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Building a Government of Laws: Adams and Jefferson 1776-1779

by

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for

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Legal Doctrines of the Rule of Law and of the Legal State

1. Introduction

In the United States the rule of law is practically a civil religion. The rule of law is guarantor of Americans' liberties. It protects them from government running amok. Today the American rule of law is under siege. The challenge does not come, however, from a Hitler on the right or a Stalin on the left who would overthrow it.[2] No. The challenge to the rule of law in America comes from the keepers of the faith, i.e., from its evangelists, apostles, reformers, and just plain disciples. Americans spread the gospel abroad and question whether they keep it at home.[3] Libertarians think the United States needs better rules rather than fewer rules.[4] Reformers see that the American rule of law undermines individual responsibility.[5] Disciples see that American rules lead to bad decisions rather than

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[2] This is not to belittle, however, that developments in terrorism and technology in this century, threaten to undermine the rule of law.

[3] *See Promoting the Rule of Law Abroad* (Carnegie Endowment for International Peace, 2006), especially Frank Upham, "Mythmaking in the Rule-of-Law Orthodoxy," *in id*. at 75-104.

[4] Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (2011).

[5] Philip K. Howard, *Rule of Nobody: Saving America from dead laws and senseless bureaucracy* [in press].

to good ones.[6] Even pious parishioners in the pews perceive that, however well they believe that it protects individual liberty against tyrannical heads of state, the American rule of law comes up short in protecting and governing day-to-day.[7] It needs, scholars say, "rethinking."[8]

Doubters of the American rule of law religion discern what true believers do not: the rule of law is not just about liberty. It is also about governing. That thought was in Americans' minds at the beginning of the last century when they sang the second verse of the then recently written and still today popular national hymn, *America the Beautiful*: "America, America, God mend thy every flaw. Confirm thy soul in self-control, Thy liberty in law." Today, liberty in law has lost its ring.[9]

Doubters of the American rule of law religion observe what true believers overlook: an effective rule of law is a law of statutory rules. Judge-made precedents are secondary. That was in the minds of American lawyers already 125 years ago when the American Bar Association resolved: "The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute."[10] Then, even the truest of true believers in judge-made law, James C. Carter, the preeminent nineteenth century opponent of codification, limited his claims for the benefits of common law lawmaking to private law, i.e., claims of rights among individuals, and excluded "our *public* law, our *statutory* law, which relates to the Constitution, organization and administration of the state."[11] Today, however, American lawyers ignore that truth when they celebrate a contemporary common law of judicial lawmaking and ignore statutes of legislatures.[12]

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[6] Frederick Schauer, *Thinking Like a Lawyer: A New Introduction of Legal Reasoning* (2009). *See* James R. Maxeiner, "Thinking Like a Lawyer Abroad: Putting Justice into Legal Reasoning," 11 *Washington U. Global Studies L. Rev*. (2012) at 55.

[7] Ronald A. Cass, *The Rule of Law in America* (2001) at 150-151.

[8] *See, e.g*., Robin L. West, "Chapter 2: Rethinking the Rule of Law," *in* Robin L. West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights and the Rule of Law* (2003), at 13. *See also* "Symposium: Is the Rule of Law Waning in America?," 56 *DePaul L. Rev*. 223-694 (2007) (eighteen essays by twenty-one authors).

[9] *See* Michael Kammen, *The Spheres of Liberty: Changing Perceptions of Liberty in American Culture* (2001).

[10] *Report of the Ninth Annual Meeting of the American Bar Association* (1886) at 72-74.

[11] James C. Carter, *Argument of James C. Carter in Opposition to the Bill to Establish a Civil Code, Before the Senate Judiciary Committee, Albany, March 23, 1887* at 26 [emphasis in original].

[12] *See, e.g*., American Bar Association, *Common Law, Common Values, Common Rights, Essays on Our Common Heritage by Distinguished British and American Authors* (2000) at viii.

Doubters of the American rule of law see two problems which are, in reality, two sides of the same coin. On the one side of the coin, they see rules of law that are excessively detailed and deny human judgment in their application. Rules and not people end up making decisions in matters that lawmakers never anticipated. The American rule of law today is, says law reformer Philip K. Howard, a "rule of nobody." The language of dead legislators governs because they did not trust judges to carry out less detailed instructions. On the other side of the coin, doubters see judges that assert supremacy over the texts of statutes. Justice Antonin Scalia describes the ills that arise when "judges fashion law rather than fairly derive it from governing texts;" instead of following rules, judges "do what they want."[13] Common law lawmaking undercuts democracy.[14] On the one side of the coin, the law is too certain. On the other side, it is too indeterminate.[15]

The coin debased by common law lawmaking cannot buy good government. Good government depends on statutes to go by itself. Only then can the governed and the governors alike apply laws, to themselves and to others using their common sense without being perplexed by unfathomable rules or being frustrated by unending procedure. Professor Richard A. Epstein, a libertarian, prescribes the cure: "make sure that the tasks that are given to the government are both limited and well-defined, and … let the people who are in charge have the degree of flexibility needed to carry out their task."[16]

Americans can structure a government that works, but it requires courage. To limit and to define the tasks given to government, while allowing flexibility in carrying those tasks out, are matters of legislating. American skills with legislation are lacking. American skills in writing statutes are deficient. American skills in interpreting statutes are lacking. American skills in applying statutes are poor. Americans know that. The world knows that.[17] Still, the task is manageа-

[13] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 4 and 9.
[14] Id. at 3.
[15] *See* West, *supra* note 8, at 13, 26-31; James R. Maxeiner, "Legal Indeterminacy Made in America: American Legal Methods and the Rule of Law," 41 *Valparaiso U.L. Rev.* 517 (2006) at 517; "Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?," 15 *Tulane J. Int'l & Comp. L.* (2007) at 541.
[16] Epstein, *supra* note 4, at 6-7. *See* Howard, *supra* note 5 (speaking of "corrals"); James R. Maxeiner, *Policy and Methods in German and American Antitrust Law: A Comparative Study* (1986) at (speaking of "negative binding").
[17] Organisation for Economic Cooperation and Development, *Regulatory Reform in the United States* (1999) at 48 ("At the heart of the most severe regulatory problems is the

ble.[18] What doubters seek for America is reality abroad. It is a part of a legal state. Others can govern according to law: what is to stop the United States from developing good laws?

The rule of law religion and the contemporary common law are the show stoppers. They so dominate American thinking about law and legal methods that they leave no ground for better methods to take root.

2. Contemporary Common Law

According to American rule of law religion, the United States is a "common law" country where judicial precedents are the law and where statutes—even today—are occasional interlopers.[19] The American rule of law religion reflects the late nineteenth century rule of law popularized by the English jurist Albert Venn Dicey: common law, common law courts and no discretion in law application.[20] "The common law in the Anglo-American world is synonymous for most people with the rule of law."[21]

In the contemporary common law judges are supreme in lawmaking. Where there is no law or the law is found only in precedents, they have authority to make binding law, *i.e*., common law precedents binding in future cases (*stare decisis*). Where there are statues, they have authority to decide whether those laws are consistent with the U.S. Constitution (constitutional or judicial review, sometimes known as judicial supremacy). Moreover, where there are statutes—

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quality of primary legislation. … More so than in other OECD countries, the United States has found it extremely difficult to improve legislative quality and coherence.").

[18] So said iconic contracts scholar Samuel Williston already in 1914. *See* Samuel Williston. "The Uniform Partnership Act with some other remarks on other Uniform Commercial Laws, An Address before the Law Association of Philadelphia December 18, 1914" (1915) at 2 *reprinted in* 63 *U. Pa. L. Rev*. 196 (1915) at 197.

[19] *See* Jane C. Ginsburg, *Introduction to Law and Legal Reasoning, Revised Edition* (2004) at 71. For views skeptical of common law carryover see, *e.g*., Calvin Woodard, "Is the United States a Common Law Country?" in *Essays on English Law and the American Experience* (Elisabeth A. Cawthon and David E. Narrett, eds., 1994) at 120; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969) at 291-305; For views skeptical of the utility of the common law, see, *e.g*., Frederick Schauer, "The Failure of the Common Law," 36 *Ariz. St. L. J*. 765 (2004); Frederick Schauer, "Do Cases Make Bad Law?", 73 *U. Chi. L. Rev*. 883 (2006); Gordon Tullock, *The Case Against the Common Law* (1997).

[20] Chapter 4 "Rule of Law," in Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1885).

[21] John V. Orth, "Common Law and United States Legal Tradition," in *The Oxford Companion to American Law* (Kermit L. Hall, ed., 2002) 127, 129.

which today, is just about everywhere—judges assert that they have authority to determine the meaning of statutes not only for the cases they are presently deciding, but for future cases (statutory precedent or statutory *stare decisis*).[22]

Contemporary common law thus extends judicial supremacy over the constitutional validity of statutes to judicial supremacy over the meaning and application of statutes. It makes judicial precedents the starting points for legal reasoning rather than statutory texts. It demonetizes legislation. It encourages legislators to leave to judges the last word in making law: judges will take it anyway.[23] It compromises governing by law.

Contemporary common law concentrates on litigation. In litigation judges are authorized—indeed, they are required—to decide rights between two competing parties before the court. Only in their own world of judicial supremacy, however, do judges in such cases have legal authority or legislative legitimacy to decide, not just the cases before them, but what will be law in future cases decided according to the statutes they apply.[24]

Applying contemporary common law in statutory cases makes a mockery of the idea that law is a set of democratically established rules, applied to the facts of cases, by those subject to law and by those who govern.[25] Contemporary common law in its concentration on litigation dovetails well with the concentration of the American rule of law religion on guaranteeing individual rights to the practical exclusion of good governing. The contemporary common law was a bad

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[22] *See* Scalia & Garner, *supra* note 13, at 5; Peter L. Strauss, "The Common Law and Statutes, 70 *U. Colo. L. Rev.* 225, 243 (1998)

[23] *See* John V. Orth, "The Persistence of the Common Law," *in* John V. Orth, *How Many Judges does it take to make a Supreme Court? And Other Essays on Law and the Constitution* (2006) at 73, 83 ("a statute is characteristically approached through prior cases that applied it"); at 85 ("Where the common law persisted, not only did it lull the legislature into inactivity, it also dulled its mind when it did act. … [A] laxity made tolerable by the possibility of judicial remediation."). *See also* Scalia, J., dissenting in Sykes v. United States, 564 U.S. 1 (2011) ("Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty."

[24] *See, e.g.*, 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure*, (1866) at 704-706 (chap. LIX, §§ 1030-1032); William G. Hammond, "Notes to Laws of England, No. 30," *in* 1 William Blackstone, *Commentaries on the Laws of England* (William G. Hammond, ed., 1890) at 213-226; American Bar Association, *Report of the Committee on Legal Education Presented at the Annual Meeting in Boston, August 26, 1891* (1891) at 44. *See also* Orth, "Can the Common Law Be Unconstitutional?" in Orth, *supra* note 23, at 53, 61-62.

[25] *See* Scalia & Garner, *supra* note 13, at 3-5, 83, 509, 517.

choice of American law when judges adopted it gradually in the course of the nineteenth century. That it did not work well was amply proven by American government in the twentieth century. That it should not be the future of American law in the twenty-first century is the challenge that the doubters make.

Faced with the evidence of failure of the contemporary common law, true believers find solace in saying that that is the price we pay for a government under law. No other way can work. Our American ways must be the best—at least for us Americans (American exceptionalism). Received wisdom clings to a view of history that holds that this is the way Americans have always done law. So the late Justice Brennan introduced American law to neophytes with the conventional view of American legal history:

> In the early years of the republic 'American' law was, in fact, largely English common law. It was transplanted by a group of former colonial subjects who had begun their revolution in order to secure their 'rights as Englishmen.' In the nineteenth century, legal innovation occurred mostly at the state level, as common law courts adapted old doctrines to the circumstances of a new and growing nation. In [the twentieth] century, the momentum of reform began to shift to the federal government [and to] … a coming supremacy of federal law [and] federal legislation.[26]

Received wisdom is myth. Its view of history is false.[27] What the American colonists brought with them and what they sought presents no monolithic picture: early America was a land of "many legalities."[28] The picture of common law in colonial America was complex. The colonies varied from colony-to-colony in what they adopted. None adopted common law wholesale; each adapted it to local conditions. They chose among common law rules (e.g., land tenures, crimes and punishments, forms of action) and common law institutions (e.g., courts, jury). The rudimentary nature of courts and law practice, as well as limitations on law reporting—there were no printed American law reports and English reports

[26] William J. Brennan, Jr., "Introduction" in New York University School of Law, *Fundamentals of American Law* 1, 3 (1996).

[27] It may be historically inaccurate, but it still has such a hold on the American legal mind that even a judge and scholar who suggests that, relegates that truth to a footnote. Guido Calebresi, *A Common Law for the Age of Statutes* (1980) at 185 n. 10 ("I would hasten to add here that I am not really concerned with the historical accuracy of this tradition, of this 'received wisdom.'").

[28] *See, e.g.*, *The Many Legalities of Early America* (Christopher L. Tomlins & Bruce H. Mann, eds., 2001); William E. Nelson, *The Common Law in Colonial America, Vol. I, The Chesapeake and New England 1607-1660* (2008), *Vol. II, The Middle Colonies and the Carolinas, 1660-1730* (2012).

were hard to come by—made adoption of eighteenth century common law methods (known as "declaring law") difficult. Of course, they could not have adopted contemporary common law methods (known as lawmaking), for those methods were yet to be developed.[29] Before the Revolution there were no published American precedents, but there many written laws.

Received wisdom ignores centuries of Americans searching for liberty and common good in written law.

In the seventeenth century, even before the Pilgrims went ashore on the American Continent, aboard the Mayflower anchored in Massachusetts Bay, they agreed in the *Mayflower Compact* to

> Combine ourselves together into a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.

Soon colonists in Massachusetts adopted written laws. The preamble of the *Lawes and Libertyes of Masschusetts* of 1647 colorfully explains why: "a Common-wealth without lawes is like a Ship without rigging and steeradge."[30] They knew that written laws—and not precedents—are how societies run and guide themselves. Their leaders provided a book of laws to "satisfie your longing expectation, and frequent complaints for want of such a volume to be published in print: wherin (upon every occasion) you might readily see the rule which you ought to walke by."

In the eighteenth century, founders of the American republic, such as John Adams and Thomas Jefferson, sought a "government of laws and not of men." Their nineteenth successors, Justice Joseph Story, President Abraham Lincoln and codifier David Dudley Field, looked to written law to govern. Americans legislated. Constitutional conventions created and amended state constitutions: in the first one hundred and ten years, to 1887, according to one count, one hundred four state constitutions and two hundred and fourteen partial amend-

[29] *See* Eugene Wambaugh, *The Study of Cases* (2nd ed., 1894) at 75-80. *See also* note 24 *supra* (giving other authorities rejecting theory of common law lawmaking and accepting declaring law theory).

[30] *The Lawes and Libertyes of Massachusetts* (1847). *See* Edmund S. Morgan, *The Puritan Dilemma: The Story of John Winthrop* (3rd ed., 2007) 156-160.

ments.[31] Every state legislature codified, revised or compiled its statutes. Civic leaders celebrated America's heritage of written laws at annual Fourth of July convocations. Civics text books taught of democratically adopted statutes. An "orgy of statute making" is nothing new: that is how modern democratic governments govern.[32]

In 1876, the *North American Review*, then under the editorship of Henry Adams and possibly the nation's most important intellectual magazine, published in its commemoration of the centennial of the American republic: "The *great* fact in the progress of American jurisprudence which deserves special notice and reflection is its tendency towards *organic statute law* and towards the *systematizing of law*; in other words, towards *written constitutions* and *codification*."[33] A competing commemorative volume sponsored by *Harpers Monthly Magazine*, observed that "The art of administering government according to the directions of a written constitution may fairly be named among the products of American thought and effort during our century."[34] That of which rule of law doubters today dream was thought the American exceptionalism of the day:

> Our idea is that … all the powers of government, all the authority which society can rightly exercise towards individuals, are originally vested in the masses of the people; that the people meet together (by their delegates) to organize a government, and freely decide what officers they will have to act for them in making and administering laws, and what the powers of these officers shall be. These written directions of the people, declaring what their officers may do and what they may not, form the constitution. The idea, in its practical development, is American.[35]

With written constitutions go written laws. The *Harper's* commemoration continued: "The readiness of American Legislatures to codify or systematize the laws is a noticeable feature. … There does not appear to be any state, with per-

[31] Henry Hitchcock, *American State Constitutions: A Study of their Growth* (1887) at 13-14.
[32] *Contrast*, Guido Calebresi, *A Common Law for an Age of Statutes* (1980), at 1.
[33] George Tucker Bispham, "Law in America, 1776-1876," in *North American Review*, vol. 122 (January 1876) 154, at 174 [emphasis in original].
[34] Benjamin Vaughn Abbott, "American Jurisprudence," in *The First Century of the Republic: A Review of American Progress* (Harper & Brothers Publishers, 1876), at 434, 437.
[35] Id. at 438.

haps the exception of Pennsylvania and Tennessee, which does not possess a codification or revision of the laws made since the commencement of 1860."[36]

Even as most Americans were looking to legislative rules, from the ranks of judges and legal practitioners came another vision: judge-made law and judicial supremacy. According to legal historian Kermit Hall, "the single most significant feature in nineteenth-century American legal culture was the steady rise of judicial authority."[37] In the last quarter of the nineteenth century the newly emerging legal professions combined to assert contemporary common law and judicial supremacy. Already in 1870 Oliver Wendell Holmes, Jr. claimed that "It is the merit of the common law that it decides the case first and determines the principle afterwards."[38] Come 1915 Samuel Williston, iconic contracts scholar of the day, reported the triumph of contemporary common law lawmaking over statute lawmaking: "Codification has an ugly sound to most American lawyers. We have been trained to believe that no code can be expressed with sufficient exactness, or can be sufficiently elastic to fulfill adequately the functions of our common law."[39] On the eve of the nation's sesquicentennial in 1926 the consen-

[36] *Id*. at 451.

[37] Kermit L. Hall, "History of American Law: Antebellum through Reconstruction, 1801-1877," in *Oxford Companion to American Law* (Kermit Hall, ed., 2002) 374, at 381. Those with foreign experiences did not, however, judge American efforts at statutory lawmaking to be unique or effective. They saw the coming of judicial supremacy. *See, e.g*., "German Legislation," 10 *Am. L. Rev*. (1875) 270, at 280-281 ("The results which have made a favorable impression [in Germany], are due to what may be called an extension of statutory in proportion to judicial legislation. But no one in America who looks to improvement in the law looks in this direction. That permanent interest in the well-being of society which is the foundation of law and good government is less and less represented in our legislative bodies. They have fallen under the control of private and local interests and questions of the moment. Like their spirit, their methods and traditions become less adapted to produce valuable results, and statutes are accordingly more careless and short-lived. So great is this deterioration, and the consequent loss of public respect and influence, that the question has been raised as to the ultimate end of these bodies, which seems almost approaching. … The authority which has slipped from their hands has passed into those of the courts.") Generally on legislative or judicial supremacy, see the works of Charles Groves Haines, *inter alia*, *The American Doctrine of Judicial Supremacy* (2d ed. 1932); "Legislative, Judicial or Executive Supremacy," Chapter XV, in Charles Grove Haines & Bertha Moser Haines, *Principles and Problems of Government* (3rd ed.. 1934).

[38] Oliver Wendell Holmes, "Codes and the Arrangement of the Law," 5 *Am. L. Rev*. 1 (1870). *See* Frederick Schauer, "Do Cases Make Bad Law?," 73 *U. Chi. L. Rev*. 883 (2006) at 885.

[39] Samuel Williston. *The Uniform Partnership Act with some other remarks on other Uniform Commercial Laws, An Address before the Law Association of Philadelphia December 18, 1914* (1915) at 1-2, reprinted in 63 *U. Pa. L. Rev*. 196 (1915). The new legal

sus of the American Bar Association's meeting in London was that to adopt a code was an un-American attempt "to supplant the parent Common Law" and "to forsake our English heritage and follow the lead of Imperial Rome."[40] In just fifty years between the nation's centennial in 1876 and its sesquicentennial in 1926 lawyers, judges and law teachers took over the legal system to run it as their own.[41]

By the time the bicentennial celebration rolled around in 1976, the ABA commemorative volumes did not even note the triumph of common law over written law; they simply assumed it.[42] At the turn of this century in 2000 the ABA commemorative volume in its "Principles" section at book's outset claimed that "The common law provides the tools and flexibility to allow the law to continue to serve the needs of a diverse society in a world of rapid change and tech-

"science" of Langdell had no room for statutes, where judicial decisions were the exclusive subject of scientific study.

[40] J. Carroll Hayes, "The Visit to England of the American Bar Association," in *The American Bar Association London Meeting 1924: Impressions of Its Social, Official, Professional and Juridical Aspects as Related by Participants in Contest for Most Enlightening Review of Trip* (1925) 9, at 15.

[41] The shift is evident in the institutional history of the American Bar Association. The ABA was founded in in the spirit of statutes. Article I of its Constitution provided that one of the Association's three objects was to promote "the uniformity of legislation throughout the Union." American Bar Association, *Call for a Conference, Proceedings of Conference, First Meeting of the Association; Officers, Members, etc*. (1878) at 16 (as proposed), at 30 (as adopted). Article III required that the President open each annual meeting with an address on the "most noteworthy changes in statute law … during the preceding year." Id. at 18, 32. On the second day of the first meeting, the first elected president, in the second sentence of his first address, expounded on the "noble" purpose of the Association "to codify and harmonize" the law." Id. at 32. The ABA was, however, a creature of its time. Its devotion to statutes flagged and its fascination with judicial supremacy jumped. In 1913 the Association amended its Constitution to drop the requirement that the President open the annual meeting with an address on the most noteworthy statutes. In 1919 it adopted a new constitution that modified its object to seek not only "uniformity of legislation" but also "judicial decision throughout the nation."

[42] *See* Harry W. Jones, "The Common Law in the United States: English Themes and American Variations," *in Political Separation and Legal Community* 91 (American Bar Association, Common Faith and Common Law, Papers Prepared for the Bicentennial Observance, Harry W. Jones, ed., 1976); *Legal Institutions Today: English and American Approaches Compared* unnumbered vii-viii (American Bar Association, Common Faith and Common Law, Papers Prepared for the Bicentennial Observance, Harry W. Jones, ed. 1977).

nological development."[43] Common law and rule of law are held to be practically one and the same.[44]

Americans need to start over. They need a legal state that works. The failures of the American legal system and the successes of foreign systems are not reasonably deniable.[45] The contemporary common law of judicial supremacy over statutes is not an essential part of American law or of American liberty. Judicial supremacy is not a part of American legal DNA. Legislative supremacy has a better claim. It was present in the legislative work of John Adams and Thomas Jefferson.[46]

3. Adams and Jefferson as Legislators

> "They formed a system of government, and a code of laws, such as the wisdom of man had never before devised."
>
> Sheldon Smith
> Eulogy Pronounced at Buffalo New York July 22nd, 1826[47]

The American Declaration of Independence of July 4, 1776 for many people around the world presents the premier principles of protection of individual

[43] *Common Law, Common Values, Common Rights, Essays on Our Common Heritage by Distinguished British and American Authors* at viii (American Bar Association, 2000).
[44] Id.
[45] *See, e.g.*, "German Legislation," *supra* note 35, at 283 ("Americans abroad are apt to fall into one of two classes**;** either to be irritated, in the presence of an older civilization, into a spread-eagle state of mind, or else to fall down and worship it. The writer will be acquitted of belonging to the former, and no declaration of independence will save him if he is thought to have dealt in too rosy colors. Political institutions [in Germany] are offensive, but he admits a feeling of satisfaction in seeing or thinking he sees the law, which is every man's attendant through life, walking by his side in modern dress, and speaking a language which everyone understands."). *See also* James R. Maxeiner with Gyooho Lee and Armin Weber, *Failures of American Civil Justice in International Perspective* (2011).
[46] *See* A. London Fell, *Origins of Legislative Sovereignty and the Legislative State, Volume Six: American Tradition and Innovation with Contemporary Import and Foreground, Book I: Foundations (to Early 19th Century)* (2004).
[47] Sheldon Smith, "Eulogy Pronounced at Buffalo New York July, 22nd, 1826," *in A Selection of Eulogies, Pronounced in the Several States, in Honor of those Illustrious Patriots and Statesmen, John Adams and Thomas Jefferson* (1826) at 91, 94.

rights.[48] And in the protection of individual rights, Americans see the essence of the rule of law.[49]

More than any other two people, John Adams and Thomas Jefferson brought the Declaration of Independence in being. They acted to make the republican ideals of the Declaration reality in law. For Adams it was a frame of government; for Jefferson it was the nuts and bolts of government itself. In fall 1779 Adams drafted the *Constitution and Form of Government of the Commonwealth of Massachusetts*, which is still law today. There he coined the phrase of a "government of laws, not of men" that into the twentieth century described what Americans today call the rule of law. From fall 1776 through spring 1779 Jefferson wrote the laws for a republican government for Virginia. He provided legislation for reformation of the law of the nation's most populous state. James Madison described Jefferson's reformation as "a mine of legislative wealth, and a model of statutory composition."[50]

In the world of Adams and Jefferson, law is about legislation and government is about governing. Written laws decide principles beforehand and authorize governors and governed alike to decide according to those principles. Democratically selected legislatures are supreme and not judges. States have governments of laws and not of men.

True believers in the contemporary common law cannot accept that the founders' world revolved around written law and not around common law, around legislators and not around judges, and around governing and not around resolving disputes. So one writes:

> The leaders of the American Revolution, such as John Adams and Thomas Jefferson talked grandly about breaking with the European past and starting "a new order of the world." But when the Constitutional Convention met in a steamy summer in Phila-

[48] *See, e.g.*, Ricardo Gosalbo-Bono, "The Significance of the Rule of Law and its Implications for the European Union and the United States," 72 *U. Pitt. L. Rev*. (2010) at 229, 231, 240 and 272 (citation omitted) ("the law of the United States incorporates the most radical principles of individualism and liberty ever known to man.")

[49] American Bar Association Section on International and Comparative Law, *The Rule of Law in the United States: A Statement by the Committee to Cooperate with the International Commission of Jurists* (1958) at 10 (the rule of law is "the body of precepts of fundamental individual rights permeating institutions of government … by which such precepts may be applied to make those rights effective.").

[50] James Madison to Samuel Harrison Smith, November 4, 1826, *in The Writings of James Madison, Volume 1819-1836* (Gaillard Hunt, 1910) at 256, 257-258.

> delphia in 1787, it was with the assumption that English common law would continue unchanged in the United States.[51]

Today scholars look beyond such false received wisdom. They tell us that that the state constitutions of the time, together with the Declaration of Independence "most authentically document the irreversible American commitment to Republicanism in 1776."[52] They perceive in Jefferson's legislation "a rare and comprehensive view of how a founder envisioned an actual republican society."[53]

4. Adams' Constitution: The Frame of Government for the Commonwealth of Massachusetts

> You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. … When before the present epoch, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?
>
> John Adams, *Thoughts on Government* (1776)

John Adams wrote the oldest constitution that is still in force today: the 1780 *Constitution and Form of Government for the Commonwealth of Massachusetts*.[54] In it Adams combined "A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts," as Part the First, and "The Frame of Government," as Part the Second. He placed the idea of "*a government of laws and not of men*" literally between the two Parts.

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[51] Norman F. Cantor, *Imagining the Law: Common Law and the Foundations of the American Legal System* (1997) at 354. *Cf.* William D. Bader, "Mediations on the Original: James Madison, Framer with Common Law Intentions—Ramifications in the Contemporary Supreme Court," 20 *Vt. L. Rev*. 5 (1995).

[52] *See, e.g*., Willi Paul Adams, "The Liberal and Democratic Republicanism of the First American State Constitutions," *in Republicanism and Liberalism in America and the German States,1750-1850* (2002) at 127.

[53] Ralph Lerner, *The Thinking Revolutionary: Principle and Practice in the New Republic* (1987) at 62.

[54] With justification Adams boasted: "I made a constitution for Massachusetts, which finally made the Constitution of the United States." As quoted in Robert F. Williams, *The Law of American State Constitutions* (2009) at 36.

Chronicle. That Adams had the opportunity to draft the Massachusetts Constitution is a remarkable story in itself. An earlier attempt at a constitution for the state had failed; Massachusetts was the last state to follow the April 1776 call of the Continental Congress to write a state constitution. But Adams left the United States in 1778 for ten years in Europe. In that decade, he was home for just three months. Yet it was in those three months that Adams was elected to the be a delegate to the Massachusetts Constitutional Convention, the Convention assembled, appointed Adams to the Committee to write the State Constitution, and Adams, in September and October 1779, wrote it. Before the Convention could approve his draft, he was gone for Europe.

In writing the Constitution Adams relied on his 1776 pamphlet *Thoughts on Government: Applicable to the Present State of the American Colonies*.[55] That pamphlet brought him acclaim, contributed to his role in the Declaration of Independence and made him someone for others to consult in drafting their state constitutions. It was there that he wrote that "the very definition of a republic 'is an empire of laws, and not of men'" and that "a republic is the best of governments." He took the term from James Harrington's *Oceana*. For Massachusetts Adams wrote of a *government* and not an *empire* of laws.

Adams wrote *Thoughts on Government* to give to other Americans on how they might create constitutions and institutions for governing the new states coming into being in 1776. He began by rejecting Pope's famous aphorism "The forms of government let fools contest: That which is best administered is best." Adams said no: "Pope flattered tyrants too much …. Nothing could be more fallacious than this." The form of government does make a difference, he asserted. "Nothing is more certain, from the history of nations and the nature of men, that some forms of government are better fitted for being well-administered than others." And so, Adams asked: "As good government is an empire of laws, how shall your laws be made?" Three years later he gave his answer in his draft of the Massachusetts Constitution.[56]

Adams' Constitution and Frame of Government. It is anachronistic to describe a document of 1780 in terms that were not to achieve currency for another

[55] It, together with *The Report of a Constitution, or Form of Government, for the Commonwealth of Massachsetts* (1779), are conveniently reprinted in *The Revolutionary Writings of John Adams, Selected and with a Foreword by C. Bradley Thompson* (2000) at 287-293 and at 297-322 respectively.

[56] Except as noted, references here are to the final language of the adopted 1780 constitution and not to that of Adams' 1779 draft. Differences between the two with respect to specific sections cited are believed minor unless discussed.

century. Yet Adam's Constitution anticipates the balanced approach of a legal state which accommodates individual rights and governing together more than it foreshadows the individual rights-focused American rule of law. It looks more like a legal state founded on statute law and a principle of legality than it does like a rule of law content with judge-made law and inherent authority. It anticipates laws that are integrated and stable that people can follow more than an ever-changing mix of judicial precedents. It is for the legislature to state the laws, for the executive to carry them out, and for the judiciary to accept the reasoned judgments of both.

The preamble of Adams' constitution begins stating that government balances common good and individual rights: "The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life."

The preamble's second paragraph states the means to accomplish this end: "certain laws for the common good." So it is "a duty of the people … *to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them."* It is through these written laws, "that everyman may at all times, find his security in them." The preamble concludes "We, therefore, the people of Massachusetts, … do agree upon, ordain and establish the following declaration of rights and frame of government as the constitution of the commonwealth of Massachusetts."

Adams' "government of laws and not of men" is part of the statement of the principle of a separation of powers among legislative, executive and judicial branches of government. It occupies a mediating place between individual rights and common good. In the Constitution it literally stands between two parts, Part the First, Declaration of Rights, and Part the Second, Frame of Government. Adams, in his draft placed it at the beginning of Part the Second, Frame of Government. The Constitutional Convention moved it to the end of Part the First. Where Adams in his draft only provided that "the legislative, executive and judicial power shall be placed in separate departments," the Convention in the final version, besides moving the provision from one part to the other, declared that each of the branches "shall never exercise" powers of the other.

Written law. Adams' Constitution provides a frame for statute law and governing. Chapter I, Section I, Article IV of Part the Second, the Frame of Gov-

ernment, gives the legislature authority "to make, ordain, and establish all manner of wholesome and reasonable orders**,** laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof." Article XXII of Part the First, the Declaration of Rights, calls on the legislature frequently to assemble "for address[ing] of grievances, for correcting, strengthening, and confirming the laws, and for making new laws**,** as the common good may require."

Adams' Constitution does not contemplate contemporary judge-made law or judicial supremacy. Article X of Part the First, the Declaration of Rights provides: "In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent." Article XX adds: "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."

Adams' Constitution commands "standing laws" to protect the people from rapid changes in law. Article X of Part the First, the Declaration of Rights provides: "Every individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws." Later Adams explained that a constant changing of the laws though judicial decision or through legislation denies the people the benefit of law.[57]

Adams' constitution anticipates laws that are coordinated one with another.[58] Article 6 of Part the Second, the Frame of Government, avoids a gap in law by providing that "All the laws which have heretofore been adopted, used, and approved in the province, colony, or State of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature, such parts only excepted as are repugnant to

[57] 1 John Adams, *A Defence of the Constitutions of Government of the United States of America* ... (3rd ed 1797) at 141 ("Instead of being permanent, and affording constant protection to the lives, liberties, and properties of the citizens, will be alternately the sport of contending factions, and the mere vibrations of a pendulum. From the beginning to the end it will be a government of men, now of one set, and then of another*;* but never a government of laws.")

[58] On the idea generally, see Karl Riesenhuber, "English common law versus German *Systemdenken*? Internal versus external approaches," 7 *Utrecht L. Rev*., (January 2001) at Issue 1, available at www.utrechtlawreview.org.

the rights and liberties contained in this constitution." To assure consistency Chapter III, Article II gives executive and legislative branches "authority to require the opinions of the justices of the supreme judicial court upon important questions of law, and upon solemn occasions." Article XXIX of Part the First, the Declaration of Rights calls for "an impartial interpretation of the laws, and administration of justice."

Law for governing. Adams' constitution looks for a government that will govern according to law. It does not limit the executive branch to acting only in response to explicit statutory direction. For example, Chapter II Section I Article IV of Part the Second, the Frame of Government, provides that "The governor shall have authority, from time to time, at his discretion, to assemble and call together the councillors of this commonwealth for the time being; and the governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, agreeably to the constitution and the laws of the land." Later Adams explained: "The executive power is properly the government; the laws are a dead letter until an administration begins to carry them into execution."[59]

Adams' Constitution comes close to anticipating a requirement of statutory authority for government action, i.e., a principle of legality. Article XVIII of Part the First, the Declaration of Rights, provides that the people "have a right to require of their lawgivers and magistrates an exact and constant observation of them [i.e. fundamental principles of the constitution], in the formation and execution of the laws necessary for the good administration of the commonwealth." It allows for exceptions to rights, such as search warrant may issue, and soldiers may be quartered in homes, but only "with the formalities, prescribed by the laws" or "in a manner ordained by the legislature."[60] Government officers are to swear to carry out their duties "agreeably to the rules and regulations of the constitution and the laws of the commonwealth."[61]

Adams' Constitution sets out a frame of a government of laws and not of men, i.e., a legal state. But what would an American legal state look like? Jefferson's legislation suggests one such state.

[59] John Adams, *A Defence of the Constitutions of Government of the United States of America* ..., vol. 1 (3rd ed 1797), at 372.
[60] Declaration of Rights, Arts. XIV and XXVII, respectively.
[61] Frame of Government, Chap. VI.

5. Jefferson's Legislation: A Government of Laws for the Commonwealth of Virginia

> When I left Congress in 76, it was in the persuasion that our whole code must be reviewed, adapted to our republican form of government, and, now that we had no negatives of Councils, Governors & Kings to restrain us from doing right, that it should be corrected in all its parts, with a single eye to reason, & the good of those for whose government it was framed.
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> Thomas Jefferson, *Autobiography*[62]

Jefferson's lawmaking from 1776 to 1779 is unparalleled in American history. No American legislator before or since has accomplished so much of such importance in such a short period of time. In three weeks in June 1776 he drafted the Declaration of Independence. In three years following he drafted the laws for a republican government."[63] In the words of a contemporary biographer Jefferson created "a model for other states" and "invented the United States of America."[64] His vision was of a government of laws, not of judges.

Chronicle. When Jefferson drafted the Declaration of Independence in June 1776, on his mind he had as much building a government of laws as declaring rights and independence.[65] Upon arrival in Philadelphia in May for congress, he wrote a friend back home that the government to be established was "the whole object of the present controversy." If that government were no good, independence would be pointless. It would be just as well to accept "the bad one offered to us from beyond the water without the risk & expence of contest."[66] In

[62] *The Autobiography of Thomas Jefferson, 1743-1790, Together with a Summary of the Chief Events in Jefferson's Life* (Edited by Paul Leicester Ford, 1914; New Introduction by Michael Zuckerman, 2005) at 67.
[63] Lerner, *supra* note 53, at 61 writes of "Jefferson's grand design to make the promise of the Declaration a reality."
[64] Willard Sterne Randall, *Thomas Jefferson: A Life* (1993), at 306.
[65] The Declaration itself demonstrates the importance that Jefferson placed on legislation. All of the first named grounds for independence are charges of bad government and not of violations of individual rights. The very first (of many) reads: "he has refused his assent to laws the most wholesome and necessary for the public good."
[66] Jefferson to Thomas Nelson, May 16, 1776, in 1 *The Papers of Thomas Jefferson (Vol. 1, 1760 to 1776)* (Julian P. Boyd, ed., 1950), at 292.

distant Philadelphia he worked as hard on a constitution for Virginia as on a declaration of a United States. To his life-long frustration, his draft arrived too late.[67]

In July and August 1776 as Jefferson remained in Philadelphia he was in correspondence with Edmund Pendleton, who would soon be first speaker of the new Virginia House of Delegates. In one letter Pendleton urged Jefferson to return home as Jefferson was needed "much in the Revision of our Laws and forming a new body."[68] In another Pendleton asked Jefferson to elaborate on his plans for changes in land tenures, elections, suffrage and penal law. Did Jefferson really intend, Pendleton asked, "to relax all Punishments and rely on virtue and the Public good as Sufficient to promote Obedience to the laws."[69]

No work was of greater urgency for Jefferson than his legislation. He expected the war to be short. He did not stay in Philadelphia a moment longer than he had to. He rushed home to Virginia. A republican state needed republican laws. "It can never be too often repeated," he later wrote," that the time for fixing every essential right on a legal basis is when our rulers are honest, and ourselves united. From the conclusion of this war we shall be going down hill."[70]

No work had more substance for Jefferson than building a government of laws. He wrote in his autobiography, "I knew that our legislation under the regal government had many vicious points which urgently required reformation, and I thought I could be of more use in forwarding that work. I therefore retired from my seat in Congress on the 2d. day of Sep., resigned it, and took my place in the legislature of my state.'"[71] When a messenger reached him in Virginia with a Congressional commission to join Benjamin Franklin on the critical mission to France, Jefferson took three days to think it over—keeping the messenger waiting—and finally declined the appointment.

From October 1776, when Jefferson joined the state legislature, until June 1779, when he became governor, Jefferson did little else than work on legislation. His work took two forms: (1) drafting bills on particular subjects, e.g.,

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[67] *See* Merrill D. Peterson, "The Virginia Constitution," in Merrill D. Peterson, *Thomas Jefferson & the New Nation: A Biography* (1970) at 100-107.
[68] 1 *The Papers of Thomas Jefferson (1760 to 1776)*, *supra* note 66, at 471, 472.
[69] Pendleton to Jefferson, Aug. 10, 1776, 1 *The Papers of Thomas Jefferson (1760 to 1776)*, *supra* note 66, at 488, 490. *See also* Pendleton to Jefferson, August 3, 1776, id. at 484. Jefferson responded to the letter of the 3rd, which was limited to land issues, on August 13. Id. at 491-494.
[70] Thomas Jefferson, *Notes on the State of Virginia* (London, 1787) at 269.
[71] *Autobiography*, *supra* note 62, at 57.

civil justice, property law, the established church, importation of slaves, and naturalization; and (2) systematic review and reform of Virginia law.[72] The latter is known as the "Revisal." The Revisal was literally two bundles of 126 bills that the Virginia House Committee on Revision under Jefferson's leadership prepared from October 1776 to June 1779.[73]

Jefferson on joining the legislature lost no time in getting to work on building a government of laws. On Monday, October 7, 1776 he took his seat. Within the week, he had three major pieces of legislation underway. On Friday, October 11, he obtained leave to bring in a bill to establish courts of justice. For that work alone he has been recognized "as the preeminent architect of Virginia's judiciary."[74] On Saturday the 12th, he obtained leave to bring in two bills: a "Bill to Enable Tenants in Fee Tail to Convey Their Lands in Fee Simple"[75] and a "Bill for the Revision of the Laws."[76] On Monday, the 14th, he introduced both bills. The former, was the first of his "great reform bills, which he hoped would destroy the foundations of an aristocracy of wealth." It was the less important of the two![77] The legislature adopted it on Saturday, November 1, without substantial change. Already on the Wednesday, the 23rd, it had approved the Bill for the Revision of the laws. Americans speak of a president's first hundred days in office. Jefferson, in office only as state legislator, in a scant twenty-six days, overturned the common law of land tenures, began creation of a new set of courts, and authorized a total overhaul of Virginia law.

November 3, 1776 the Assembly appointed the Committee of five to reform Virginia law. By giving the younger Jefferson the most votes, it made him de facto chair. Of the four other members, it was Jefferson's former law teacher, George Wythe, who contributed most to the revision.[78] The Act creating the Committee gave it "full power and authority to revise, alter, amend, repeal or introduce all or any of the said laws, to form the same into bills, and report them

[72] 2 *The Papers of Thomas Jefferson (Volume 2, 1777 to 18 June 1779, Including the Revisal of the Laws, 1776-1786*) (Julian P. Boyd, ed., 1950), at 306.
[73] Id. at 306-307.
[74] 1 *The Papers of Thomas Jefferson (1760 to 1776), supra* note 66, at 605.
[75] Id. at 560.
[76] Id. at 562.
[77] Id. at 561.
[78] The other members were Edmund Pendleton (Speaker of the House), George Mason (drafter of the state constitution), and Thomas Ludwell Lee. Soon the committee lost Mason (to resignation) and Lee (to death). Although Pendleton remained to join the final report, Jefferson and Wythe did most of the work originally assigned to him.

to the next meeting of the General Assembly." The charge to the committee—written by Jefferson—was expansive:

> Whereas the later change which hath of necessity been introduced into the form of government in this country, it is become also necessary to make corresponding changes in the laws heretofore in force, many of which are inapplicable to the powers of government as now organized, others are founded on principles heterogeneous to the republican spirit, others which, long before such change, had been oppressive to the people, could yet never be repealed while the regal power continued, and others, having taken their origin while our ancestors remained in Britain, are not so well adapted to our present circumstances of time and place, and it is also necessary to introduce certain other laws, which, though proved by the experience of other states to be friendly to liberty and the rights of mankind, we have not heretofore been permitted to adopt …."[79]

The Committee presented its report June 18, 1779. Owing to the war and the British invasion of Virginia, the Assembly did not take up the report until years later. In 1784 it ordered the report printed. By then Jefferson was away for a five year mission in Europe.

In Jefferson's absence it was James Madison who brought Jefferson's legislation to the Assembly and took over sponsorship from 1785 to 1787. Madison's central role in presenting Jefferson's anti-common law revision to the Virginia Assembly just months before the 1787 convocation of the U.S. Constitutional Convention contradicts the claim that the Convention convened with the assumption that English common law would continue unchanged in the United States.[80]

October 31, 1785 Madison introduced 118 of the report's 126 bills. In that session the legislature adopted thirty-five bills and put the remainder over to the October 1786 session. In the October 1786 session Madison secured the adoption of another twenty-three. At the end of that session, on January 2, 1787,

[79] *Report of the Committee of Advisors Appointed by the General Assembly of Virginia in MDCCLXXVI* (1784) at 3 (available at books.google.com).
[80] *See* text at note 51 *supra*.

the Assembly with Madison's support referred the balance of Jefferson's proposal for updating to a new committee of revisors and for future action.[81]

Jefferson's government of laws. Jefferson has rightly been called Jefferson the legislator, Jefferson the lawmaker and Jefferson the law giver. Just as Jefferson's contemporaries Catherine the Great, Frederick the Great and Napoleon are remembered for their legislation, so too should Jefferson be remembered for his. His work was no less impressive nor was it less extensive. And, except for Catherine's Proposal for a New Code, he got there first. Moreover, he did the work himself! Yet Jefferson's legislation is unknown among American lawyers. Law schools pay it no mind.[82]

Laymen debate whether the Revisal was "a complete codification" or a "compilation of laws in force."[83] It was more than the latter and closer to the former. The former no man or two men alone could have accomplished in the three years Jefferson and Wythe had.

The enormity of the work that Jefferson and Wythe undertook is hard to appreciate even for lawyers. Lawyers work with one case at a time. In counseling they advise how they see the law in one or a handful of fact situations. In litigating they argue for one view that they see as benefiting their client. Judges focus on one set of facts and the laws that might apply to it. Law teachers in America assume the role of lawyers. Good lawmakers, on the other hand, must make provision for not one case, but for all possible cases, even though they well know that they cannot anticipate all cases. Good lawmakers must capture in a few understandable words what they want people to do. Good lawmakers must make their laws consistent internally and with other laws. John Austin saw that this "the technical part of legislation, is incomparably more difficult than what may be styled the ethical.[84]

In legislating Jefferson was building a government of laws. He was the architect designing a new republic. His designs would demolish old law that was

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[81] 2 *The Papers of Thomas Jefferson (Volume 2, 1777 to 18 June 177), supra* note 72, at 322-323.

[82] The nations' secondary schools may do a better job. *See, e.g.*, "Jefferson The Legislator (1776-1779)", in *Thomas Jefferson and His World* (American Heritage Junior Library, Narrative by Henry Moscow in consultation with Dumas Malone, 1960), at 48-53.

[83] *See* 2 *The Papers of Thomas Jefferson (Volume 2, 1777 to 18 June 1779), supra* note 72, at 315.

[84] John Austin, *Codification and Law Reform*, in 2 John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* 1092, 1099 (5th ed., Robert Campbell, ed., 1885).

inapplicable, oppressive, contrary to republican sensibilities, or simply not well-adapted to present time and circumstances as the Act creating the committee contemplated. Jefferson intended his designs to rationalize existing laws and institutions and to create new ones. They would create government, guide governors in how to govern and instruct those governed in what was expected of them. He was ripping out common law that he found feudal, offensive or just plain foolish.

Jefferson's Revisal suggests no thought to using contemporary common law methods of lawmaking to bring about the republic of his visions. To the contrary, the Revisal was legislation. Jefferson could hardly have proceeded in any other way. Only statutes can root out old laws, refashion rationally remaining institutions, create wholly new institutions, and provide direction in how to govern. Jefferson sought to use legislation to do all four.[85] In a democratic republic Jefferson could not decree judicially a new society and new laws. He had to get the assent of the democratically-elected legislature.

The substance of Jefferson's legislation.[86] Historians focus—as did Jefferson himself—on the substance of his legislative work. His biographers take from twenty-five to fifty pages to describe it. The bills of the Revisal alone were printed in ninety oversized folio pages in tiny type (over three hundred pages in a standard type face in a large octavo book). Other legislation he wrote or spon-

[85] Common law aficionados point out that Jefferson rejected fellow committee member-Pendleton's proposal to revise all of Virginia's common law, but chose to make only what one describes as a "few 'necessary alterations'" in it. Orth, "The Persistence of the Common Law," *supra* note 21, at 73, 84. The one hundred and twenty six bills of the Revisal, not to mention the rest of Jefferson's legislation, made more than a "few" necessary alterations. In retaining only common law that was "anterior to the date of the earliest statutes extant" (i.e., the twelfth century), Jefferson was not leaving great deal untouched. It seems likely, in view of the mountain of work that Jefferson and Wythe—with little help from Pendleton—undertook, that Jefferson acted, as he later said, for practical reasons. Moreover, Pendleton had in mind making Blackstone the basis of such a code, a choice Jefferson probably would not have agreed with. In any case, had the revisors taken on all of the substantive common law that still does not suggest that they would have endorsed common law lawmaking. *See, e.g*. Jefferson to Judge John Tyler, June 17, 1812 (improvements in the common law made by the courts of equity "should be transferred by statute to the courts of common law").

[86] The following paragraphs do not generally cite to individual bills from the Revisal. They are found in the Committee's Report, cited above at note 79, and in Boyd's analysis of the Revisal, found in 2 *The Papers of Thomas Jefferson (Volume 2, 1777 to 18 June 1779), supra* note 72.

sored was of comparable extent. He was, as the editor of his papers said, "a veritable legislative drafting bureau."[87]

Jefferson worked to build a new society. He designed legislation that struck at the very roots of the common law: the land law, inheritance and criminal law. According to one biographer, Jefferson intended to "completely overthrow the English legal system that had chained Virginia for 170 years."[88] Jefferson abolished primogeniture and completely changed rules of descent. He proposed a new penal law "to proportion crimes and punishments in cases [previously] capital." It failed of passage by a single vote. Jefferson drafted legislation that would end forever the idea that the common law made Christian doctrine a part of law. His legislation disestablished the Anglican Church in Virginia. His bill establishing religious liberty is the best-known of all his legislation.

Jefferson sought to organize and rationalize common law institutions. His legislation restated and reorganized court institutions and procedures both civil and criminal to make, writes one historian, a "mantel of procedural safeguards for all."[89]

Jefferson's legislation reorganize government in all its branches. It provided for a state militia and navy, a board of war, a board of trade and a board of auditors. It districted the legislature and provided for elections and appointments. It created a public land office to administer claims to the western lands.

Jefferson did not know how to treat slavery. He wanted to end it, but did not know how politically he could. Today his legislative proposals look modestly progressive at best and frighteningly racist at worst: gradual emancipation followed by mandatory emigration.[90] His other legislation addressed all manner of personal status, including slaves, indentured servants, mulattoes, citizens, and aliens.

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[87] 2 *The Papers of Thomas Jefferson (Volume 2, 1777 to 18 June 1779), supra* note 72, at 306.
[88] Randall, *supra* note 64, at 285.
[89] Lerner, *supra* note 53, at 64.
[90] *Compare* Lerner, *supra* note 53, at 88 (sympathetic, "society is invited to raise its hopes, even while mired in a system of chattel slavery that promise to swamp or befoul every brave plan") *with* John T. Noonan, Jr., "Chapter 2 "Virginian Liberators" in John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (1976) at 29-64 (critical). *See also* Dumas Malone, "Chapter XIX. Architect of Laws: Slavery and Crime," *in Jefferson the Virginian* (Jefferson and His Time, vol. 1, 1948), at 261-273; Randall, *supra* note 53, at 300-303.

Jefferson restated and rationalized a nascent regulatory state. His legislation addressed matters as diverse as infection and breeding of animals, licensing and regulating taverns, regulating mill-dams, public store-houses, commodities fraud, unwholesome meat and drink, public health vaccination and quarantine, usury, gaming and what we would call unfair competition.

Jefferson worked at building what we might call a social state. His legislation provided for maintaining and building public roads, establishing ferries, a state postal service, support of the poor, registration of vital statistics, and legal aid in civil court proceedings.

Of all of his proposals for new legislation, Jefferson was most proud of his bills for "the more general diffusion of knowledge." Jefferson wanted to establish universal public schooling. His bill for public education was an American model for a generation. He sought to establish a public research library, to reorganize the College of William and Mary and to establish the University of Virginia.

Jefferson's dealing with statutes. Jefferson knew how to deal with statutes. Some of his best practices included:

- *Professional drafting.* In Jefferson's day legislatures acting as a body generally drafted legislation within a single term of few months. The Act that Jefferson wrote took the Revisal out of the normal legislative cycle and gave the work to experts. The Act explained why: "a work of such magnitude, labor and difficulty, may not be effected during the short and busy terms of a session of Assembly."
- *Justifications for bills*. In Jefferson's day legislation usually began simply, "be it enacted," without explanation why. Jefferson, however, for his most important laws, prefaced them with elegant explanations, sometimes called proems, of the basis for the proposed legislation.[91]
- *Publication of the proposed legislation for public comment*. Generally the Virginia legislature decided for itself the merits of proposed legislation. In a day of difficult communication and transportation and expensive printing, hardly any other course was conceivable. But in the case of the Revisal, the legislature directed printing of the revisal. It allowed for a comment period of nine months. The Act authorizing printing explained why: "for the purpose of affording to the

[91] *See* Lerner, *supra* note 53, at 90.

> citizens at large, an opportunity of examining and considering a work which proposes such various and material changes in our legal code."[92]

- *Clarity of statutory language*. Jefferson was aware of the need and the difficulty of expressing legal rules in language that expresses what is intended, while keeping all laws consistent with each other. The very idea of a comprehensive revisal in written law shows that. Jefferson sought to strike a balance between the old and the new in his drafting. He wrote co-draftsman Wythe: Wythe, "In its style I have aimed at accuracy, brevity and simplicity, preserving however the very words of the established law, wherever their meaning has been sanctioned by judicial decisions or rendered technical by usage."[93]
- *Understandable*. High quality legislation requires written law that can be followed. His biographers—laymen—praise his language in the penal bills as "a model of plain, elegant writing"[94] and "comprehensible to laymen."[95]

Jefferson's legal state. Jefferson's bills respecting education—although not adopted in his day in Virginia—show Jefferson's aspirations for laws that would strike the right balance of defining the tasks of government and yet allowing the governors sufficient flexibility to govern well.

Government gives direction. Jefferson's proposals give in detail how schools shall be established. They set out not only what shall be done, but who shall do it. "Electors" have their duties, "aldermen theirs," and "overseers" theirs. The latter are to appoint, and remove teachers, and to examine scholars. Summarizing Lerner observes:

> Visitors of the grammar schools are charged with hiring and firing the master and steward of the school, setting tuition, and examining the school, its staff, and its students. Both the overseers of the hundred and the visitors of the grammar schools are charged with seeing to it that any general instructional plan rec-

[92] As quoted in 2 *The Papers of Thomas Jefferson (Volume 2, 1777 to 18 June 1779)*, *supra* note 72, at 310.
[93] Jefferson to Wythe, Nov 1, 1778, 2 *The Papers of Thomas Jefferson (Volume 2, 1777 to 18 June 1779)*, *supra* note 72, at 229, 230.
[94] Randall, *supra* note 64, at 298.
[95] Mallone, *supra* note 90, at 271.

> ommended by the visitors of William and Mary College shall be observed. Teachers are accountable for their performance; just as they are for their fidelity to the commonwealth; overseers are accountable for their recommendations and appointments; scholars are accountable for making the best of whatever genius they have. In short, the entire scheme for establishing and maintaining an educational system constitutes in itself an education in responsible self-governance. In lavishing these details upon the bill, Jefferson also gave his fullest explanation by example of what he meant by self-government. … [A] free people must be qualified 'as judges of the actions and designs of men.' Jefferson's bill encompasses that intention at every level."[96]

The ultimate judge of legislation is whether it works. Since much of what Jefferson wrote was not adopted and since much that was adopted addressed soon-to-be-obsolete matters, it is difficult to characterize how well his bills would have worked. But some can be measured. One commentator singled out Jefferson's Statute of Descents of October 1775 a century later. That law "demolished" "every shred of the pre-existing (English) law of descents" and established new law based on contradictory principles. Nonetheless, the admirer wrote: "So precise, so comprehensive and exhaustive, so simple and clear, were the terms in which they were expressed, that in the experience of a completed century *but one single doubt as to the construction and effect of any part of it has arisen.*"[97]

6. Conclusion

Ten years ago Professor Charles Abernathy told a German audience of lawyers and judges, that although they and their American counterparts might see the roots of the American legal system in English common law and a common law process of simultaneously making and applying law, "with respect to constitutional law—America's greatest legal contribution to modern respect for the rule of law, the roots of the U.S. legal system are firmly planted in Europe, not England."[98] I have suggested here that much the same might be said of American lawmaking generally.

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[96] Lerner, *supra* note 53, at 80-81.

[97] R.G.H. Kean, "Thomas Jefferson as a Legislator," 11 *Virginia L.J.* (1887)`705, 720 (emphasis in original).

[98] Charles Abernathy, "The Lost European Aspirations of US Constitutional Law," *in 24. Februar 1803: Die Erfindung der Verfassungsgerichtsbarkeit und ihre Folgen* (Werner

In this contribution, I have not been concerned with where the ideas of Adams and Jefferson came from, but where they might lead. Their government of laws and not of men partakes more of a democratic legal state than it does of the Dicey-like rule of law of the contemporary common law. Their state is a state based on statutes adopted by democratic legislatures using procedures intended to produce laws that promote the common good. Their statutes are well-crafted and consistent within themselves and with other laws to the end that no one should be forced to break one law in order to follow another. Their laws guide the people—the governed and governors alike—toward making good decisions based on personal responsibility. Their directions are understandable and not obtuse. They can be faithfully interpreted. They do not presume to decide all issues of their application beforehand. They are a path to good government and to liberty in law.

Kremp, ed., Atlantische Texte, vol. 19, 2003) at 37l. The occasion was the 100th anniversary of the Supreme Court's decision in *Marbury v. Madison*. For classical roman law ideas in the U.S. constitution, see David J. Bederman, *The Classical Foundations of the American Constitution: Prevailing Wisdom* (2008); M.N.S. Sellers, *American Republicanism: Roman Ideology in the United States Constitution* (1994).