2004) (in a “political-legal” process in which judges had no special role, jury nullification, customary practices, and popular crowd action contributed to determining a “special category of law” in eighteenth-century America); J.P. Reid, LAW FOR THE ELEPHANT (1980) (arguing that travelers on the Overland Trail in the mid-nineteenth century applied legitimate and sophisticated legal principles in resolving their disputes). Along comparable lines, constitutional historian Bruce Ackerman has suggested that so-called “higher lawmaking” outside Article V has come to acquire something of a constitutional sanction in America. ACKERMAN, supra 327; 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). Akhil Amar has gone so far as to suggest that post-Revolutionary Americans “legalized” the right to “alter or abolish” their government. Amar, The Consent of the Governed, supra note 373, at 471, 482.
moment in early American legal history. This Article has shown, moreover, that this orientation arose not as a pre-modern colonial survival or out of economic grievances alone, but as a legitimate jurisprudential expression of revolutionary republican ideology. The foregoing analysis suggests, furthermore, that the American revolution against the law in 1786 helped provoke the movement for a new Constitution in 1787, problematized the Constitution’s public meaning at ratification, shaped early national jurisprudence, and accounts for antebellum legal and political developments in provocative ways that suggest new directions for future research. That legal historians have elided these formative dimensions of early American legal culture is not altogether surprising. For, as we have seen, post-Revolutionary antilegalism sometimes masqueraded as law. Occasionally employed by Austin as a defensive measure, the language of the law belied a deep-seated opposition to the thing itself. As well, some unlikely suspects—namely, antebellum lawyers and jurists: the very propagators of law and legalism whom the Austinites had originally sought to “annihilate” forever—helped carry the spirit of ’86 forward into the nineteenth century, not by loudly denouncing courts or the “pernicious practice of law” as Austin had done, but by weaving antilegalistic ideals into the warp and woof of an otherwise formalistic discourse of legal science.

The most profound expressions of post-Revolutionary antilegalism in the antebellum period, however, came largely from outside the legal profession in the popular consciousness, little if any evidence of which exists within the institutional source materials on which legal historians continue to focus. Here, however, at least political and intellectual historians have taken notice. And how could they not? Jacksonian antilegalists no longer felt any need to pay lip service to the law in their attacks on law itself. Their writings thus gave expression to the revolutionary spirit of ’86 in American life with a directness and clarity that, ironically, even its original spokesman could not quite match. But where the Austinites believed the people had to take affirmative action to protect their liberties from a creeping epistemological aristocracy, the editors of the Democratic Review contemplated simply standing back and watching the irresistible forces of American democracy follow themselves through to their natural and inevitable conclusion—the permanent extinction of all law and lawyers in America.

The great Perry Miller went to his grave grappling with the intellectual implications of the post-Revolutionary radical law reform tradition in antebellum America. But if Miller intended to pass the baton,

468. See Grimsted, supra note 438; KOHL, supra note 438; MILLER, supra note 38, bk. II.
469. MILLER, supra note 38, bk. II.
subsequent historians have declined to grab hold of it.\textsuperscript{470} Scholars interested in the topic can probably agree that at some point around mid-century the radical reform tradition that Austin had inaugurated, like so many of the other heady American antebellum reform movements steeped in the revolutionary heritage, went into decline.\textsuperscript{471} We have already observed a few of the reasons for this. For one, antebellum lawyers—establishmentarians and reformers alike—commandeered and ultimately deradicalized the post-Revolutionary critique. Over time they moved it in highly formalistic directions that separated the law from the people and consolidated the profession’s monopoly on law, legal knowledge, and legal practice. This cannot, however, account for the profound critiques that emerged from outside the profession in the Jacksonian era which, as we have seen, generated probably the most subversive, self-conscious attack on law itself ever to appear in American history, but which by all appearances also vanished after the Civil War. How can we account for its disappearance?

The Article’s final pages can suggest only the broadest outlines of an answer. As the era’s defining political, ethical, and legal question, slavery certainly figures into the analysis. The slavery question provided an unprecedented political outlet for the expression of the post-Revolutionary resistance to law with which we have been concerned here. Anti-slavery thinkers in the North leveraged the age’s antinomian faith in the supreme authority of the individual conscience into a thoroughgoing moral attack on the peculiar institution and on any law, lawyer, or politician that even implicitly tolerated or supported it.\textsuperscript{472} Southern Jacksonians, meanwhile, adopted their own forms of antilegalism. The Southern mind’s peculiar resistance to law derived from an ideological admixture of revolutionary republicanism;\textsuperscript{473} the belief that “slave relationships should be regulated by sentiment, not law”;\textsuperscript{474} the concept of “herrenvolk democracy,” which contemplated for the white masters total equality, independence, and freedom from all forms of dependence or “slavery,” legal or otherwise;\textsuperscript{475}

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\textsuperscript{470} One important work running in Miller’s line, however, is \textsc{Robert A. Ferguson, Law and Letters in American Culture} (1984).

\textsuperscript{471} See, e.g., \textsc{John L. Thomas, Romantic Reform in America, 1815-1865}, 17 AM. Q. 656, 680-81 (1965).

\textsuperscript{472} See generally \textsc{Against Slavery: An Abolitionist Reader} (Mason I. Lowance ed., 2000); see also \textsc{Henry David Thoreau, Civil Disobedience, in The Selected Essays of Henry David Thoreau} 103-21 (Wilder Publications 2008).


\textsuperscript{474} \textsc{Mark Tushnet, The American Law of Slavery, 1810-1860}, at 230 (1981); see also \textsc{Morton Horwitz, Mark Tushnet, Legal Historian}, 90 GEO. L.J. 131, 134 (2001) (noting in Tushnet’s \textit{The American Law of Slavery} a basic “conflict between the antilegalism and informalism of a slave society and the more formal-law characteristic of bourgeois society”).

\textsuperscript{475} See \textsc{George M. Fredrickson, The Black Image in the White Mind} 61-68, 90-94 (1971); \textsc{Kenneth S. Greenberg, Masters and Statesmen 85-88 (1985)}; \textsc{Holt, supra note 473, at 241}; see also \textsc{Edmund Morgan, American Slavery, American Freedom} (1975); \textsc{Larry E. Tise,}
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and a programmatic anti-majoritarianism that would have paralyzed federal lawmaking and which imagined "law" as almost entirely devoid of any coercive dimension.\textsuperscript{476}

These sectional currents and crosscurrents of antilegalism, however, found their conditions of possibility in deeper constitutional issues going to the taproot of American attitudes toward law after the Revolution. The slavery debates turned on underlying conflicts over where sovereignty itself resided in the American constitutional system, conflicts that the Constitution of 1787 left unresolved and which transcended the specific issue of slavery. In the years after the Revolution, these conflicts played out in debates over where the nullification power properly lay. Who, if anyone, had the power to exempt themselves from law in the American republic? What person or group could legitimately step \textit{outside the law} within the American constitutional system? Certainly juries possessed this power in the colonial and revolutionary periods. In 1776 revolutionary republicans began enacting state constitutions that purported to lodge the power of nullification in the "people" of the individual states and Publius (with James Wilson's help) subsequently converted this into an effective rhetorical strategy to legitimate the national Constitution. On the national scale, however, Publius's Constitution made the people's sovereignty difficult, if not impossible, to exercise directly. A truly collective national popular sovereign could exist only as an appealing idea.\textsuperscript{477} Competing ideas as to the proper locus for popular sovereignty's practical exercise quickly appeared in the post-Revolutionary decades, doing battle in the controversies over Hamilton's financial overhaul, the Alien and Sedition Acts, the Hartford Convention, South Carolina's attempt to nullify federal tariffs, the Dorr Rebellion in Rhode Island and, of course, the slavery question and slavery-related legislation.\textsuperscript{478} Generally these years saw Americans positioning to locate the nullification power in progressively smaller units within American society—in sections, states, parties, "interests," and juries.\textsuperscript{479} At last, in Emerson and Thoreau's influential

\textsuperscript{476} For the classic articulation of Southern anti-majoritarianism, see JOHN C. CALHOUN, A DISCUSSION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES (Richard Cralle ed., Charleston, Walker & James 1851); see also Holt, supra note 475, at 242 ("Repeatedly, southern extremists denounced the very idea of majority rule as subversive of republicanism."). See generally Lacy K. Ford Jr., Inventing the Concurrent Majority: Madison, Calhoun, and the Problem of Majoritarianism in American Political Thought, 60 J.S.HIST. 19 (1994). For additional works discussing southern white culture's resistance to law and legal process, see CHRISTOPHER WALDREP, ROOTS OF DISORDER (1998); EDWARD AYERS, VENGEANCE AND JUSTICE (1984); and PETER KOLCHIN, AMERICAN SLAVERY (1993).

\textsuperscript{477} See EDMUND MORGAN, INVENTING THE PEOPLE (1988).

\textsuperscript{478} On all these controversies (except slavery), see FRITZ, supra note 261.

\textsuperscript{479} Particularly on issues relating to slavery, antebellum constitutional politics seemed effectively to place the nullification power in each of the sections. See MARK GRABER, DRED SCOTT
formulations, the power to step outside the law came to rest in the "imperial self"—the individual mind and conscience. This final move seemed to render sovereignty in the American constitutional system essentially independent of society itself.

Each attempt to circumscribe more narrowly the nullification power's proper locus degraded the law's integrity, authority, and clarity in American life. The growing refusal to accept the sanctity of law that marked the antebellum politics of nullification culminated in the 1840s and 1850s, when more and more Americans began allocating to the sections, states and individuals the power to nullify the law that, from one vantage point, made all others possible, the law that bound the American people together: the law of union.

The idea of disunion as a real possibility for many Americans in the years approaching the Civil War unraveled the nation's legal, political, and constitutional fabrics in the profoundest of ways. And perhaps for this very reason, its emergence may simultaneously mark the dramatic climax of the post-Revolutionary "disposition unfriendly to the law itself" explored in this Article and the beginning of its end in American history. For no sooner had the subversive secessionary impulse exploded forth into

AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006). The Virginia and Kentucky Resolutions in 1798, as well as South Carolina's tariff ordinance in 1832, suggested that the power lay in the states. See WILENTZ, supra note 439, at 79, 379-88. ( Drafter of the Virginia Resolution, James Madison would later argue, though not very convincingly, that neither the Virginia Resolution nor the Kentucky Resolution supported state nullification. See Kenneth Stampp, The Concept of a Perpetual Union, 65 J. AM. HIST. 5, 30 (1978).) In the late 1840s, John C. Calhoun effectively located the nullification power in "interests." CALHOUN, supra note 476. As the antebellum era proceeded and the slavery debates intensified, renewed efforts to locate the nullification power in the jury emerged. See LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 8-9 (Boston, John P. Jewett & Co. 1852); Trial by Jury, 6 U.S. MAG. & DEMOCRATIC REV. 463 (1839). Jury nullification experienced a notable revival in connection with Fugitive Slave Act cases in the 1850s. See H. Robert Baker, The Fugitive Slave Clause and the Antebellum Constitution, 30 LAW & HIST. REV. 1131, 1170 (2012).

480. SELECTED ESSAYS OF HENRY DAVID THOREAU, supra note 472, at 121 (“[Law] can have no pure right over my person and property but what I concede to it.”). On Emerson’s anti-social tendencies, see QUENTIN ANDERSON, THE IMPERIAL SELF 3-58 (1971). Antebellum spiritualists also embraced the principle of individual sovereignty, as did many in the emerging women’s movement. See ANN BRAUDE, RADICAL SPIRITS: SPIRITUALISM AND WOMEN’S RIGHTS IN NINETEENTH-CENTURY AMERICA (1989). For the dilemma between law and conscience which sharpened in the 1850s largely due to the Fugitive Slave Act of 1850, see HARRIET BEECHER STOWE, UNCLE TOM’S CABIN 141-52 (Penguin Classics 1986) (1852).

481. Recall here one of James Madison’s minimum requirements for a “republican” government: it could not exist totally “independent of the society itself.” THE FEDERALIST No. 51, supra note 69, at 322 (James Madison).


practical fruition, rending the union asunder, than Abraham Lincoln rose up decisively to contain and suppress it forever: "[I]n legal contemplation," Lincoln declared in his first inaugural, "the Union is perpetual." 484 Andrew Jackson had made a similar claim during the nullification crisis in 1832. 485 But in and after 1861 the idea of a perpetual union, "in legal contemplation," took on a whole new meaning and significance. In putting the law of union outside of the reformer's reach, Lincoln had in essential respects placed the law itself beyond his reach. For it followed from the inviolable law of perpetual national union that states and citizens had an absolute duty to obey laws constitutionally enacted, no matter how objectionable, unless and until constitutionally revoked or overruled. As Lincoln viewed matters, the legally corrosive cultural politics of nullification in post-Revolutionary America had produced a stark existential choice for Americans in 1861: law or anarchy. For "[p]lainly the central idea of secession is the essence of anarchy." 486 The sixteenth president chose law, and the North followed him.

Partisans for a new Constitution thought America faced the same choice in 1787. They also chose law. But countless post-Revolutionary Americans in both sections did not follow them, at least not in spirit, and the Janus-faced Constitution ratified thereafter did little finally to resolve the matter. Law's defenders in 1865, however, had more than an internally conflicted constitutional vision to show for their efforts. They had a decisive victory in a bloody Civil War that had claimed hundreds of thousands of American lives. If, as Madison had written in 1787, "[a] sanction is essential to the idea of law, as coercion is to that of Government," then the Civil War arguably established the first national government by law in American history. 487

Lincoln's commitment to the fundamental law of American union, the North's willingness physically to enforce it, and their ultimate success in doing so, together represented a significant moment of decline for all forms of radicalism and reform in post-Revolutionary America, including Austinian antilegalism. 488 "The extreme individualism of the antebellum reformers," writes one historian, "was swallowed up in a Northern war effort that made private conscience less important than saving the Union." 489 In essential ways, the citizenry that emerged from the war, particularly in the North, looked almost nothing like its antebellum}

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484. ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 582 (Roy Prentice Basler ed., 1946).
485. See Stampp, supra note 479, at 31.
486. Id. at 585. As to the Dred Scott decision, which Lincoln himself found highly repugnant, the President recommended that it be obeyed until overruled or otherwise revoked: "[T]he evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice." Id.
487. 2 WRITINGS OF JAMES MADISON, supra note 313, at 363.
488. See Thomas, supra note 471, at 680-81.
489. Id. at 680.
predecessor with respect to its attitudes toward law, government and authority. By rendering the very idea of revolution or rebellion “anathema” to Northerners, the Civil War dramatically “widened the gulf that separated nineteenth-century Americans from their revolutionary heritage.”

In *The American Republic* (1866), the influential former Transcendentalist Orestes Brownson offered some revealing insights on the nature of the post-war intellectual transformation. Brownson argued that the war experience had operated to discredit the country’s erstwhile “political tradition.” Following Locke and Rousseau, that tradition had held that “the people” inalienably possessed the unconditional right of revolution: “Individuals create civil society and may *uncreate it whenever they judge it advisable*.”

Stitched into the nation’s DNA in 1776, this radical ideology had produced a uniquely recalcitrant citizenry in both sections that reveled in their revolutionary ways. “Prior to the Southern Rebellion,” Brownson wrote, “nearly every American asserted . . . ‘the sacred right of insurrection’ or revolution, and sympathized with insurrectionists, rebels and revolutionists . . . . [T]reason was regarded as a virtue, and traitors were honored, feasted and eulogized as patriots.”

Possessed of such antiauthoritarian ideals, pro-slavery southern democrats, anti-slavery northerners and many other post-Revolutionary Americans had effectively conflated the distinction between governor and governed. After the Revolution, Brownson wrote, Americans therefore could not quite bring themselves to recognize a “state” or “civil authority” as such.

The “fearful struggle of the nation against a rebellion which threatened its very existence,” however, seemed to Brownson to have put an end to these legally subversive impulses in American life. Americans had now finally recognized that for government to exist at all, there must be “a power, force or will that governs distinct from that which is governed.” Authority had to be established and accepted so that governments could do their job. For “to make the controller and the controlled the same, is precisely to deny all control.” America’s post-war mission, Brownson concluded, would lay less in promoting “liberty” that in finally realizing “the true ideal of the state.”

490. GEORGE FREDRICKSON, THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF UNION 187 (1965); see also LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA x (2001) (“The Civil War discredited the beliefs and assumptions of the era that preceded it . . . . [It] swept away the slave civilization of the South, but it swept away almost the whole intellectual culture of the North along with it.”).

491. BROWNSON, supra note 292, at 47 (emphasis added).

492. *Id.* at 47-48.

493. *Id.* at 20, 353-54.

494. *Id.* at 48, 20.

495. *Id.* at 20, 54.
Perhaps even Brownson, who passed away in 1876, would have looked with amazement at the breathtaking transformations in ideology, politics, and legal attitudes that took place in the postbellum decades. The rhetoric of anti-aristocracy mysteriously disappeared in American political life after the Civil War. Social Darwinism permitted corporations, their lawyers, the courts, and many others to contort the pre-war doctrine of individual self-reliance into a "weapon against reform." For post-war reformers the whole idea of law as it related to individuals took on a radically different meaning in this new environment. To counteract a paternalistic judiciary, overreaching railroad corporations, and corrupt political machines, Gilded Age reformers wanted more law, not less. Contrast, for example, the Jacksonian P.W. Grayson to the late nineteenth-century social reformer Henry Demarest Lloyd: Where Grayson had held that law alienated the individual from his true moral self and ipso facto precluded true self-rule, Lloyd felt certain that law, and only law, made the individual real. "We can become individual," Lloyd wrote, "only by submitting to be bound to others. We extend our freedom only by finding new laws to obey. Life outside the law is slavery on as many sides as there are disregarded laws."

The decades after the Civil War marked the true "golden age" for American law and lawyers. Law schools and bar associations sprang up in abundance. Forging a lasting and lucrative alliance with corporate America, the legal profession consolidated its monopoly and grew in power. Langdell's Harvard established the supremacy of common law and formalism over common sense and custom. A discerning eye might detect traces of the earlier reform tradition in what historians have called "Classical Legal Thought." Constitutional classicists believed that a natural order governed by principles of moral justice and individual responsibility existed prior to government and did everything in their power to protect this pre-legal order from legislative law's coercive

496. Thomas, supra note 471, at 680.
497. HENRY DEMAREST LLOYD, WEALTH AGAINST COMMONWEALTH 527 (New York, Harper & Brothers 1902) (1894).
encroachments. But if classicists employed ideas with intellectual roots in the post-Revolutionary reform tradition, their exertions now had the effect of erecting an enormous jurisprudential bulwark around the legal status quo. Formalistic to their core, classicists feared disorder, exerted judicial power in highly coercive ways, and believed in a strict rule of law separable from and superior to the popular will. In due course, the anti-formalist and sociological revolts would make their appearances and begin dismantling the massive intellectual architecture in which the classicists had labored. But here we risk running afield. Suffice it to say that after Appomattox the American legal mind often enough confronted the question of what law is, and later what courts do, but never again whether either—or both—should be.


503. See HORWITZ, supra note 501, at 33-192; G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 99-135 (1978); MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1957); WIECEK, supra note 70, at 175-244.