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A Government of Laws not of Precedents 1776-1876: The Google Challenge to Common Law Myth

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A GOVERNMENT OF LAWS NOT OF PRECEDENTS 1776-1876: THE GOOGLE CHALLENGE TO COMMON LAW MYTH[G]

James R. Maxeiner[**]

ABSTRACT

The United States, it is said, is a common law country. The genius of American common law, according to American jurists, is its flexibility in adapting to change and in developing new causes of action. Courts make law even as they apply it. This permits them better to do justice and effectuate public policy in individual cases, say American jurists.

Not all Americans are convinced of the virtues of this American common law method. Many in the public protest, we want judges that apply and do not make law. American jurists discount these protests as criticisms of naïve laymen. They see calls for legal certainty through statutes as unwise and unattainable. But not all American jurists agree.

Some American jurists believe that times have changed. The golden era of common law is past, they say. It passed in the early 20th century. Today Americans live in an "age of statutes"; courts apply statutory texts and not common law precedents. Some American jurists conclude that the United States needs a new common law for an age of statutes. Others believe that the United States should have a textual approach that deals with statutes.

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[*] Common law myth in this article refers only to the United States and not to England or elsewhere. "Google" is a teaser for digitization generally. See II.C. *infra*.

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Apology: Although in this article I call attention to legal history, I do not intend it to be a work of legal history. In working on a book tentatively titled *Failures of American Lawmaking in International Perspective*, I realized that even if I show that present American statutory methods do not work well and that foreign statutory methods do, some readers will respond by saying: so what? America is exceptional: America has always eschewed statutes and preferred judge-made law. The point of this article is to disestablish common law myth rather than to establish any particular competing history. It is an invitation to others to do legal history. Others have preceded me with works of legal history that make the same challenge.

Moreover, where here I consider statutes before precedents, Jacques Vanderlinden has disestablished the myth from another perspective: early American "common law" was a law of principles not precedents. American treatises in the mid-19th century "perfectly fit (but for the replacement of principles by articles of a code) any French treatise of the same period." *Is the Pre-20th Century American Legal System a Common Law System? An Exercise in Legal Taxonomy*, 4 J. CIVIL L. STUDIES 1, 16 (2011).

The near religious reverence that Americans have for their legal institutions inhibits reform. What most Americans do not know, however, is that the United States has always lived with statutes. Contemporary American common law methods, and not statutes, are the intruder of the 20th century. Statutes and statutory methods are the normal way that modern states govern their people and conduct their legal systems. For the first century of the Republic Americans expected to adopt modern methods.

Until only a few years ago, the literature of earlier American ages of statutes was lost to view. The digitization of American legal history by Google and others now makes that history available to all. It suggests a record that challenges the myth that contemporary common law methods have always dominated American legal history.

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I. INTRODUCTION

In 1876, as part of the national celebration of the Centennial of the independence of the United States of America, Americans commemorated a century of American law. They celebrated progress wrought through statutes, i.e., through written laws. In other words, they commemorated a government of laws. They saw what one would call today American exceptionalism in "written constitutions and codification." They feted freedom from the "atrocities" of common law. They looked forward to a world where legislation would improve society and bring law home to all Americans.

How strange that sounds to contemporary ears! Statutes—American progress? Common law—American atrocity? No. It cannot be. All true American lawyers know that common law is their legal system's genius. It is America's heritage—it is America's destiny. Contemporary American common law judges ingeniously make law as they decide cases. That's how law

progresses. Only naïve laypersons believe that law is a system of rules in a rulebook, or so advocates of contemporary common law profess.

Guess what? The Centennial Writers were right. One now can read the long-overlooked proof. Google and other digitizers provide it. For more than a century Americans sought to create a system of written laws organized in *rule books*, i.e., to establish a government of laws and put law on a firm foundation *for the people*. Only a decade ago, American lawyers, judges and law professors might have dismissed the Centennial Writers' commendation of statutes and their corresponding condemnation of common law as delusional. No longer. In the last ten years, 19th century American law has been digitized. Where before, it lay unread in musty pamphlets and crumbling sheepskin bindings hidden away in dusty stacks in the darkened lower reaches of a few research libraries, today it is on everyone's desktop. Where before, even if one could borrow the rare books, for want of indexing, one would not know which books to borrow or which pages to read. Today, however, word searches take one directly to veins of gold in hundreds of publications which before one had to sift through laboriously to find a few nuggets.

So why does it matter? If the Centennial Writers were right, professors of contemporary American common law are wrong. Giving precedents' primacy in legal reasoning and lauding judges making law as they apply it—is NOT part of America's legal makeup. If professors of contemporary common law are to persist in their praise of contemporary common law methods, then they ought not be allowed to rely on sentiment, but they ought to be required to show efficacy and justice. This article challenges the contemporary common law myth that the first century of the Republic was an age when common law dominated to the near exclusion of statutes in providing rules by which Americans lived. It questions conventional wisdom that judges through their decisions were principally responsible for adjusting the country's law to the tremendous changes that took place in the course of those hundred years.

Contemporary common law myth accounts for contemporary American fixation on the Supreme Court of the United States, on judicial process and on appellate opinions as the source of law. It accounts for American lawyers' indifference to state and federal legislatures, to their processes of making laws and to whether people can comply with conflicting commands. It accounts for why in the American legal system legal reasoning starts from cases instead of from statutory texts, which renders statutes of little use to the public. In short, contemporary common law myth denies the United States of America a modern government of laws and has left it with a primitive rule of lawyers.

Digitization challenges contemporary Americans to consider:

- Did Americans in the first century of the Republic look for ***a government of written laws***? Might they have seen statutes as the natural and expected building blocks of their nation?
- Did Americans in the first century of the Republic look for a ***law of rules***, where in abiding by the law people fit facts into an existing system of laws and did not expect judges to create new law?

- Did Americans in the first century of the Republic expect that ***rules would be systematized*** by legislatures, in codes, so that people could apply laws to themselves without judicial intervention?

That these issues were much discussed in the first century of the Republic is sufficient to disestablish contemporary common law myth that statutes and their systematization are somehow un-American. If in the 19th century Americans looked for a modern legal system, then surely they should in the 21st. They should put behind them the sentimentality of the 20th century that pined for a common law for an age of statutes[1] or sought to fit common law courts into a civil court system.[2] Americans should look for a civil system for an age of statutes, i.e., a government of laws.[3]

The balance of this article consists of six further parts:

Part II, *Celebrating Law in America 1776-1876*, describes the legal commemoration of the Centennial of American Independence and the assertions there made by writers that I term the "Centennial Writers." It sets out the gist of contemporary common law myth. It shows how digitization—the Google of this article's title—challenges Americans to compare the myths of today with the facts underlying the themes of the Centennial Writers.

Part III, *Founding a Government of Laws*, reports *legislative work* of the Founders. It discusses the enigmatic role of English law in American legal history. It shows how digitization undoes contemporary common law myth that the Founders were looking for a common law state and gave statutes little thought.

Part IV, *Building a Government of Laws*, shows the myriad ways in which Americans in the first century of the Republic looked to written law to facilitate governing, including constitutions, constitutional conventions, statutes, civics, and self-governance. It shows how digitization challenges Americans today to question the contemporary common law myth of dominance of precedents over statutes supposedly superseded only later in a 20th century "age of statutes."

Part V, *Progress in American Jurisprudence: Systematizing,* demonstrates that in the first century of the Republic Americans sought and taught systematizing, *i.e.*, compiling statutes, revising law and codifying it. Digitization challenges the contemporary common law myth that systematizing was exceptional and was not, as it has been elsewhere in the world, a normal incident of building a modern government of laws.

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[1] *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

[2] *See* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[3] *See* James R. Maxeiner, *Scalia & Garner's* Reading Law*: A Civil Law for the Age of Statutes?,* 6 J. CIVIL L. STUDIES 1 (2013).

Part VI, *Epilogue*, identifies the demise of systematizing and the rise of American legal institutions that created and today perpetuate contemporary common law myth that true Americans don't deal with statutes.

Part VII, *Conclusion*.

II. CELEBRATING PROGRESS IN LAW IN AMERICA 1776-1876

1876: *The Torch of Liberty* at the Philadelphia Centennial Exhibition[4]

In 1876, a century after Americans met in Philadelphia to declare independence, they returned to celebrate the anniversary with "a competitive display of industrial resources, constructions, fabric, and works of use and beauty, distributed through a hundred departments of classified variety."[5] Americans invited the world to participate. France sent the Torch of Liberty that a decade later would adorn the Statue of Liberty in New York Harbor that today greets the world.

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[4] FRANK LESLIE'S HISTORICAL REGISTER OF THE UNITED STATES CENTENNIAL EXPOSITION, 1876 at 239 (1877).

[5] *History and the Centennial*, 8 POPULAR SCIENCE MONTHLY 630 (March 1876).

A. THE CENTENNIAL OF WRITTEN LAW

For the legal profession, participation in the Centennial Exposition of 1876 was problematic. What would be their "works of use and beauty?" Long-serving federal judge and later chancellor of the State University of Iowa Law School, James H. Love, wryly related to the Iowa bar:

> If we could exhibit at the Centennial, the burning of a witch or a heretic, at the stake; or the putting of a prisoner to the question on the rack; or the disemboweling of a traitor while yet alive; … the progress and amelioration of the law would be made manifest to all men. If we had any means of making a visible exhibition of what the common law, which forms the basis of our jurisprudence was even a century ago, in contrast with what it is to-day, we might venture to challenge a comparison of progress with any calling, art or profession which is displaying the evidences of its progress at the great exposition.[6]

Love presented an indictment of common law consisting of about a dozen "atrocities." He added, "if time allowed, I could give a thousand illustrations and proofs to maintain it as a 'true bill.'"

Although the legal profession provided no exhibit at the Centennial Exposition, it did contribute to commemorative volumes published by two of the nation's leading journals, *The North American Review* and *Harper's New Monthly Magazine*.[7] Each volume reported on American progress in the century just past. *The North American Review*, then under the editorship of Henry Adams, was the premier intellectual journal of the day.[8] Adams' review, presented a special issue that included an essay on "Law in America, 1776-1876."[9] Harper's *New Monthly Magazine,* was a part of one of the most successful publishing enterprises of the day, Harper & Brothers. It offered a series of articles which Harper's then combined in a centennial volume, *The First Century of the Republic: A Review of American Progress*. The Centennial volume included a new essay on "American Jurisprudence."[10]

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[6] James H. Love, *Address of the Hon. J. M. Love, Delivered at the Third Annual Meeting of the Iowa State Bar Association, in* PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE IOWA STATE BAR ASSOCIATION HELD AT DES MOINES, MAY 11 AND 12, 1876, 7, at 17, *reprinted in* 10 WESTERN JURIST 399, 409 (1876).

[7] For information on the publications, see John B. Mason, *The North American Review*, 289-300, *in* AMERICAN LITERARY MAGAZINES: THE EIGHTEEN AND NINETEENTH CENTURIES (Edward E. Chielens, ed., 1986); and Barbara M. Perkins, *Harper's Monthly Magazine, in id*. at 166-71. Harper's also published *Harper's Weekly: A Journal of Civilization*. Today, it is the second oldest continuously published journal in America.

[8] *See North American Review*, N.Y. TIMES, April 18, 1876, at 2.

[9] G.T. Bispham, *Law in America, 1776-1876*, 122 N. AM. REV. 154 (1876) [hereinafter *Law in America, 1776-1876*, 122 N. AM. REV.]. The author George Tucker Bispham, was later dean of the University of Pennsylvania Law School. He was author of a leading textbook on equity.

[10] THE FIRST CENTURY OF THE REPUBLIC: A REVIEW OF AMERICAN PROGRESS (Harper and Brothers, 1876) [hereinafter, THE FIRST CENTURY OF THE REPUBLIC]. The editors had planned, published and advertised the series from the start "as a valuable addition to the

The editors recorded their goals for their commemorations: Henry Adams of the *North American Review* wrote to one potential contributor of his hope that the law article would influence public opinion and that "the ultimate aim of the article should be to settle the question whether on the whole the movement of American Law has been such as ought to satisfy our wishes and reasonable expectations, or has fallen short of them, and whether we are justified in feeling confidence in its future healthy progress."[11]

Harper's, in *The First Century of the Republic's* foreword ("Publishers' Advertisement"), stated goals that, if anything, were more ambitious for its *Review of American Progress*. The volume was "an indispensable supplement" to the Philadelphia exposition's display of "the material symbols of progress." It connected with the "formative idea" in the subjects of inquiry to show "the beginnings of great enterprises, tracing them through consecutive stages their development, and associating with them the individual thought and labor by which they have been brought to perfection." The papers, when first published, were recognized, not as magazine articles "of merely temporary importance," but as "a valuable contribution to the permanent history" of the United States. Taken together they suggested a comparison of progress in the United States with that of other countries "such as to awaken a feeling of just pride in every American citizen."[12]

1. Celebrating Modern Statutes Displacing English Law

The two volumes are similar. Both displayed a century of American progress in many fields. Their two essays on law are likewise similar. Both measured progress in law in terms of displacing feudal English law with modern American statutes. Both included in their selections of English law that Americans had cut out, the heart of the ancient English common law: property law, criminal law, and procedure.[13] In property law, for example, both essays celebrated that Americans had reversed English common law rules that gave husbands control of their wives' lands, personal property, services, contracts and crimes. Both cited statutes as the source of the change. *The North American Review* contrasted American "fondness" for "positive legislation" with English "indisposition to statutory reform" to explain why

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history of our country." *Id*. at 8-9. The law essay was written by Benjamin Vaughn Abbott, who was a member of the 1870s commission that revised federal laws. He edited dozens of volumes of case reports and digests.

[11] Letter of August 28, 1875 from Henry Adams to Thomas M. Cooley, Benton Historical Library, Cooley Collection, Box 1, Folder August to September. Judge Cooley, one of the century's most renowned jurists, apparently declined the invitation. Did Adams then ask his friend, Oliver Wendell Holmes, Jr. to write the entry? We don't know. Holmes's biographer Marke DeWolf Howe wrote at length of the two men's friendship at that time, read all the primary sources that he could find, but made no mention of such an offer. MARKE DEWOLF HOWE, OLIVER WENDELL HOLMES; VOL. 2. THE PROVING YEARS 1870-1882, at 142-48 (1963).

[12] THE FIRST CENTURY OF THE REPUBLIC at 437.

[13] They both consider a variety of topics. Among those that both consider are imprisonment for debt and expansion of admiralty jurisdiction to navigable inland waters.

American law of women's property had been "many steps in advance of the English system."[14]

In criminal law neither essay dwelt on the cruelties that Judge Love derided. They accented the positive.[15] *The North American Review* rejoiced: "the seeds of reform in criminal law, sown at an early date, have borne most luxuriant harvests." It noted "in criminal jurisprudence the American mind has always been far in advance of the English."[16] Harper's *The First Century of the Republic* noted how many acts once counted crimes were no longer so and how the "criminal law was severe in those days as compared with ours."[17]

Both essays judged English common law civil procedure similarly. *The North American Review* charitably critiqued: "however perfect in theory, [it is] liable to abuse or disarrangement in practice."[18] Harper's *The First Century of the Republic* was more pointed: "as actually pursued [legal proceedings] were often the means of doing injustice in the name of the law."[19] The latter noted that more than half of the states had replaced common law procedure with the David Dudley Field's reform Code of Procedure of New York. *The North American Review* was not so sure "whether the results of this simplification of procedure have been altogether desirable."[20]

2. Celebrating American Progress: "*written constitutions* and *codification*"

Such improvements were for *The North American Review* "but passing illustrations of the originality of American thought in jurisprudence." They were instances where "[t]he American mind, practical as well as liberal,

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[14] *Law in America, 1776-1876,* 122 N. AM. REV. at 155-56; THE FIRST CENTURY OF THE REPUBLIC at 448-49. *Cf.* 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN UNDER THE STATUTES OF THE SEVERAL STATES AND AT COMMON LAW AND IN EQUITY 1-4 (1875). For a statement of medieval common law and subsequent modifications of married women's property rights, see ANDREA DIANNE BESSAC MAXEINER, DOWER AND JOINTURE: A LEGAL AND STATISTICAL ANALYSIS OF THE PROPERTY RIGHTS OF MARRIED WOMEN IN LATE MEDIEVAL ENGLAND (Ph. D. thesis, The Catholic University of America, 1990). Before Americans adopted Married Women's Property Acts starting in the 1840s, they had already overturned much of common law property law. *Law of Real Property,* 1 AM. JURIST 58, 98 (1829) ("not only … a complete revolution, but a substantial improvement, has been made in this country in the law of real property").

[15] In another essay *The First Century of the Republic* catalogued the gruesome "barbarities of the past." *Humanitarian Progress,* in THE FIRST CENTURY OF THE REPUBLIC at 454, 460-61. Neither essay does more than hint at the reason given then (and now) for abolishing common law offenses: there should be no public offense "unless the legislative power of the country has positively and plainly so declared it." THOMAS W. POWELL, ANALYSIS OF AMERICAN LAW 544 (2d ed., 1878).

[16] *Law in America, 1776-1876,* 122 N. AM. REV. at 173.

[17] THE FIRST CENTURY OF THE REPUBLIC at 437.

[18] *Law in America, 1776-1876,* 122 N. AM. REV. at 185.

[19] THE FIRST CENTURY OF THE REPUBLIC, at 450-51. *See generally* DAVID DUDLEY FIELD, JR., LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD. REPRINTED FROM THE AMERICAN LAW REVIEW OF AUGUST 1891 WITH SOME CHANGES AND NOTES (1891).

[20] *Law in America, 1776-1876,* 122 N. AM. REV. at 185-86.

brought down [an idea] from the region of speculation and applied it, through the machinery of *statute law*, to the direct and practical amelioration of mankind."[21] That is what made American law exceptional. *The North American Review* elaborated: "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*."[22]Similarly Harper's *The First Century of the Republic* wrote: "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."[23]

Both essays saw American progress similarly: written constitutions of the people implemented by written codes and statutes of their legislatures. These differences from English common law, not affinity with it, are what defined American progress. Both essays distinguished American constitutions from earlier charters. *The North American Review* characterized American constitutions not as "*concession[s]* from a sovereign," but as expressions "of a free people, who are perfectly at liberty to form their own governmental institutions."[24] More fully Harper's *The First Century of the Republic* explained:

> Now a 'constitution,' as we in America understand the term, is something far deeper and more fundamental than any of the state papers of past centuries. Our idea is that there is no hereditary right, but that all the powers of government, all the authority which society can rightly exercise toward 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.[25]

Legislatively enacted statutes are the corollary to the peoples' constitutions. In accord *The North American Review* wrote: "Akin to the disposition to crystalize organic law in the form of written constitutions is the disposition to codify municipal law, which has always displayed itself in the legal history of all of the States of the Union."[26] Similarly Harper's *The First Century of the Republic* wrote: "[t]he readiness of American Legislatures to codify or revise the laws is a noticeable feature."[27]

The North American Review concluded that codification, to a greater or lesser extent must become "indispensable to any nation which draws its

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[21] *Law in America, 1776-1876,* 122 N. AM. REV. at 174 [emphasis added].
[22] *Law in America, 1776-1876,* 122 N. AM. REV. at 174 [emphasis in original].
[23] THE FIRST CENTURY OF THE REPUBLIC at 437.
[24] *Law in America, 1776-1876,* 122 N. AM. REV. at 176, 177 [emphasis in original].
[25] THE FIRST CENTURY OF THE REPUBLIC at 437.
[26] *Law in America, 1776-1876,* 122 N. AM. REV. at 176.
[27] THE FIRST CENTURY OF THE REPUBLIC at 451.

laws from varied sources … and which designs or attempts to make the progress of those laws keep pace with the growing wants of the times without developing into a mass of unmanageable contradictory rules." The practical administration of law, the essay argued, depends on its simplicity, and "this end can only be attained … by resorting to the expedient of codification."[28] *The First Century of the Republic* agreed with qualifications: "Codes are useful; but immediately relieving the lawyer of his library has not been their strong point."[29]

3. Taking the Centennial Writers Seriously

In 1876 *The North American Review*, *Harper's* and a third journal, *The Nation*, were a "national forum where positive and concrete proposals for institutional reform could be aired and debated."[30] So what did reviewers think of these two volumes?

Popular Science Monthly called the essays of the *North American Review* "able, calm and philosophic."[31] The *Journal of Jurisprudence* in Edinburgh, Scotland gave over nine of its pages to excerpt the law essay that it found "thoughtful and philosophical."[32] It closed its excerpts quoting: "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] *The North American Review's* competitor, *The Nation*, on the other hand, looking at the same remarks, thought the law contribution "not so satisfactory as the others. It contains too much philosophy of a vague sort and too little law."[34] In its review of the Harper's volume the *New York Times* was catty: "As magazine papers they served their purpose moderately well, but the wisdom of collecting them into a volume may be questioned."[35] It had no comment on the law paper. Two months later, however, the *Times* reported that Harper's had released the essays in book form because "they had been so well received."[36] Vaughan, author of the "American Jurisprudence" essay, only four years later, reported that "the paper, as published,

[28] *Law in America, 1776-1876,* 122 N. AM. REV. at 179.
[29] THE FIRST CENTURY OF THE REPUBLIC at 436.
[30] STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920, at 44 (1982). Skowronek credits these and other journals, as creating "a national intellectual community for the first time." The three others were *Atlantic Monthly, Century* (in 1876 published as *Scribner's Monthly*) and *The Forum* (in 1876 not yet published).
[31] *Retrospects of Our Past Hundred Years,* 8 POPULAR SCIENCE MONTHLY 630, at 631 (March 1876). It summarized the law essay without criticism.
[32] *Law in America 1776-1876,* 20 J. JURISPRUDENCE 293 (T. & T. Clark, Law Book-sellers, Edinburgh, 1876).
[33] *Id.* at 302.
[34] *The North American Review for January,* THE NATION, No. 555, 118, 119 (Feb. 17, 1876).
[35] *New Publications, The First Century of the Republic: A Review of American Progress. New York: Harper & Brothers, 1876,* N.Y. TIMES, Oct. 9, 1876, at 3.
[36] *Harper & Brothers,* N.Y. TIMES, Dec. 15, 1876, at 5.

gave rise to calls for others in the same vein, resulting in the preparation of numerous popular articles upon law topics, which appeared in the New-York *Times* [!] and *Tribune*, *The Christian Union* and *Congregationalist*, and other periodicals."[37]

Whether the Centennial Writers were right, particularly in their conclusions, might reasonably be questioned, but that their point of view is to be taken seriously, cannot. Henry Adams, editor of the *Review*, great-grandson of John Adams, former student of law in Berlin, friend of Oliver Wendell Holmes and then professor in Harvard College writing one of America's first books in legal history, surely would not have tolerated slipshod work. In this article I address how these two leading journals in celebration of the first century of the American republic could indict common law and laud code law. Today an untenured American law professor who espoused such heresy would be drummed out of the academy. Before explaining how the Centennial Writers could believe as they did, this article examines what I mean by contemporary common law myth and juxtapose it with the understanding of the Centennial Writers (in B.) and identify the sources that challenge it (in C.)

B. CONTEMPORARY AMERICAN COMMON LAW

> "[T]his system of making law by judicial opinion... is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law."
>
> Antonin Scalia (1997)[38]

The Centennial Writers saw a different world than that described by Justice Scalia. They saw law as a system of determinant written rules organized and adopted by democratically legitimate legislatures for impartial application in individual cases. Although this was an exceptional idea in 1776, and was still remarkable in 1876, today it is conventional legal thought nearly everywhere.[39] It is the essence of a "government of laws," or what

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[37] BENJAMIN VAUGHAN ABBOTT, JUDGE AND JURY: A POPULAR EXPLANATION OF LEADING TOPICS IN THE LAW OF THE LAND iv (1880).

[38] Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9 (1997).

[39] *Cf.*, H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977).

Americans today more commonly call a "rule of law." U.S. Supreme Court Justice Antonin Scalia aptly captures the idea when he writes of "the rule of law as a law of rules."[40]

American law schools *today*, however, do NOT teach that law is a system of rules. Instead, they teach what Justice Scalia describes: a contemporary common law that puts "synthesizing" law, i.e., finding and making new "law" ahead of applying existing rules to determine rights.[41] They have taught such law for a century. "The common law is not a body of rules," contracts law icon Arthur L. Corbin told his law professor colleagues in 1912, "it is a method. It is the creation of law by the inductive process."[42] In such a common law, the judge is the central figure. Judges' decisions are the touchstone for legal argument even when statutes are applied.[43] Rather than rules, their system and their application, law schools give process and judicial lawmaking primacy.

The genius of contemporary American common law, American law professors claim, is its flexibility in adapting to change and in developing new causes of action. Courts make law even as they apply it. Judges gain when they can wait to state the rule until the "point of decision." [44] A youthful Oliver Wendell Holmes, Jr. asserted that "It is the merit of the common

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[40] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[41] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 5 (2012).

[42] Arthur L. Corbin, *What is the Common Law?*, 3 AM. L. SCHOOL REV. 73, 75 (1912). *Cf.*, PAUL SAMUEL REINSCH, THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 8-9 (1899), *reprinted in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 370-71 (1907) ("When the courts [today] come to analyze the nature of the law actually brought over by the colonists, they find it a method of reasoning, 'a system of legal logic, rather than a code of rules;' the rule, 'live honestly, hurt nobody, and render to every man his due.' Such a very indefinite conception of the matter is without value historically; on the basis of this indefinite notion there has been claimed for the courts an almost unlimited power, under the guise of selecting the applicable principles of the common law, of fixing really new and unprecedented rules and, by their adjudications, legislating in the fullest sense of the word."). Corbin adjusted his teaching accordingly; "Learning the details of contract law, per se, is a worthy objective … but this is clearly the secondary objective." *Supra*. A century later there is a casebook that teaches Corbin's lesson. TRACEY E. GEORGE & RUSSELL KOROBKIN, K: A COMMON LAW APPROACH TO CONTRACTS xix (2012).

[43] Although agreement with all points made in this paragraph is not universal, this and the following paragraph capture the conventional wisdom that American law professors teach their students today. *See* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 103-17 (2009); ANNE M. BURR & HOWARD BROMBERG, U.S. LEGAL PRACTICE SKILLS FOR INTERNATIONAL LAW STUDENTS 6-7, 44, 79-87 (2014); BONITA K. ROBERTS & LINDA L. SCHLUETER, LEGAL RESEARCH GUIDE: PATTERNS AND PRACTICE 2-3 (5th ed. 2006); AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 2-9 (5th ed. 2012); William J. Brennan, Jr., *Introduction* in NEW YORK UNIVERSITY SCHOOL OF LAW, FUNDAMENTALS OF AMERICAN LAW 1, 3 (1996).

[44] Richard A. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMPLE INT'L & COMP. L. REV. 87 (1998). *See also* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 8 (3d ed. 1997) (textbook used by the National Institute of Trial Advocacy)("The heart of the common-law tradition is

law that it decides the case first and determines the principle afterwards."[45] A middle-aged and already iconic Massachusetts Justice Holmes told an audience of aspiring lawyers that "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[46] Holmes "prediction theory" led to "legal realism," which remains the dominant American approach to law.[47]

What could be wrong with such genius? To begin, judge-made law is law for lawyers; it is not law for people. Lawyers might be able to synthesize a rule out of a mass of precedents; the public cannot. People need to be able to apply law without seeking a judicial decision. What might be called judge-made law in other judicial systems is subsidiary to statute law; written rules provide the public with the guidance the rule of law requires. To continue, judge-made law is not democratic. No matter how judges are selected, they are not ordinarily employed to make law. To conclude, most law is made and most applications of law take place outside of courts.

American law professors concede that "most laypeople probably think of law as a system of rules; much like the traffic code writ large."[48] But this "popular conception," they write, is "highly misleading." Such a "rulebook picture of law is a particularly inapt rendering" of the American "common law system."[49] Not rules, but cases "are the primary grist for the legal reasoning mill." [50] Case law, also known as judge made law, is the American preference: legislation is the exception.[51] American law professors belittle the

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adjudication of specific cases. Case-by-case development allows experimentation because each rule is reevaluated in subsequent cases to determine if the rule did or does produce a fair result. If the rule operates unfairly, it can be modified.... The genius of the common law is that it proceeds empirically and gradually, testing the ground at every step, and refusing, or at any rate evincing an extreme reluctance, to embrace broad theoretical principles.").

[45] Oliver Wendell Holmes, Jr., *Codes and the Arrangement of the Law,* 5 AM. L. REV. 1 (1870).

[46] Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 460-61 (1897).

[47] *See* Anthony D'Amato,, *A New (and Better) Interpretation of Holmes's Prediction Theory of Law* 3, 14 (2008), NORTHWESTERN UNIVERSITY SCHOOL OF LAW FACULTY WORKING PAPERS, Paper 163 (suggesting that legal realism "was a disastrous setback for American law").http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/163.

On Holmes's address generally, see David Luban, *Essay: The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's* The Path of the Law, 72 N.Y.U.L. Rev. 1547 (1997).

[48] STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 11 (3d ed. 2007).

[49] FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 103 (2009).

[50] BURTON, *supra* note 48, at 11.

[51] *See* JANE C. GINSBURG, INTRODUCTION TO LAW AND LEGAL REASONING 71 (rev. ed., 2004).

public's longing for legal determinacy[52] and judges that only apply law but to not make it.[53]

Anglo-American jurists from English legal philosopher Jeremy Bentham to U.S. Supreme Court Justice Antonin Scalia have criticized "judge-made law." Bentham famously flailed it as "dog-law:" "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it."[54] Justice Scalia denounces judge-made law as undemocratic: "we elect those who will write our laws—and expect courts to observe what is written."[55] They have powerful criticisms for which there are no good answers.[56] Perhaps the most persuasive indictment of judge-made law is that by itself it fails to produce rules that people can follow.

Most applications of law are by individuals who apply law to themselves: they follow the law in ordering their daily lives, *e.g.*, they stop at red lights. A smaller, but still large number of applications are by individuals charged with applying law to others: *e.g.*, government officers issue driver's licenses. Even less numerous are applications by individuals charged with compelling others to follow the law: *e.g.*, police officers who stop speeding motorists. Least numerous of all are where judges decide rights and disputes. To defend contemporary common law indeterminacy Americans resort to claims of American legal history that have become myths: ***dominance*** of common law in the 19th century legal system over statutes and ***primacy of precedents*** in legal reasoning. Both impede law reform; the latter imperils contemporary American law as well. Primacy of judicial precedents imperils good government and a just society. Primacy of judicial precedents undermines application of law, by its subjects, by its officers and by its law enforcers. It even undermines application of law by judges.

I seek in this article to debunk common law myths of dominance and priority over statutes. I suggest a greater role for statutes than is usually allowed in American understanding of the past, but I am not creating an alternative universe, either in the past or in the present, of statutory law. Legal method—making, finding and applying law to facts—is a joint enterprise. The best solution will include both "judge-made law" and statutes.

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[52] *See* James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, 31 HOUSTON J. OF INT'L L. 28, 33-34 (2008).

[53] *See* James R. Maxeiner, *Imagining Judges that Apply Law: How They Might Do It*, 114 PENN STATE L. REV. 472, 473 (2009).

[54] JEREMY BENTHAM, TRUTH *VERSUS* ASHHURST; OR, LAW AS IT IS, CONTRASTED WITH WHAT IT IS SAID TO BE 11 (1835, 1st ed. 1823, written 1792), *in* 5 *The Works of Jeremy Bentham* 231 (John Bowring, ed., 1843).

[55] SCALIA & GARNER *supra* note 41, at 22 (2012).

[56] *See* Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765 (2004); GORDON TULLOCK, THE CASE AGAINST THE COMMON LAW (1997).

C. THE "GOOGLE CHALLENGE" I.E. DIGITIZATION

Digitization offers access to test the claims of the Centennial Writers. Their world is now open to us. Before, it was largely closed. Their publications were found scattered in only a handful of research libraries and, for want of indexing, difficult to access even when found.

The typical American law school library of the 20th century reflected the case-law orientation of the 20th century legal system. Its collection consisted mostly of case reports, case digests, case citators, and law school law reviews. All of these as we know them today got their start in the 1880s and 1890s. They reflected a world that had already changed from the world that the Centennial Writers knew. In the 20th century, much legal literature for the law before 1876 could be found in only a handful of research libraries. Even in its own day, that literature was often difficult to acquire.

In 2004 the *Google Library Book Project* began; one of its goal is to digitize and make available all books published before 1926.[57] About the same time, Gale Research introduced its *Making of Modern Law* database, which makes available digital copies of many English language legal treatises, including pamphlets, published between 1800 and 1926. W.H. Hein similarly first offered its *Hein Online* database, which includes, nearly all 19th century Anglo-American legal periodicals and many statutory collections. Other organizations have contributed to the digitization of American law. Hathi-Trust, Cornell's *Making of America*, and the Internet Archive are others that I have used frequently. One that I have just started to use is that of the Bavarian State Library's Digital Library - Munich Digitization Center; MDZ, available at https://www.bsb-muenchen.de/en/catalogues-databases/digital-collections/. Digitization is now moving from books and journals to newspapers and manuscripts.

What digitization offers is more than even the best of research law libraries could offer: convenient desktop access to most legal materials, including large classes of materials that one might not ever have thought to access. Digitization goes beyond just providing access to physical texts: through word searching it takes researchers directly to relevant passages within physical books. Particularly in the first century of the Republic, relevant information is found in volumes and articles the titles of which often do not even suggest that they might be of interest. Whole new classes of legal literature that had been practically forgotten are now available, while known classes have become accessible and usable as never before.

1. Pamphlets. A "new" class consists of a mountain of pamphlets of independent "discourses" and "orations." Throughout the 19th century, when jurists talked with each other, the means of communication was often a twenty-to-fifty page pamphlet. Law journals were few, infrequent, and did

[57] The first wave of legal digitization began earlier, on April 2, 1973, when the Lexis system was first offered. It did not change and may have even reinforced the case law orientation of American law libraries. It was slow to extend coverage back in time and stayed largely with case reports and law school law reviews.

not publish long comments. So authors self-published or, commonly, the sponsor of an address published the talk. Journals, law and public, took note of these addresses. Opposing parties answered with their views.[58]

2. *Legislative materials*. Although constitutions and statutes have been available with difficulty, with exceptions, the materials that went into making those constitutions and statutes, *i.e.*, governors addresses, committee reports and debates, have been hard to locate, and when attainable, not easily used. Digitization and word searching changes all of that.

3. *Early legal periodicals*. Hein Online now makes practically all early American legal periodicals available and word searchable. These journals took a variety of forms ranging from academic journals to chatty legal newspapers. For the latter in particular, word searching is a god-send for access.

4. *Non-legal periodicals*. Although the first U.S. law journal appeared in 1806, only in the 1830s did law journals appear with some regularity. Particularly in first half-century of the New Republic, but continuing for decades after, authors often published legal works in general interest journals such as *The North American Review*, *The Southern Review*, *The Democratic Review*, *Hunt's Merchants' Magazine* and *The American Quarterly Review*.

5. *Earliest legal materials (to about 1826)*. Some of the earliest legal materials appear in unlikely places, e.g., the appendices or notes to other works. So, for example, one of the most interesting of comments on the commerce clause of the U.S. constitution is appended to an 1804 work on the *History of Land Titles in Massachusetts*. Prefaces to the initial volumes of case reports are often informative. Some of the early reports of U.S. Supreme Court decisions included substantive appendices. To a limited extent, this appending approach continued through the end of the century. Full notes--not mere footnotes--to editions of Blackstone by St. George Tucker (1803) and by William G. Hammond (1890) are particularly valuable commentaries on American law.

6. *Popular works*. Not to be forgotten are the many thousands of popular works that appeared and addressed legal issues principally or incidentally. Once it would not have been practical to search them. Now it is.

Most of the materials cited here from before 1926 are available full text from one or more of the digitizers. Because of limitations in digitizing, sometimes several searches, or visits to several sites, may be necessary to find any given item. Except as noted otherwise, I believe that most of the pre-1926 works I cite here are available at one of the half-dozen digitizers noted above.

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[58] Before digitization Professor Michael H. Hoeflich brought this literature to public attention. *See, e.g.,* Michael H. Hoeflich, *Savigny and His Anglo-American Disciples,* 37 AM. J. COMP. L. 17 (1989). In the case of legal education reprint publishers guided by scholars such as Professor Hoeflich and Professor Steve Sheppard provided important primary sources even before digitization. *See, e.g.,* MICHAEL H. HOEFLICH, GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES (1988); MICHAEL H. HOEFLICH, SOURCES OF THE HISTORY OF THE AMERICAN LAW OF LAWYERING (2008); STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES (2 vols., 1999).

III. FOUNDING A GOVERNMENT OF LAWS

The founders of the United States believed that they were creating a new order of the ages. Contemporary common law myth denies, however, that they did. The myth imagines:

> 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 Philadelphia in 1787, it was with the assumption that English common law would continue unchanged in the United States.[59]

This statement is fiction. On July 1, 1787, just as the Convention came close to falling apart over the issue of small state representation in Congress, in Virginia, twenty-three state statutes that Jefferson had drafted and that Madison, the Convention's orchestrator-in-chief, had sponsored in the Virginia legislature, went into force.[60] These statutes changed received English criminal law and procedure, property law and civil procedure. One new statute subjected lawyers to licensing, regulation and examination.[61] Another directed courts to order lawyers "to help and speed poor persons in their suits … without any reward for their counsels, help and businesses in the same."[62] So much for common law continuing unchanged as the delegates met.

Statutes had a leading role in the Founders' vision of a New Republic. What role, if any, English law, whether statutory or common law, would have in the independent United States of America is a more difficult issue. This Part III considers first the Founders' vision of statutes, and second, the enigmatic role of English law in America.

A. *THE FOUNDERS' VISION: A GOVERNMENT OF LAWS FOR A NEW NATION*

> 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?

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[59] NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM 354 (1997). *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). *See* JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 15 (2003).

[60] THE PAPERS OF THOMAS JEFFERSON (VOL. 2, 1777 TO 18 JUNE 1779, INCLUDING THE REVISAL OF THE LAWS, 1776-1786) 332 (Julian P. Boyd, ed., 1950).

[61] Bill No. 97 "A Bill for Licensing Counsel, Attorneys at Law, and Proctors," *Id.* at 587.

[62] Bill No. 112 "A Bill Providing a Means to Help and Speed Poor Persons in Their Suits," *Id.* at 629.

John Adams, *Thoughts on Government* (1776)

> 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.
>
> Thomas Jefferson, *Autobiography*[63]

In the world of Adams and Jefferson, law was about legislating and government was about governing. Written laws were supposed to state principles beforehand and to authorize governors and governed alike to judge according to those principles. Democratically selected legislatures were to be supreme and not judges. States were governments of laws and not of men.

Lost in the clouds of common law myth is American leadership in statute law in the 18th century Enlightenment. Americans have long taken pride in their leadership in the world of written constitutions—that of Massachusetts of 1780 is the oldest still in force—but few know that America, for a time, was a leader in written statutes as well.

One doesn't need digitization to dismantle the myth that the nation's founders were captives of the hoary English common law who didn't believe in written law or even might be seen as having advocated contemporary common law myth. Of English law—statute law as well as common law—they made selective interim use, and dispatched much to the dustbin of history. For American statutes they labored. Against judge-made law, they cautioned, but they relied on right-minded judges to refrain from making law in the guise of interpretation. Their aspirations ran to written law of legislation and not to unwritten common law.[64] In this part I address written law and ten of the founder lawyers: two created the Declaration of Independence, Jefferson and Adams; two secured adoption of the Constitution: Madison and Hamilton; and six constituted the first Supreme Court of the United States.

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[63] THE AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790, TOGETHER WITH A SUMMARY OF THE CHIEF EVENTS IN JEFFERSON'S LIFE 67 (Paul Leicester Ford, ed. 1914; *New Introduction* by Michael Zuckerman, 2005).

[64] *Cf.* Charles Abernathy, *The Lost European Aspirations of U.S. Constitutional Law*, *in* 24 FEBRUAR 1803: DIE ERFINDUNG DER VERFASSUNGSGERICHTSBARKEIT UND IHRER FOLGEN 37 (Werner Kremp, ed. 2003) ; Vanderlinden, *supra* note **, at 8-9. For a tempered view that denies contemporary common law myth, yet ascribes a greater role to common law tradition, see JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM (2003) (mostly directed to constitutional law, but at page 14 referring to Jefferson's Revisal as a "decision simply to draft model statutes for reform, not to try to introduce a wholly new order.")

1. Declaring Independence to Write Laws for the Public Good

The Declaration of Independence of 1776 was about legislation and legislatures. Its first charge against King George was that "He has refused his Assent to Laws, the most wholesome and necessary for the public good." That and the next seven charges related to legislation and legislatures. Thirteen of the twenty-seven charges in all dealt with some manifestation of legislation. Of common law there was no mention. Four charges did deal with administration of justice, including judiciary powers, appointment of judges and trials.[65]

More than any other two people, John Adams and Thomas Jefferson brought the Declaration of Independence into 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.

2 The Written Laws of the Founders: Adams, Jefferson & Madison.

a. Adams' Government of Laws: Massachusetts' Frame of Government

In fall 1779, Adams drafted the *Constitution or Frame of Government* of the Commonwealth of Massachusetts, which is still law today, and which is still reasonably well known. There he popularized the phrase of a "government of laws, not of men" that into the twentieth century described what Americans today call the rule of law. There he provided for a framework for statute law and for governing.[66]

b. Jefferson's Code: Virginia's Revisal of Laws

From fall 1776 through spring 1779, Jefferson wrote the laws for a New Republican government for Virginia. He provided legislation for reformation of the laws of the nation's then most populous state. James Madison described Jefferson's reformation as "a mine of legislative wealth, and a model of statutory composition."[67] One modern scholar sees in Jefferson's legislation, "a rare and comprehensive view of how a founder envisioned an actual republican society."[68]

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[65] Professor Stoner again provides a tempered more common law view of the Declaration of Independence: "the choice of independence—or its defense to the world—mandated that appeal be made to the law of nature rather than the law of England, but when abstract terms such as 'absolute Despotism' were given concrete meaning, it was by reference, in the largely unread catalogue of grievances, to numerous rights and privileges at common law …." *Id*. at 13-14.

[66] *See* James R. Maxeiner, *Building a Government of Laws: Adams and Jefferson 1776-1779*, *in* LEGAL DOCTRINES OF THE RULE OF LAW AND OF THE LEGAL STATE (James Hickey & James Silkenat, eds., IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE vol. 38, 2014).

[67] James Madison to Samuel Harrison Smith, November 4, 1826, *in* THE WRITINGS OF JAMES MADISON, VOL. 1819-1836 at 256, 257-258 (Gaillard Hunt, 1910).

[68] RALPH LERNER, THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC 62 (1987).

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. Then he already had in mind as much building a government of laws as declaring rights and independence. In May in Philadelphia for congress, he wrote a friend back home that the government to be established was "the whole object of the present controversy."[69] In the three years that followed he drafted the laws for a republican government.

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." [70] 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.*, civil justice, property law, the established church, importation of slaves, and naturalization; and (2) systematic review and reform of Virginia law.[71] 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.[72] 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).[73] Other legislation he wrote or sponsored was of comparable extent. He was, as the editor of his papers said, "a veritable legislative drafting bureau."[74]

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[69] Jefferson to Thomas Nelson, May 16, 1776, in 1 THE PAPERS OF THOMAS JEFFERSON (VOL.1, 1760 TO 1776) 292 (Julian P. Boyd, ed., 1950).

[70] THE AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790, TOGETHER WITH A SUMMARY OF THE CHIEF EVENTS IN JEFFERSON'S LIFE 57 (Paul Leicester Ford, ed. 1914; *New Introduction* by Michael Zuckerman, 2005).

[71] THE PAPERS OF THOMAS JEFFERSON (VOL. 2, 1777 TO 18 JUNE 1779, INCLUDING THE REVISAL OF THE LAWS, 1776-1786) 306 (Julian P. Boyd, ed., 1950).

[72] *Id.* at 306-307.

[73] REPORT OF THE COMMITTEE OF ADVISORS APPOINTED BY THE GENERAL ASSEMBLY OF VIRGINIA IN MDCCLXXVI (1784) (available best at Google books). The following paragraphs do not cite to individual bills from the Revisal. They are found in the Committee's Report and in Boyd's analysis of the Revisal, *in* 2 THE PAPERS OF THOMAS JEFFERSON (VOLUME 2, 1777 TO 18 JUNE 1779), *supra* note 71.

[74] THE PAPERS OF THOMAS JEFFERSON (VOL. 2, 1777 TO 18 JUNE 1779), *supra* note 71, at 306.

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."[75] Jefferson's legislation 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."[76]Jefferson's legislation reorganized 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.

Professors of contemporary common law myth take heart that Jefferson declined the suggestion of one committee member that the committee tackle all law including all common law. If one knows the extent of the tasks that Jefferson and his committee of three did take on, and how limited were their resources, one should accept his explanation that it simply was not practical: "an arduous undertaking, of vast research, or great consideration & judgment: and when reduced to a text … would become a subject of question & Chicanery until settled by repeated adjudication." [77]

Although Jefferson's Revisal did not banish common law altogether, it did not promote 18th century common law methods as a path to the New Republic. It gave no hint of approval of judicial legislation that characterizes contemporary common law methods. To the contrary, Jefferson's Revisal promoted legislative methods; it *was* legislation. Jefferson could hardly have proceeded in any other way. Only statutes can root out old laws, rationally refashion remaining institutions, create new institutions, and provide direction to governors in how to govern. Jefferson sought to use legislation to do all these things. His success was limited by his own methods. In a democratic republic Jefferson could not decree a new society and new laws. He had to get assent of the democratically-elected legislature.

c. Madison's Adoption of: Jefferson's Revisal 1784-1787

The English invasion of Virginia in 1779 delayed the Virginia legislature's consideration of Jefferson's Revisal. By the time the English were expelled and the legislature able to take up the work, Jefferson was on a mission to Europe. James Madison took Jefferson's place as legislator leading

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[75] WILLIAM STERNE RANDALL, THOMAS JEFFERSON: A LIFE 285 (1993).
[76] LERNER, *supra* note 68, at 64.
[77] AUTOBIOGRAPHY, *supra* note 63, at 67-68.

the Revisal. In the two years just before Madison brought the country together for a constitutional convention and helped draft a constitution, he presented Jefferson's anti-common law legislation to the Virginia legislature. He introduced 118 of the Revisal's 126 bills and achieved adoption of fifty-eight.[78]

3. The Written Laws of the Constitution

The Founders designed a government of written laws. That made America exceptional in 1787. Contemporary common law myth claims the Constitution for common law tradition but its "true family affinity," writes Professor Charles Abernathy, "is that of the written law of the great codes of France and Germany that followed in the nineteenth century."[79] The Founders were much influenced by Continental legal thought, by Montesquieu, Locke and Beccaria and classical Roman ideas.[80] That meant written laws.[81] The Constitution is about making and applying written laws.

The first provision after the Preamble, Article 1, section 1, grants Congress "legislative power." Article 1, section 8 lists specific powers and concludes with a general grant "To make all laws which shall be necessary and proper for carrying into execution the forgoing powers."

Article II vests the "executive power" in the President. Article II, section 3, provides that the president "shall take care that the laws be faithfully executed."

Article III, section 1 vests the "judicial power" in "one Supreme court." Article III, section 2, provides that that power extends to an assortment of controversies, but first to cases "arising under" written law, *i.e.*, this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority."

Article VI provides for the supremacy of written laws and binds all judges to that written law: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby …"

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[78] THE PAPERS OF THOMAS JEFFERSON (VOL. 2, 1777 TO 18 JUNE 1777), *supra* note 71, at 322-323.

[79] Abernathy, *supra* note 64, at 37.

[80] *See, e.g.,* DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM (2008); Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution,* 18 PEPPERDINE L. REV. 1 (1990); JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 332 (2014); M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION (1994).

[81] That idea is well conveyed by the title of the book by Montesquieu that influenced America's founders. Published originally in French as *De l'esprit des loix,* and then as *De l'esprit des lois,* the French title has been variously rendered in English, first as *The Spirit of Laws,* and later sometimes as *The Spirit of the Laws.* The German rendition leaves no doubt: *The Spirit of the Statutes* (*Der Geist der Gesetze*).

If judge-made law is in the Constitution, it must be found in the interstices. The Constitution provides the mechanism for Congress to make statutes subject to the approval of the President. It makes no allowance for the Supreme Court to invalidate statutes that Congress makes and the President approves.[82] It speaks of "judicial power," but does not include in that power giving Supreme Court decisions the force of law or even giving the Court power to make rules for the conduct of its business. Nor does it include in that power other issues that might be seen as judicial, *i.e.*, determination of whether there are courts inferior to the Supreme Court or where trials are to take place when the crimes do not occur within a State. Instead Article III assigns those issues to Congress.

The 1787 Constitution does not mention "common law",[83] but it does abolish the common law punishment for treason. It uses English law terminology for legislation when it refers to concepts such as "ex post facto" law and "bill of attainder."The Constitution does address uniformity and coordination of state laws. Article I, section 8 grants Congress the power "To establish an uniform rule of naturalization, and uniform Laws on the Subject of Bankruptcies throughout the United States." Article I, sections 9 and 10, prohibits states from taking certain actions and subjects other actions to Congressional authorization. Article IV, section 1 requires states to give "full faith and credit" to the public acts of other states and gives Congress authority 'by general laws [to] prescribe … the effect thereof." It provides for interstate extradition. Article IV, section 2 infamously provides for extradition of fugitive slaves ("Person[s] held to service or labour").

4. Written Laws in the Federalist Papers 1787-1788

> Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?
>
> *Federalist* No. 62 (1788)[84]

The Federalist Papers confirm the commitment of James Madison, Alexander Hamilton and John Jay to written law. They address issues of statute law and statute lawmaking. These include quality of legislation, uniformity of laws throughout the nation, and worries that constitutional review of statutes might lead to judicial superiority over legislatures. So *Federalist No. 62, The Senate*, by Madison, saw in the Senate (as contrasted to the House) a body with "due acquaintance with the objects and principles of legislation." It would protect the people against "so many monuments of deficient wisdom" that were "are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes." It would provide "a knowledge of the [legislative] means by which that object [of the happiness

[82] The Supreme Court itself claimed that power in the controversial decision of *Marbury v. Madison,* 5 U.S. 137 (1803).
[83] The term appears only in the Seventh Amendment.
[84] Publius [James Madison], *The Senate,* FEDERALIST NO. 62, INDEPENDENT JOURNAL, Feb. 27, 1788, http://www.constitution.org/fed/federa62.htm.

of the people] can be best attained." It would secure that laws are not "made for the FEW, not for the MANY." [Emphasis in the original.]

Federalist No. 53, The House of Representatives (continued) (by Madison)[85] worried that "The laws are so far from being uniform, that they vary in every State." It foresaw that "The most laborious task will be the proper inauguration of the government and the primeval formation of a federal code." Yet Madison was optimistic that "Improvements on the first draughts will every year become both easier and fewer … And the increased intercourse among those of different States will contribute … to a general assimilation of their manners and laws." He underestimated subsequent difficulties in harmonizing law, when he wrote in *Federalist No. 56, The Total Number of the House of Representatives (continued)*[86] of creating a federal tax code: "In every State there have been made, and must continue to be made, regulations on this subject which will, in many cases, leave little more to be done by the federal legislature, than to review the different laws, and reduce them in one general act."

Federalist No. 78, *The Judiciary Department*, (by Hamilton)[87] answered the "perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power." It argued that: "The interpretation of the laws is the proper and peculiar province of the courts." That did not mean, however, "a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." Judges must always be faithful to law: "a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Judges were to apply and not make law: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."

5. Written Laws and the First Supreme Court

The first Supreme Court of the United States was not a judicial legislature. Probably its most enduring act was not a judicial decision, but a 1793

[85] Publius [James Madison], *The House of Representatives (continued)*, FEDERALIST NO. 53, INDEPENDENT JOURNAL, Feb. 9, 1788. http://www.constitution.org/fed/federa53.htm.

[86] Publius [James Madison], *The Total Number of the House of Representatives (continued),* FEDERALIST NO. 56, INDEPENDENT JOURNAL, Feb. 16, 1788, http://www.constitution.org/fed/federa56.htm.

[87] Publius [Alexander Hamilton], *The Judiciary Department*, FEDERALIST NO. 78, INDEPENDENT JOURNAL, June 14, 1788, http://www.constitution.org/fed/federa78.htm.

letter to President Washington declining to give an advisory opinion.[88] This is the origin of the case or controversy requirement. The first Court decided only a handful of cases. None foreshadowed modern-day judicial supremacy. Moreover, the methods by which it worked were not conducive to judicial lawmaking, *i.e.,* the justices delivered their opinions seriatim from the bench and not as a single opinion of the Court.[89] There was, as yet, no system of publication of written opinions. The justices of the first Supreme Court were as much legislators or governors as they were judges.

Chief Justice John Jay (1789-1795) was the third author of the Federalist papers. His best-known affirmative act while on the Supreme Court was extra-judicial: negotiation of the controversial "Jay Treaty" with Great Britain. In 1795 he resigned his position as Chief Justice to become Governor of the State of New York. His speeches as governor demonstrate his respect for a government of laws.[90] Governor Jay looked for clear lines of authority: "The more the principles of government are investigated, the more it becomes apparent that those powers and those only, should be annexed to each office and department, which properly belong to them."[91] Legislatures made laws for the people; judges carried them out.[92]

Associate Justice John Rutledge (1789-1792) was South Carolina's first chief executive after independence. He made his mark as Chairman of the Committee of Detail of the Constitutional Convention of 1787, where he had much to do with enumerating Congress's legislative powers, including the necessary and proper clause.[93] On the Court he decided no cases as Associate Justice. He attended only one of three terms before he resigned to become Chief Justice of South Carolina. In 1795 he served as interim Chief

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[88] STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 179 (1997) (reprinting the letter in full).

[89] Professor Gerber attributes the generally low estimation of Justice William Cushing to his speaking last as senior associate justice. SCOTT DOUGLAS GERBER, *Deconstructing William Cushing, in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 97, 107 (1998).

[90] John Jay, *in* THE SPEECHES OF THE DIFFERENT GOVERNORS, TO THE LEGISLATURE OF THE STATE OF NEW YORK 47-67 (1825). In his first address, the *Speech of January 6, 1796*, he promised to respect the "constituted authorities" under national and state constitutions, *id.* 47; to "give efficacy" to national laws and measures, id. at 48; to amend "laws and regulations, [which] however carefully devised, frequently prove defective in practice," *id.* at 48; and, to resolve opposite opinions in constitutional construction by a "declaratory act," *id*. at 48-49.

[91] *Id*. at 49.

[92] *Id.* ("One great object of which a people, free, enlightened and governed by laws of their own making, will never lose sight, is, that those laws be always so judiciously applied and faithfully executed, as to secure to them the peaceable and uninterrupted enjoyment of their rights.").

[93] James Haw, *John Rutledge: Distinction and Declension, in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 70, 89 (Scott Douglas Gerber, ed., 1998).

Three of the other four members of the Committee on Detail went on to substantial roles in the federal government, James Wilson as Associate Justice, Oliver Ellsworth as Chief Justice, and Edmund Randolph as Secretary of State and Attorney General.

Justice. His judicial philosophy as shown on the bench in South Carolina is said to "leave legal innovation to legislators, in the belief that fixed and known laws were important to liberty."[94]

Associate Justice James Wilson (1789-1798) was one of only six men to sign both the Declaration of Independence and the Constitution. He is considered to have been second only to James Madison as principal drafter of the Constitution. While he was on the Court, in March 1791 the Pennsylvania House of Representatives engaged him "to prepare bills, containing such alterations, additions and improvements as the code of law, and the principles and forms of the constitution then lately adopted might require."[95] Wilson accepted the challenge. He proposed that he would work to make law "a plain rule for action" and through a commentary reduce the common law into "a just and regular system". He intended to write laws "level to the understanding of all."[96] Had Wilson brought the work to completion, it would have rivaled Jefferson's revisal. But Wilson, even more than Jefferson was strapped for funds. When the legislature failed to provide support, he dropped the project. Hugh Henry Brackenridge, Justice of the Pennsylvania Supreme Court, wrote "It was considered a great loss by intelligent men that the design should be abandoned; and it continued to be thought of as what ought to be accomplished."[97]

Associate Justice William Cushing (1789-1795). Justice Cushing, of the six, is perhaps the one most remembered for work as a judge. He had served as a judge in Massachusetts since 1772 and as Chief Justice of Massachusetts since 1780. In that capacity he found slavery to be unconstitutional. His reputation as Supreme Court justice is lackluster. Professor Gerber, in reconstructing the justice, attributes to him "Inventing Textualism."[98]

Associate Justice John Blair, Jr. (1789-1799) is described as "A Safe and Conscientious Judge." He was apparently a quiet supporter of Madison and Jefferson's Revisal Committee of George Wythe and Edmund Pendleton.[99]

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[94] *Id.*

[95] 1 THE WORKS OF HONORABLE JAMES WILSON, L.L.D. Preface (Bird Wilson, ed., 1804), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 417 (Kermit L. Hall & Mark David Hall, eds., 2007). On Wilson's role in drafting the Constitution, see William Ewald, *James Wilson and the Drafting of the Constitution*, 10 J. CONST. L. 901 (2008).

[96] 1 WILSON, *supra* note 95, at 419-21.

[97] Hugh Henry Brackenridge, *Some View of the Endeavors to Improve the Law by the Legislature, in* HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES: CONTAINING AN INTRODUCTION TO THE STUDY OF LAW, SHEWING THE VARIATIONS OF THE LAW OF PENNSYLVANIA FROM THE LAW OF ENGLAND, AND WHAT ACTS OF ASSEMBLY MIGHT REQUIRE TO BE REPEALED OR MODIFIED …27, 28 (1814). *See* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 28, 37 (1981).

[98] SCOTT DOUGLAS GERBER, *Deconstructing William Cushing, in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 97, 106-113 (1998).

[99] Wythe Holt, *John Blair: "A Safe and Conscientious Judge," in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 155 (1998). In 1780, the year after Jefferson and his team of Wythe and Pendleton submitted the Revisal, Blair joined the latter two as the third judge

Associate Justice James Iredell (1790-1799) who died prematurely at forty-eight, is remembered as reviser of laws in the model of Jefferson. In 1776 he served on the North Carolina Commission established to recommend which statutes should continue in force as "consistent with the genius of a free people."[100] He then drafted North Carolina's first court bill. In 1787 the State Assembly appointed him to revise and compile the legislative acts of the state and former colony. He completed the work in 1791 after joining the Court. It is known as "Iredell's Revisal" and long was the basis for North Carolina law.[101]

B. THE ENIGMA OF THE RECEPTION OF ENGLISH LAW IN AMERICA IN THE FIRST CENTURY OF THE REPUBLIC

Proponents of contemporary common law myth claim a faux mantel of history to perpetuate priority for judge-made law in contemporary America. They belittle the role of statutory law, they inflate the extent of the reception of English law, and they mischaracterize what America did receive. Not America generally, but individual American colonies and states, received not all of English law, but some British statutes and some English common law. The legal method that they received was not contemporary creation of law, but a more modest "discovery" of law. American scholars have known for sixty years that "The legal philosophy dominant when [the American] government was established did not contemplate judicial legislation in any form."[102]

In the first century of the Republic, reception of English law was enigmatic, because it had been enigmatic in Colonial America. In 1774 loyalist John Dickenson, repeating a grievance from New York, complained that law in the American colonies was in a state of "confusion" and "controversy;" no one knew when English law applied. He argued that "passing an act for settling the extent of the English laws" was "absolutely necessary for the public security."[103]

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of the Court of Chancery. *Id.* at 158. He supported both of them—silently—in the Virginia convention that ratified the Constitution. *Id.* at 162.

[100] JAMES IREDELL & WILLIAM H. BATTLE, *Preface, in* 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA v, x-xi (1837); Willis P. Whichard, *James Iredell: Revolutionist, Constitutionalist, Jurist in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 198, 203 (1998). *See generally* WILLIS P. WHICHARD, JUSTICE JAMES IREDELL (2000).

[101] *See* IREDELL & BATTLE, *supra* note 100, at xii.

[102] FRED V. CAHILL, JR., JUDICIAL LEGISLATION: A STUDY IN AMERICAN LEGAL THEORY v (1952). *See also* 21 and 151.

[103] [JOHN DICKINSON], LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES 90-91 (Philadelphia 1774). Dickinson wrote for Pennsylvania, but he took (with attribution) most of his criticism from New York's WILLIAM SMITH, THE HISTORY OF THE PROVINCE OF NEW YORK, FROM THE FIRST DISCOVERY TO THE YEAR M.CDD.XXXII 243 (London 1767).

1. English Law and the Colonies

In contemporary common law myth the 17th century colonists practically brought "the common law" over in the cargo holds of their ships. A plaque placed in 1959 by the Virginia Bar at Jamestown states: "Here the common law of England was established on this continent with the arrival of the first settlers on May 13, 1607." Ironically, in 1607 when the settlers who named their settlement Jamestown were at sea on their way to America, the settlement's namesake, King James I, was telling the British Parliament that it should replace common law with statute law: "leave not the Law to the pleasure of the Judge, but let your Lawes be looked into: for I desire not the abolishing of the Lawes, but onely the clearing and the sweeping off the rust of them, and that by Parliament our Lawes might be cleared and made knowen to all the Subjects. Yea rather it were lesse hurt, that all the approved Cases were set downe and allowed by Parliament for standing Lawes in all time to come." [104]

Today's scholars see the common law carryover differently than contemporary common law myth. Professor William E. Nelson concludes, "England's common law was not the initial foundation of [the] legal systems." Instead "the English legal heritage … constituted a set of background norms to which [colonies] turned when convenient."[105] Professor James R. Stoner sees as "a serious error" the assumption "that the Americans of the Revolutionary era simply accepted the dominant understanding of common law in contemporary Britain …."[106] Just five years after the bar posted the plaque in Jamestown, in a comprehensive study of British statutes in America, Elizabeth Gaspar Brown, warned against the "utter folly" of presuming an identity of law between law as practiced in individual colonies and in England.[107]

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[104] King James I, *Speach [sic] to Parliament of 31 March 1607*, KING JAMES VI AND I: SELECTED WRITINGS (Neil Rhodes et al., eds.) 307, 310-11 (2004). *Accord, King James I, Speach [sic] to Parliament, March 1609, id.* at 325, 332-333, and partly quoted in SAMUEL ROBERTS, A DIGEST OF SELECT BRITISH STATUTES, COMPRISING THOSE WHICH, ACCORDING TO THE REPORT OF THE JUDGES OF THE SUPREME COURT, MADE TO THE LEGISLATURE, APPEAR TO BE IN FORCE, IN PENNSYLVANIA, WITH SOME OTHERS xv (1817) ("I would wish both these statutes and reports, as well in the parliament as common law, to be once maturely reviewed, and reconciled").

[105] WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA, VOL. 1, THE CHESAPEAKE AND NEW ENGLAND, 1607-1660 (2008). *See also William B. Stoebuck, Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968) (reviewing the three "standard" theories of reception). Max Radin observed that legally common law could only be subsidiary and not obligatory, since common law was the king's law which, with the exception of the writ of error, did not run across the seas. Max Radin, *The Rivalry of Common-Law and Civil Law Ideas in the American Colonies*, in 2 LAW: A CENTURY OF PROGRESS 404, 407-11 (1937).

[106] JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 13 (2003).

[107] ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836, at 20 (1964).

It could hardly have been otherwise. English laws, legal institutions and legal methods were so complex as to make it practically impossible for even the most sophisticated colonials to know, let alone import and recreate them.[108] The first modern systematization of English common law—Blackstone's *Commentaries on the Laws of England*—came too late to enable a colonial reception; it was not published until the very eve of the Revolution, in England in 1765-1769, and in the United States, not until 1771 to 1772. While a masterful improvement, it is not short. It consumes four thick oversized volumes. It was intended only as an introduction![109] Contemporary Hugh Henry Brackridge, Justice of the Supreme Court of Pennsylvania, observed"Even in the country of its origin the common law is not a *national*, or a *uniform* system." He thought that "as a part therefore of English jurisprudence the common law is intricate, and too much embarrassed with exceptions and distinctions to be a subject of ready comprehension to the public mind." [110] Brown, in her path-breaking work on British statutes in America, concluded that, "However much the colonists may have wished that they possessed the full body of the common law of England, they did not."[111]

Common law even in early modern England did not enjoy the near total dominance that contemporary common law myth supposes. Written law, i.e., statutes, always had a role. Already in the early modern era statutes made major inroads on common law in England. A "deluge of parliamentary legislation"[112] in the mid-eighteenth century led the Lord Chancellor to complain that "our statute books are increased to such an enormous size, that they confound every man who is obliged to look into them."[113]

Reception of English law varied throughout the colonies. Law in one colony cannot rightly be assumed to have been law in another.[114] The new world was a land of "many legalities."[115] Each colony must be investigated separately.[116] Their differing origins, as settlements of previously uninhab-

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[108] *Cf.*, PAUL SAMUEL REINSCH, THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 7 (1899), *reprinted in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 369 (1907); Vanderlinden, *supra* note **, at 5-9, 10-11.

[109] *"Sullivan's Lectures,"* 3 BOSTON ANTHOLOGY & MONTHLY REV. 438, 439 (1806).

[110] HUGH H. BRACKENRIDGE, CONSIDERATIONS ON THE JURISPRUDENCE OF THE STATE OF PENNSYLVANIA, NO. 1, at 6 (1808). I have not found this digitized.

[111] Brown, *supra* note 107, at 20-21. Owing to the unwritten constitution of the United Kingdom, statutes were British, for they generally applied in Scotland, but common law was "English," for it applied only in England and Wales.

[112] DAVID LEMMINGS, LAW AND GOVERNMENT IN ENGLAND DURING THE LONG EIGHTEENTH CENTURY: FROM CONSENT TO COMMAND 3 (2011).

[113] *Quoted in id.* at 9 and *in* 18 THE SCOT'S MAGAZINE 476 (1756).

[114] *See* BROWN, *supra* note 107, at 20.

[115] *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).

[116] BROWN, *supra* note 107, at 20.

ited territories or as lands obtained by cession, and their differing constitutional statuses, led to debate about differing legislative authority.[117] Even if the Jamestown settlers had common law in their cargo holds, their counterparts in Massachusetts carried over a more civil cargo. Literally on board their ship before landing, the Pilgrims pledged in the *Mayflower Compact*, not fidelity to an undefined common law, but to the creation of statutes for governing:

> [We] 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.

They followed through on their pledge. The preamble of the *Lawes and Libertyes of Massachusetts* of 1647 colorfully explains why: "a Commonwealth without lawes is like a Ship without rigging and steeradge."[118] Colonial magistrates 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."[119]

That there might have been an indigenous and dominating American common law in the colonial era does not seem plausible. The rudimentary nature of courts and law practice, the lack of lawyers, as well as the lack of law reporting made even limited adoption of new law wherever sourced difficult. Before the Revolution, there were no published books of American precedents. Books of English decisions, on which an American common law would have built, were hard to come by and imported.[120] There were, however, statutes in large numbers to guide the governors and the governed alike. Digitization permits perusal of the many volumes of indigenous colonial statutes. In some colonies there were already revisals of statutes.[121] A case might be made that colonial Americans lived already in an "age of statutes."[122]

2. English Law in the First Century of the Republic

In 1826, a half century into the New Republic, satirist and later Secretary of the Navy James Kirke Paulding in a popular satire quipped: "That it

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[117] *Id.* at 1-15.

[118] THE LAWES AND LIBERTYES OF MASSACHUSETTS (1647). *See* EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP (3d ed., 2007) 156-160.

[119] *Id.*; Vanderlinden, *supra* note **, at 6, 11.

[120] *Cf.* BROWN, *supra* note 107, at 19-20; Vanderlinden, *supra* note **, at 6, 11.

[121] For an extensive guide to pre-statehood law in the several states, see PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA, 2 vols., (Michael Chiorazzi & Marguerite Most, eds., 2005).

[122] *See* Erwin C. Surrency, *Revision of Colonial Laws*, 9 AM. J. LEGAL HIST. 189 (1965).

is the common law is certain. But nobody can tell exactly what is the common law."[123] Eleven years later in 1837, in what was soon the most popular one volume student's introduction to American law of the 19th century, Professor Timothy Walker made the same point: "The only certainty, therefore, is that we have something which we call common law, scattered at random over a vast surface. But precisely what it is, or how far it extends, is hidden in the breast of our judges, and can only be ascertained by experiment. I need hardly to observe, that this uncertainty is a vast evil."[124]

The uncertainty was self-inflicted. English law, including English common law, had no force in the new states except as the states themselves adopted it.[125] When in 1776 the American colonies became "free and independent states" with full power "to do all the other acts and things which independent states may of right do,"[126] among those powers was the power to legislate for themselves without royal interference. And legislate they did. But it was thought expedient to carryover some English statutes and to adopt some of English common law.[127]

When a legislature enacts a specific foreign statute, or continues one in force, with or without modification, lawgiving is not problematic. For a formerly occupied state to carry on law of the erstwhile occupier is common. Legal systems are complicated and are not easily created. So German states on which Napoleon imposed his codes, for one example, continued his codes in force after French troops departed, some for nearly a century.[128] Korea, for another example, continued Japanese law in force long after Japanese troops were expelled in 1945.[129] Although some American states adopted by

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[123] JAMES KIRKE PAULDING, *The Perfection of Reason, in* THE MERRY TALES OF THE THREE WISE MEN OF GOTHAM 144, 166 (1826) (2d ed. 1835; 3d ed. 1839).

[124] TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW, DESIGNED AS A FIRST BOOK FOR STUDENTS 56 (1837) (11th and last edition, 1905). The final sentence Walker deleted already in the second edition. The rest of the quotation was retained through to the last edition in 1905. *See also* PAUL SAMUEL REINSCH, THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 8-9 (1899), *reprinted in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 370-371 (1907) ("… on the basis of this indefinite notion there has been claimed for the courts an almost unlimited power, under the guise of selecting the applicable principles of the common law, of fixing really new and unprecedented rules and, by their adjudications, legislating in the fullest sense of the word.").

[125] ST. GEORGE TUCKER, *Note E, Of the Unwritten, or Common Law of England, and Its Introduction Into, and Authority Within the United American States, in* 1 BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 378 (St. 1803). In their introduction to the 1996 reprint of St George Tucker's edition of Blackstone, Paul Finkelman and David Cobin explain that Tucker "placed much greater emphasis on legislation than Blackstone had." *Id.* at x-xi.

[126] DECLARATION OF INDEPENDENCE.

[127] BROWN, *supra* note 107, at 23-24.

[128] *See, e.g., Abolition of the Code Napoleon in the Rhenish Provinces,* 1 JURIST: Q.J. JURIS. & LEGISL. 246 (1827).

[129] *See* JAMES R. MAXEINER WITH GYOHOO LEE & ARMIN WEBER, FAILURES OF AMERICAN CIVIL JUSTICE IN AMERICAN CIVIL JUSTICE 276-81 (2011).

legislation specific British statutes, others did so by less precise means. Some legislatures just continued in force existing law. Others adopted English law specifically, but wholesale, by reference and without enumeration. Others did the same, but placed limits on which laws applied, of time (*e.g.*, of a certain date or event) or nature (*e.g.*, "general nature," "applicable" or "suitable" to America conditions).[130] All of these general measures left it to whoever applied the law—subject, governor or courts—to decide in particular cases whether English or British law applied.[131]

The *raison d'être* of **the** first volume of American reports of cases, Ephraim Kirby's reports for Connecticut, a state where there was no reception statute, was the identification of which British statutes applied in the state.[132] Kirby acknowledged that his reports would not have been feasible had the Connecticut legislature in 1785 not required superior courts to give written reasons for their decisions when pleadings closed in issues at law.[133] Jesse Root, Connecticut's only other reporter in the eighteenth century, likewise thought reports would help show which "laws of England and the civil law … have been incorporated into our own system, and adapted to our own situations and circumstances."[134]

Such piecemeal adjudicatory determination was inadequate for the public. Some states simply repealed all British statutes. In other states, where British statutes were too numerous to repeal *in toto* or to adopt specifically, jurists, sometimes with legislative sanction, and sometimes without, compiled volumes of British statutes that they considered applicable to American

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[130] BROWN, *supra* note 107, at 25-26 lists these in tabular form for the first years of the New Republic and then details them all through her book.

[131] *Cf.,* SAMUEL ROBERTS, A DIGEST OF SELECT BRITISH STATUTES, COMPRISING THOSE WHICH, ACCORDING TO THE REPORT OF THE JUDGES OF THE SUPREME COURT, MADE TO THE LEGISLATURE, APPEAR TO BE IN FORCE, IN PENNSYLVANIA, WITH SOME OTHERS xvi (1817) (noting that the judges' report was not determinative in later legal proceedings whether a particular English statute was in force in Pennsylvania).

[132] EPHRAIM KIRBY, REPORTS OF CASES ADJUDGES IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT FROM THE YEAR 1875 TO MAY 1879 WITH SOME DETERMINATIONS IN THE SUPREME COURT OF ERRORS iii (2d ed. 1898) (1st ed., 1789) ("Our courts were still in a state of embarrassment, sensible that the common law of England, "though a highly improved system," was not fully applicable to our situation; but no provision being made to preserve and publish proper histories of their adjudications, every attempt of the judges, to run the line of distinction, between what was applicable and what not, proved abortive: For the principles of their decisions were soon forgot, or misunderstood, or erroneously reported from memory.— Hence arose a confusion in the determination of our courts; — the rules of property became uncertain, and litigation proportionately increased.") *See* Alan V. Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789,* 16 AM. J. LEGAL HIST. 297, 302-305 (1972). Briceland also describes the difficulties Kirby had financing, producing and distributing the book.

[133] *Id.* at iii-iv.

[134] 1 JESSE ROOT, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS… PREFACED WITH OBSERVATIONS UPON THE GOVERNMENT OF LAWS OF CONNECTICUT … xiv (1798).

conditions.[135] The purpose of these volumes was the same as that of compilations of the states' own statutes. So, wrote the author of a Georgia volume: "Now [the laws] are placed within the power of every man, and all may know the *statute* law of Georgia who chose to read it."[136]

Identifying English common law presented greater hurdles still. In 1837 Justice Story, in a report to the state legislature listed five prerequisites for applying a rule of English common law in Massachusetts: (1) was it was in force at the time of emigration; (2) had it since then remained unmodified by English statutes; (3) was it "applicable to the situation of the colony," (4) had it been "recognized and acted upon"; and (5) "with this additional qualification, that it ha[d] not been altered, repealed, or modified by any of our subsequent legislation now in force."[137] With such strenuous requirements one might assume that little English common law was applicable in Massachusetts.[138] Without an exhaustive examination of early court records and

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[135] Georgia: WILLIAM SCHLEY, A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA (1826);

Kentucky: *Appendix. A Collection of All the Acts of Parliament an Acts of Virginia, of a General Nature, Which Remain in Force in the State of Kentucky, in* 2 THE STATUTE LAW OF KENTUCKY; WITH NOTES, PRÆLECTIONS, AND OBSERVATIONS ON THE PUBLIC ACTS 493 (William Littell, Compiler, 1798);

Maryland: WILLIAM KILTY, A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES …. (1811); JULIAN J. ALEXANDER, A COLLECTION OF THE BRITISH STATUTES IN FORCE IN MARYLAND ACCORDING TO THE REPORT THEREOF MADE TO THE GENERAL ASSEMBLY BY THE LATE CHANCELLOR KILTY: WITH NOTES AND REFERENCES (1870) (2d revised ed. In two vols. by Ward Baldwin Coe, 1912);

North Carolina: FRANÇOIS-XAVIER MARTIN (ED.), A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA (1792)(It was said to be "utterly unworthy of the talents of the distinguished compiler, omitting many important statutes, always in force, and inserting many others, which never were, and never could have been in force …." IREDELL & BATTLE, *supra* 100, at xii);

Pennsylvania: THE REPORT OF THE JUDGES OF THE SUPREME COURT OF THE PENNSYLVANIA OF THE ENGLISH STATUTES, WHICH ARE IN FORCE IN THE COMMONWEALTH OR PENNSYLVANIA; AND OF THOSE OF THE SAID STATUTES WHICH, IN THEIR OPINION, OUGHT TO BE INCORPORATED INTO THE STATUTE LAWS OF THE SAID COMMONWEALTH REPORTED ON THE 19TH AND 20TH OF DECEMBER 1808 (1808); SAMUEL ROBERTS, A DIGEST OF SELECT BRITISH STATUTES, COMPRISING THOSE WHICH … APPEAL TO BE IN FORCE, IN PENNSYLVANIA (1817) (2d ed. by Robert E. Wright, 1847).*See also*, HUGH HENRY BRACKENRIDGE, *Note: Introductory to the Report of the Judges on the British Statutes in Force, &c*. [By an act of Assembly of April 7, 1807] *in* LAW MISCELLANIES …. 39 (1814).

[136] WILLIAM SCHLEY, A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA; … xvii-xviii (1826) ("hence the ignorance of many in regard to this branch of our laws, which was as much out the reach of the people, as were the laws of.")

[137] REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS OR ANY PART THEREOF 7 (1837).

[138] Professor Stoner quoting this passage observes: "To the modern reader, this sounds so qualified as to sever all relation, but Story is merely writing with his customary precision."

printed records, it's difficult to reach definitive conclusions. Suggestive that there was not much is the absence of English common law volumes counterpart to the collections of applicable British statutes.[139] On the other hand, the absence may simply be indicative of uncertainty.[140] In any case, by 1841 the *United States Magazine and Law Review* had had enough. It regretted any carryover of English law: the Founders "should have declared their independence not only of the government, but of the laws of the mother-country."[141]

Whatever was the extent of carryover of English 18th century common substantive law, that carryover does not validate contemporary common law myth of lawmaking judges. At the beginning of the New Republic, common law, whether English or American, if there was such, was understood to be a pre-existing body of rules that judges *discovered* and did not *create*. Judges declared law; they did not make it, so the judges said. Judges found law in long-existing customs, in statutes and in statute-like common law writs. They "pretended" that common law consisted of statutes "worn out by time, their records having been lost."[142] The reports of their decisions were merely evidence of the law and not the law.[143] What Professor Stoner calls "The

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JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 14 (2003).

[139] According to Cook, "Regrettably, no one has attempted to compile a list of received common law rules." CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 12 (1981). Thanks to digitization, I found one nominal exception: CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY, TO WHICH IS PREFIXED A BRIEF SUMMARY OF THE LAWS OF THE UNITED STATES (1822).

[140] *See* SCHLEY, *supra* note 136, at xvii-xviii (1826) Schley lamented that he could not provide the same service for common law: "But the common law is still in some measure unattainable by the people, being as it is, a collection of immemorial customs which are not written like the statute law, but handed down from one generation to another, by the decisions of the court of justice, which are said to be the evidence of the common law, and preserved in the various books of reports and elementary treatises, written by men who have made this subject their particular study. This branch of law then, from its nature, is not susceptible of being placed in a *tangible* form and handed to the people like the statute law; and therefore the General Assembly by giving us the following statutes, have done all they have power to do, unless, indeed, they should be disposed to new model our whole system of jurisprudence, and present us with a new code, *a la mode du code Napoleon*." [Emphasis in original].

[141] *Edward Livingston and His Code, Second Article,* 9 U.S. MAG. & DEMOCRATIC REV. 211, 212 (1841). The article continued: "In consenting to adopt the Common Law as the rule of their civil existence, they brought upon themselves a vast and complicated system, which every year would render more cumbersome and intricate, and demonstrate its utter want of congeniality with the institutions they were about to establish, and the popular spirit and manners destined to grow up under their influence." *Id.*

[142] *See* WALKER, *supra* note 124, at 53.

[143] *See generally, id*. at 53; WILLIAM G. HAMMOND, *Not Delegated to Pronounce a New Law but to Maintain and Expound the Old One,* (note 30) in 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND … EDITED FOR AMERICAN LAWYERS213-226

Great Transformation" to today's world of judges as lawmakers did not come until the second century of the Republic. Stoner dates it to the publication in 1881 of Oliver Wendell Holmes book, *The Common Law*.[144]

Development of contemporary common law could hardly have come much sooner. The prerequisites were lacking. Common law pleading and the lack of modern common law bibliographic tools stood in the way. The system of common-law pleading used in England, and when copied in America, discouraged lawyers from urging judges to make law. Pleaders had to make a single issue of law or of fact determinative of the court's decision. If they sought to make new law through interpretation and failed, they lost the case.[145] Wise pleaders would seek to make new law only when absolutely necessary and then still describe the decision sought as applying old law. Moreover, much "new law" that courts made worked not to reform substantive law and justice, but to expand their own jurisdiction.[146]

IV. BUILDING A GOVERNMENT OF LAWS

A government of laws rests on institutions. In the first century of the Republic Americans looked to written laws—constitutions and statutes—to build those institutions. They adopted statutes to guide society. They taught their children and each other about those statutes. They used those statutes—without judicial intervention—to apply law.

A. A CENTURY OF WRITTEN CONSTITUTIONS

Before there was the Declaration of Independence there was what Professor Gordon S. Wood calls "the real declaration of independence:" the resolution of the Second Continental Congress of May 10 and 15, 1776 authorizing and encouraging the states—then still colonies—to create new governments and state constitutions.[147] The Founders were serious about creating a government of laws.

By 1780 all but two states (Connecticut and Rhode Island) had followed the recommendation of the Continental Congress and had adopted

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(William G. Hammond, ed., 1890); EUGENE WAMBAUGH, THE STUDY OF CASES 75-80 (2d ed., 1894); *see also* STONER, *supra* note 138, at 3 and 11.

[144] STONER, *supra* note 138, at 25-29. *See also*, Vanderlinden, supra note **, at 17-18.

[145] *Cf.*, THEODORE F.T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 3-4 (1922) (observing of 14th century pleading, "there were circumstances under which a clever pleader would offer up … puzzling points, for the simple reason that he had no better matter to advance. Judges, however, were men of plain common sense, and not infrequently put an abrupt end to such attempts to 'embarrass the court,' whereupon the ingenious pleader would immediately offer to take issue on some simple matter of fact.").

[146] *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 43, 103, 107 (1768) (accepting as irrebuttable plea that contract was made in England in order to give common law court over jurisdiction of civil law court). *See* Louisa Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L. J. 1, 5-9 (1990).

[147] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 132 (1969).

written constitutions. Americans did not stop adopting constitutions then. In 1782 they adopted the Articles of Confederation and, when those Articles proved inadequate, in 1787 they convened to create the Constitution of the United States. When new states joined the Union, they adopted their own constitutions. When state constitutions fell behind the times, states amended or replaced them. In 1876, coincident with the centennial of independence, the United States Senate ordered publication of the states' constitutions to that date. The collection required two over-sized volumes of more than 2100 pages.[148] By 1887, the centennial of the drafting of the U.S. Constitution, by one count, the United States had adopted one hundred four state constitutions (including Connecticut and Rhode Island) and two hundred and fourteen partial amendments.[149] Americans in the first century of the Republic were serious about building governments of laws.

Conventional wisdom today, in the shadow of contemporary common law myth, holds that constitutional changes are a bad thing.[150] But in the nineteenth century amendments were thought to be essential for improvement.[151] Legal educator and judge George Sharswood may have had that in mind when in 1860 on the eve of the Civil War he wrote: "How sublime a spectacle it is to behold a great nation … engaged peacefully and calmly in considering, and determining by the light of reason and experience those deeply interesting and exciting questions which in other countries and other

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[148] THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES, 2 vols., (Ben Perley Poore, compiler, 1877). Poore's collection was updated by THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA COMPILED AND EDITED UNDER THE ACT OF CONGRESS OF JUNE 30, 1906 BY FRANCIS NEWTON THORPE (7 vols. 1909). These volumes are searchable on a number of Internet sites.

[149] Henry Hitchcock, *American State Constitutions: A Study of Their Growth* 13-14 (1887).

[150] *See* Lawrence M. Friedman, *State Constitutions in Historical Perspective*, in STATE CONSTITUTIONS IN A FEDERAL SYSTEM, 496 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 33, 35 (1988). Conventional wisdom may be changing: leading jurists, including Supreme Court justices, have called for constitutional amendments in light of lawmaking failures. *See, e.g.*, PHILIP K. HOWARD, RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT 179-183 (2014) (proposing a "Bill of Responsibilities" consisting of five amendments); JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014); THOMAS E. BRENNAN, THE ARTICLE V AMENDATORY CONSTITUTIONAL CONVENTION: KEEPING THE REPUBLIC IN THE TWENTY-FIRST CENTURY (2014).

[151] JOHN ALEXANDER JAMESON, THE CONSTITUTIONAL CONVENTION; ITS HISTORY, POWERS AND MODE OF PROCEEDING § 81, 80 (3d ed., 1873). The first edition appeared in 1867; the 4th and last, in the centennial year of the U.S. Constitution, 1887. I cite the third edition as the one just before the 1876 Centennial. *See* Roman J. Hoyos, *A Province of Jurisprudence?: Invention of a Law of Constitutional Conventions, in* LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE 81 (Angels Fernandez and Markus D. Dubber, eds., 2012).

ages not far remote were settled on the battle-field or in more terrific scenes of domestic revolution."[152]

In the decade of the 1860s, the United States adopted what has sometimes been called "the second constitution," *i.e.*, the Civil War amendments, the 13th, 14th and 15th amendments.[153] They (finally) abolished the scourge of slavery from the country. But the United States had to settle these issues on the battlefield.

At century's end, in 1897 James Schouler, newly elected president of the American Historical Association and law treatise writer, in his inaugural address, proposed "A New Federal Convention" to change the Constitution. Schouler contrasted the absence of "constructive statesmanship" in the federal constitution with amendments of state constitutions where one could see "American ingenuity still at work." He proposed that the convention consider, among other issues, "improved modes of federal legislation."[154]

In the 19th century Americans used constitutional conventions to change their framework laws. Constitutional conventions were so common—192 by 1876—that John Alexander Jameson wrote a 684-page treatise on their "history, powers and modes of proceeding." His book appeared in four editions from 1867 to 1887.[155] At a time of general legislative stinginess, the people or their representatives repeatedly brought expensive conventions into being.

There was a less-expensive alternative: unwritten constitutions—a mix of judge-made law and interpreted statutes—as was the case in England. Yet in the United States, all constitutions save two in early Connecticut and Rhode Island have been written. Why? According to Jameson for the same reasons that one might prefer statute law to common law. "Precisely the same distinction exists between written and unwritten Constitutions":

> An unwritten Constitution is made up largely of customs and judicial decisions, the former more or less evanescent and intangible …; and the latter composing a vast body of isolated cases having no connecting bond but the slender thread of principle running through them, a thread often broken, sometimes recurrent, and never to be estimated as a whole but by tracing it through its entire course in the thousand volumes of law reports.[156]

"Not so with written Constitutions," he continued. Such constitutions are "statutes merely." Like well-written statutes, they can reduce the ground for interpretation; they cannot and should not eliminate all interpretation.

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[152] SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 4, 443 n. 4, 646 (George Sharswood ed., 1860).

[153] *See, e.g.*, GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (2007); JAMES R. STONER, JR., COMMON LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 1 (2003).

[154] James Schouler, *A New Federal Convention*, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 19, 24, 28 (1898), also separately printed and so available on Google, and reprinted in JAMES SCHOULER, IDEALS OF THE REPUBLIC 289 (1908).

[155] The count is from the fourth edition of JAMESON, *supra* note 151 at 655.

[156] JAMESON, *supra* note 1151, at 76.

"The field thus provided for construction," Jameson wrote, "though infinitely narrower than in unwritten Constitutions, is still ample, for a Constitution can only deal in generalities, whereas its application to particular cases is precisely that which must daily be determined."[157]

In discussing the difference between applying a written constitution and applying an unwritten one, Jameson made a perceptive point that pertains equally to the difference between applying statute and case law. Applying unwritten law adds an extra and difficult step: "the duty of those who construe a written Constitution is merely, first, to ascertain the meaning of the general clause of it covering the case; and, secondly, to determine its application to the particular facts in question." In interpreting an unwritten constitution, "this inquiry must be prefaced by another still more difficult [task] …; it first inquires what the terms of the law are and then proceeds to determine their meaning and application."[158] That extra step undercuts self-application of law.

Jameson saw written constitutions as inhibiting judge-made law: "If judicial legislation is an evil, written Constitutions are clearly barriers in the way of its progress." But "how far are they advantageous on the whole?"[159] He agreed with Jefferson that an important benefit is that "they fix... for the people the principles of their political creed."[160] He saw the major drawback in inflexibility of amendment. Constitutions required efficient mechanisms for amendment, which are neither too restrictive nor too lax.[161]

B. A Century of Constitutional Conventions

State constitutions are just one place to look for American views of statute law and common law. The debates that gave rise to them are goldmines for exploring American legal culture.[162] People cared about their constitutions. In Pennsylvania they cared so much that they published the proceedings of the convention begun in 1837 in fourteen volumes in English *and* in an additional fourteen volumes in German translation![163] Use of written or

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[157] *Id.*
[158] *Id.* at 77.
[159] *Id.* at 78.
[160] *Id.* at 78 (quoting Letter to Dr. Priestly, 4 *Works* at 441).
[161] *Id.* at 80-81.
[162] *Cf.*, WILLIAMJAMES HULL HOFFER, TO ENLARGE THE MACHINERY OF GOVERNMENT: CONGRESSIONAL DEBATES AND THE GROWTH OF THE AMERICAN STATE, 1858-1891 x (2007) ("one finds a treasure trove of thinking about the nature and function of government embedded in the debates on particular pieces of legislation."). *See* James R. Maxeiner, *Bane of American Forfeiture Law: Banished at Last?*, 62 CORNELL L. REV. 768 (1977) (using Congressional debates over the Civil War confiscation acts to gain insights into contemporary forfeiture law).
[163] PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION COMMENCED AND HELD AT HARRISBURG ON THE SECOND DAY OF MAY, 1837 (John Agg, compiler, 14 vols. 1837-1839), hereafter PENNSYLVANIA 1837-1839 PROCEEDINGS, *published in German as* VERHANDLUNGEN UND DEBATTEN DER CONVENTION DER REPUBLIK PENNSYLVANIEN UM

unwritten law arose in such disparate issues affecting legal methods as incorporation by reference of foreign law,[164] constitutional mandates for codification of state laws,[165] length of legislative terms,[166] judicial life tenure,[167] election of judges,[168] and Supreme Court judges' circuit riding.[169]

Into these debates scholars today can dig from their desktops to uncover buried gold. The California Convention of 1849 is a particularly rewarding dig because contemporaries throughout the nation saw California government as a national achievement accomplished by the tens of thousands of Americans from around the country who settled California in only two years. Looking back in 1881 legal educator William G. Hammond recalled: "That wonderful state was the first to grow up to full maturity almost in a night and to create a judiciary, a bar, and the entire organization of the state government, of men suddenly brought together from all parts of the continent."[170]

VERBESSERUNGEN ZU DER CONSTITUTION VORZUSCHLAGEN, ANGEFANGEN UND GEHALTEN ZU HARRISBURG, AM ZWEITEN MAI, 1837 (14 vols., 1837-1839).

[164] Thoroughly researched with respect to English statutes in the pre-digital age is ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836 (1964). Several Constitutions incorporate by reference English common law and statutes up to a particular time. Louisiana constitutions have prohibited adoption of foreign law. *See* text at 220-21, *infra*.

[165] *See* text at 232-34, *infra*.

[166] *See* text at 232-34, *infra*.

[167] *E.g.*, 10 PENNSYLVANIA 1837-1839 PROCEEDINGS, *supra* note 163, at 195-204 (remarks of Mr. Read) (arguing that life tenure had not worked well, gave judges "despotic power," allowed them to "change the law according to their own caprice," at 201; permitted them to "unblushingly avow their determination to *make law*" and disregard "the plainly expressed intention of the *legislature*, at 202; and leading to "a glaring usurpation of legislative power," at 203).

[168] *Id*. at 159, 162 (Remarks of Mr. Biddle) (arguing that election of judges would threaten "that uniform and consistent symmetry, which should exist in a system of laws, and which is so essential in the administration of justice.").

[169] *E.g.*, REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN. 1850, at 640 (1850) (remarks of Mr. Goodwin) (arguing against the asserted benefits of judges of the Supreme Court holding local circuit courts to obtain popular sentiment: "The application and construction of the laws and the construction of statutes are neither of them to be determined or aided by popular sentiment and popular impulses, as has been in fact suggested. The interpretation of statutes is to be ascertained from the statutes themselves, and those rules of construction which reason and good sense have established; and the rules of the common law are to be determined by the investigation of its principles and reasons, in reports and other books of authority, and the exercise of sound judgment in their application to facts as they are presented, and circumstances as they arise in the progress of things. The judges are not to make the law, but to determine what it is, and apply it to the case presented.").

[170] WM. G. HAMMOND, AMERICAN LAW SCHOOLS IN THE PAST AND IN THE FUTURE 5 (1881). Hammond elaborated: "Its law and practice were constructed from materials gathered in every state of the union." *Id*. It modeled its Constitution on the New York Constitution of 1846 and the Iowa Constitution of 1844.CARDINAL GOODWIN, THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA 1846-1850, at 230-46 (1914). California considered adoption of Civil Law, but chose "American common law." *Report on Civil and Common*

Reading the 1849 California debates one finds nuggets. One is whether the California constitution should incorporate, in deviation from the English common law rule, the then new rule of modern American statutes of separate property for married women. Conditions in California made the issue ripe for challenge since existing law was not the English common law of coverture (no separate property) but the Mexican civil law (of separate marital property rights).

One proponent of separate property promoted it as one of "many excellent provisions in the civil law" that had been the "law of the land" under which "native Californians" had "always lived."[171] Another recommended it as a practical way to get women to immigrate to California: "It is the very best provision to get us wives that we can introduce into the Constitution."[172] Still another attacked the English common law rule as having its origin "in a barbarous age;" in the "nice distinctions of the common law," "the principle so much glorified" was "that the husband shall be a despot, and the wife shall have no right but such as he chooses to award her."[173]

Advocates of English common law coverture countered: "we tread upon dangerous ground when we make an invasion upon that system which has prevailed among ourselves and our ancestors for hundreds and hundreds of years."[174] They made a nationalist argument: "The great mass must live under the common law. It would be unjust to require the immense mass of Americans to yield their own system to that of the minority."[175]

Still others defended the substance of the English common law rule itself: "there is no provision so beautiful in the common law, so admirable and beneficial, as that which regulates this sacred contract between man and wife. … Nature did what the common law has done—put [wife] under protection of man."[176]

Opponents made the methodological argument that it would be better to try the new rule as a statute that the legislature could revise or repeal if experiences were adverse.[177] Proponents of separate property used the debate over separate property to make their own methodological arguments against adopting English common law of any kind. One said: "Sir, I want no such system; the inhabitants of this country want no such system; the Americans of this country want no such thing. They want a code of simple laws which

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Law, 1 REPORTS OF CASES … IN THE SUPREME COURT OF THE STATE OF CALIFORNIA 588 (1851). In 1872 California adopted Field's five codes.

[171] J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849 at 258 (1850) (remarks of Mr. Tefft).

[172] *Id.* at 259 (remarks of Mr. Halleck).

[173] *Id.* at 264 (remarks of Mr. Jones).

[174] *Id.* at 257 (remarks of Mr. Lippitt).

[175] *Id.* at 260-61 (remarks of Mr. Lippitt).

[176] *Id.* at 259 (remarks of Mr. Botts).

[177] *Id.* at 258 (remarks of Mr. Lippitt).

they can understand; no common law, full of exploded principles with nothing to recommend it but some dog latin, or the opinions of some lawyer who lived a hundred years ago."[178]

In short, said this proponent of statute law: "They want something the people can comprehend." He explained that: "the law is the will of the people properly expressed, and that the people have a right to understand their own will and derive the advantage of it, without going to a lawyer to have it expounded."[179]

One delegate, reared in common law religion, reacted in shock: "for the first time in my life, to hear the common law reviled; yes sir, that which has been the admiration of all ages … has been in this House, this night, spoken of with contempt and derision."[180]

The Convention voted with the proponents of statute law and against a substitute proposal that would have retained common law coverture.[181]

The married women's property rights issue was not the only instance when the Convention weighed use of written versus unwritten law. It considered whether it had authority to appoint a commission of three persons to form a code of laws to be submitted to the legislature at its first session. In the end, it tabled the motion, but in consequence directed that the legislature meet every year and not every other year as the motion's proponent favored.[182]

C. A CENTURY OF STATUTES

A government of laws is a government of written laws, *i.e.*, statutes. Statutes are inevitable in modern government. Statutes are how modern societies democratically decide what they shall do. Statutes are how democracies inform people and guide their officials. Statutes are the people's directions for modernization: they throw out the old and bring in the new. In the first century of the Republic statutes drove out English law; statutes gave the American people new and better rules.

1. Necessity of Statutes

Were there only a constitution establishing a government, but no statutes to structure the government and to guide governing, there would be a

[178] *Id*. at 264 (remarks of Mr. Jones).

[179] *Id*. The speaker continued: "Where is this common law that we must all revert to? Has the gentleman from Monterey got it? Can he produce it? Did he ever see it? Where are the ten men in the United States that perfectly understand, appreciate, and know this common law? I should like to find them. When that law is brought into this House—when these thousand musty volumes of jurisprudence are brought in here and we are told this is the law of the mass—I want gentlemen to tell me how to understand it. I am no opponent of the common law, nor am I advocate of he civil law. Sir, I am an advocate of all such law as the people can understand." *Id*.

[180] *Id*. at 268 (remarks of Mr. Botts).

[181] *Id*. at 269.

[182] *Id*. at 76-82, 301-04, 322.

government of men. Precedents cannot create institutions. Precedents can sometimes determine who was right in the past, where there is general agreement on what is right, but not what is better policy for the future. Precedents assume existing institutions; they cannot create new ones. Precedents assume consensus; they cannot legitimate commands where consensus is absent.

Written statutes are a corollary to written constitutions.[183] American legislatures lost no time adopting statutes. Virginia led in the New Republic thanks to Jefferson, but was not alone. Legislatures passed statutes on just about any imaginable subject. By the 1840s, according to one civics text, "Almost every transaction of life is regulated by laws." [184]

Written laws can be difficult of adoption. That is well recognized. Written laws are difficult of drafting. That is not so well recognized. The public assumes that it is easy to write good laws. Many lawyers, judges and academics share that false assumption. Many scholars outside law assume it is. They can dismiss a decision not to write new law on political grounds when, in fact, technical reasons or lack of manpower may stand in the way.

Legislation is more demanding than litigation. It is harder to make good laws than it is to decide individual cases, for in lawmaking one is deciding classes of cases for the future. 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.

Good laws, on the other hand, make provision for not one case, but for all cases, even though lawmakers know that they cannot anticipate all cases. Good laws capture in a few understandable words what people are to do. Good laws are consistent internally and consistent with other laws. John Austin saw that this, "the technical part of legislation, is incomparably more difficult than what may be styled the ethical.[185]

The "American Jurisprudence" essay of *The First Century of the Republic* cheerfully characterized organized American legislation as four tones sounding together to make the "common chord" of the "ear of 1876": (1) divine authority underlying human law, (2) willingness to obey the present existing law, (3) confidence in ability to improve the forms and modes of

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[183] *Cf.* TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW, DESIGNED AS A FIRST BOOK FOR STUDENTS (1st ed., 1837 ("our constitutional law has been codified to the admiration of the world, while that of England still remains unwritten, a heavy mass of doubtful precedents. … Again, the criminal law both of the United States, and of our own state [Ohio], has been likewise codified."). The last, 11th edition, appeared in 1905.

[184] SAMUEL G. GOODRICH, THE YOUNG AMERICAN: OR BOOK OF GOVERNMENT AND LAW; SHOWING THEIR HISTORY, NATURE, AND NECESSITY. FOR THE USE OF SCHOOLS. 35 (8th ed., 1847).

[185] 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).

law as growth warranted, and (4) a resolute purpose to make that improvement in due season.[186] The "Law in America: 1776-1876" essay of *The North American Review* affirmatively concluded that three headings captured how American law in the past century had progressed to become "(1) more simple, (2) more humane and (3) more adaptive."[187]

The First Century of the Republic didn't give details. Even in a single jurisdiction that would be impossible in a brief and accurate epitome. "In our country such difficulty is increased by the consideration that the law in all its details differs exceedingly in different States. … Hence in matters of law it is not possible to give concise, simple answers, which shall be accurate, to even the simplest questions."[188]

Each state had (and has) its own books of statutes and, eventually, its own books of reports. In 1876, *The First Century of The Republic* estimated, that just the volumes in then current use, including statutes, reports, treatises and journals, counted more than three thousand volumes. That count took no account of the multitude of legislative materials appearing separately in small pamphlets and addressed again and again in successive revisions and reenactments.

The outpouring of legislative materials in America to 1876 already was enormous. In 1906 the State Library of Massachusetts published a "Hand-List" of statute law in which it made "the effort to record every legislative session and every volume containing session laws or revisions and compilations of law." It disclaimed completeness. It chose to publish a "Hand-List" and not a catalogue, since the latter was foreclosed by time and cost. The *Hand-List* included only a few non-official materials, *e.g.*, contemporaneous or historic discussions of statutes. Yet, so limited, the list is more than six hundred pages long and includes more than 10,000 entries.[189]

Behind each entry is a statute—or more commonly several or even many statutes—to which a legislature devoted hours, days, weeks, months or even years of attention. One page of a statute, even a hastily drafted one, is likely to have required more human attention than one page of case report. Yet common law myth acknowledges only the latter and ignores the former.

2. Progress with Statutes

What did all these statutes address? In the first century of the Republic new statutes had two principal tasks: changing existing rules, often originating in England, and creating new rules to deal with a modern world.[190]

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[186] THE FIRST CENTURY OF THE REPUBLIC at 434.

[187] *Law in America: 1776-1876,* 122 NORTH AM. REV. at 191.

[188] *Id.*

[189] STATE LIBRARY OF MASSACHUSETTS, HAND-LIST OF LEGISLATIVE SESSIONS AND SESSION LAWS, STATUTORY REVISIONS, COMPILATIONS, CODES, ETC., AND CONSTITUTIONAL CONVENTIONS (1912).

[190] Along similar lines, but asserting a dominant though not exclusive role for unwritten law, see E.W. [presumably Emory Washburn], *We Need a Criminal Code,* 7 AM. L. REV. 264 (1872) ("In a community like ours, whose chief characteristic may be said to be

a. Replacing English Law with American Statutes

It should be no surprise that Jefferson sought to get rid of English law.[191] American legislatures followed Virginia's lead and by statutes overturned the heart of English common law: property law, criminal law and procedure. Here is a partial list:

- Statutes, not precedents, ended English common law tenures and created modern ones.
- Statutes, not precedents, abolished English common law coverture and created married women's property rights.
- Statutes, not precedents, ended English descents and created modern ones.
- Statutes, not precedents, ended English criminal law and created criminal codes.
- Statutes, not precedents, ended English criminal procedure and created counsel-based criminal trials.
- Statutes, not precedents, ended common law pleading and created code pleading.

In other words, Americans could look at their statutes with pride, as one Ohioan did: "if our legislation has been excessively variable and fluctuating … it has at least the merit of doing away many of the abuses which have come down to us with the common law, by introducing simplicity in the place of technicality."[192]

b. New Rules for a Modern World

Getting rid of old law alone was not enough to create the new American order that rapid changes in life the 19th century demanded. The first century of the Republic required new laws. Early in the 19th century America began making new laws needed for a modern economy of national travel, fast communication, mass production, national markets and national corporations, in which people could make their own choices. The Centennial Writers saw that. Common law myth, already in the early 20th century, held that Americans should thank judges for the "vast body of jurisprudence … built up to meet these new and unexpected conditions of society."[193] Modern American law was, according to the myth, "the work of the judges and the lawyers,

progress, new demands are constantly requiring to be supplied by new laws or modifications of old ones, where changes are steadily wrought in the body of the system, sometimes by legislation, and at others, far more frequently, by that all –pervading sentiment whose power courts recognize as one of the chief sources of a people's unwritten law.").

[191] Virginia by Act of December 27, 1792 ended application of British statutes that the revisal had not included in its text. HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, OLIVER WENDELL HOMES DEVISE HISTORY VOLUME II, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815, 562 (1981).

[192] *Ohio Legislation*, 11 AM. JURIST & L. MAG. 91, 100 (1834).

[193] William B. Hornblower, *A Century of Judge-Made Law, Address Before the School of Law of Columbia University, June 16, 1907*, 7 COLUMBIA L. REV. 453 (1907).

aided or interfered with only occasionally by statutory provisions."[194] Yesterday's myth is today's conventional wisdom. One text writes, "Antebellum judges dethroned the English common law by Americanizing it."[195] A noted monograph takes as its point of departure: "Especially during the period before the Civil War the common law performed as great a role as legislation in underwriting and channeling economic development."[196]

That was not the view of the Centennial Writers.[197] It was not the view of a leading common law proponent a century ago. In 1908, Harvard Law School, basking in the teaching triumph of the case method, was the epicenter of emerging American common law myth. Yet Cambridge icon Professor Charles Warren in discussing "The New Law: 1830-1860" in his semi-official history of Harvard Law School, even as he paid homage to the role of common law, gave first credit and greater attention to "the simplification of the law by codes and statutary [*sic*] revisions, *for the benefit of laymen as well as lawyers*."[198]

In twenty of twenty-five pages in his *New Law* chapter, Warren catalogued changes in fifteen areas of law: mill act and watercourse law, the law of torts, telegraph law, gas corporation law, street railway law, grain elevator law, insurance law, patent law, copyright law, trademark law, insolvency and bankruptcy law, labor law, married women, criminal law, and the law of evidence. In each of these entries, judges appear as handmaidens to statutes, if they appear at all. Expanding on Warren's list and considering the reports of the Centennial writers, the following seem to be true:

- Statutes, not precedents, created the post office and provided for carrying the mails.
- Statutes, not precedents, created corporations.
- Statutes, not precedents, created common schools, and provided for educating children.
- Statutes, not precedents, governed distribution of public lands.
- Statutes, not precedents, created state land-grant colleges.
- Statutes, not precedents, regulated trade in alcohol and explosives, sometimes controversially ("license laws").
- Statutes, not precedents, guarded the public health, *e.g.*, authorized quarantines.

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[194] *Id.* For an extreme statement from the 20th century, see J.A. Corey, *Book Review,* 9 CANADIAN J. ECONOMICS & POL. SCI. 265, 266 (1953) (there was "only an infinitesimal amount of law-making by legislatures until after the middle of the nineteenth century").

[195] KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 109 (1989). In the posthumous second edition of Hall's work (2008), successor author Peter Karsten deletes the quoted sentence and writes instead "To a certain extent, American jurists in the first century of the 'new nation' altered or 'Americanized" some English common law."

[196] MORTON J. HORWITZ, TRANSFORMATION OF AMERICAN LAW 1780-1860, at 1 (1977).

[197] *See* THE FIRST CENTURY OF THE REPUBLIC at 451-52 (a "Brief Retrospect" listing many areas where America had achieved "systems of laws.").

[198] *Id.* at 234 [emphasis added].

- Statutes, not precedents, regulated navigation and merchant seamen.
- Statutes, not precedents, created taxes and provided for tax collection.
- Statutes, not precedents, created new government offices.
- Statutes, not precedents, created election laws.
- Statutes, not precedents, created protections for civil rights.
- Statutes, not precedents, governed immigration.
- Statutes, not precedents, infamously constrained internal emigration (fugitive slave laws).
- Statutes, more than precedents, regulated and protected the public in steamboat and railroad traffic.
- Statutes, more than precedents, regulated and protected the public in markets.

America could and did legislate. The first century of the Republic and its *Golden Age of American Law*[199] was itself an "Age of Statutes."

D. A Century of Common Schools

Contemporary common law myth holds that following the American Revolution "The content and method of the common law were absorbed into American social culture and have never been displaced."[200] Modern legal historians claim that "It was as clear to laymen as it was to lawyers that the nature of American institutions, whether economic, social or political, was largely to be determined by judges."[201] Digitization challenges the idea that the American people preferred common law rules and judge-made law over statutes.

As already discussed, digitization demonstrates that the people through their legislatures discarded the content of common law, *i.e.*, property law, criminal law and procedure. Digitization discloses no public demand for common law. Where would one look to find common law incorporated in the social culture? One should not look in pre-digital law libraries with their endless rows of unread case reports and dry treatises. One might better look in ephemeral popular works of the 19th century retained in only a few public or university libraries, but now largely available through digitization. If common law and judge-made law really were absorbed into American social culture in our first century, one would expect to find them in the works through which Americans' ancestors passed on their governmental culture to the next generation: civics texts, patriotic addresses, popular political works and the like. One doesn't. Those works, by and large, passed on a culture of a government of laws not of precedents.

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[199] *Cf.*, Charles M. Haar (ed.), The Golden Age of American Law [1820-1860] (1965).
[200] Graham Hughes, *Common Law Systems, in* New York University School of Law, Fundamentals of American Law 9, 12 (Alan Morrison, ed. 1996).
[201] Horwitz, *supra* note 196, at 2 (*quoting* Mark De Wolf Howe, *The Creative Period in the Law of Massachusetts*, 69 Proceedings of the Massachusetts Historical Society 237 (1947-1950)).

1. Common Schools

American public schools—first called common schools—are largely an innovation of the first fifty years of the 19th century. Beginning already in colonial times in Massachusetts, they gradually spread throughout the land. Jefferson made the establishment of public schools a central part of his Revisal. Slave states were slower than were free states in making public education available. Civics had a central role in the newly-established common schools. The American Revolution was about self-governing. Since the Revolution Americans have taken interest in providing for the education of the people in the workings of their government. James Wilson reports that already the first assembly of Pennsylvania adopted an act "for teaching the laws in the schools."[202]

2. Civics Texts for Common Schools

American civics texts date to the introduction of universal public education in the first half of the nineteenth century.[203] They were central to achieving the mission of the newly forming common schools, *i.e.*, public schools: to educate youth as private citizens who would in public life take responsibility for government and administer its laws.[204] When in 1819 New York promoted public schools, the state's Superintendent of Common Schools recommended that the "course of study in every well organized common school, ought to embrace … "the history of our own country, its constitution and form of government, the crimes and punishment which form our criminal code, and such parts of our civil jurisprudence as every man in his own daily intercourse with the world, is concerned to know."[205] In laying out his plans, he lamented that there was yet no proper book for this. He expressed hope that soon a "suitable" one would be available. It took more than a decade for his hope to be fulfilled, but by the 1830s there were a dozen or more candidates for common schools to choose from.[206] In the 1840s yet another dozen or so came on the

[202] 1 WILSON, *supra* note 95, at 420.

[203] Of his proposals for new legislation in his Revisal, Jefferson was especially 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.

[204] INSTRUCTIONS FOR THE BETTER GOVERNMENT AND ORGANIZATION OF COMMON SCHOOLS, PREPARED AND PUBLISHED PURSUANT TO A PROVISION IN THE ACT FOR THE SUPPORT OF COMMON SCHOOLS, PASSED APRIL 12, 1819, at 3, 6 (Gideon Hawley, Superintendent of Common Schools, 1819).

[205] *Id.* at 4.

[206] Authors included: Arthur J. Stansbury (1828), Alexander Maitland (1829), Andrew Yates (1830), William Sullivan (1831), Samuel C. Atkinson (1832), William Alexander Duer (1833), Edward D. Mansfield (1834), Joseph Story (1834), Francis Fellowes (attributed, 1835), John Phelps (1835), Andrew W. Young (*Introduction to the Science of Government*, 1835), Alfred Conkling (1836), and Marcius Willson (1839). Young's book had more than twenty editions.

market.[207] Some of these and new similar books provided America's civics texts to 1876.

These books do not teach common law content or judge-made law.[208] These books do teach a government of laws, not of men. They instruct in legislation not litigation. Their laws are statutes not precedents. One of the first of the then new books, Arthur J. Stansbury's *Elementary Catechism on the Constitution of the United States for the Use of Schools* (1828) boasts: "Let every youthful American exult that he has no master but the law."[209] *The Young American* (first edition, 1842), written by S.G. Goodrich, author of the popular Peter Parley children's books series, uses illustrations to show the progress from the customs of "The Savage State" to the written laws and civil government of "The Civilized State." The book explains the alluring illustrations:

> Among savages, there are no written or printed laws. The people have certain customs and if disputes arise, they are settled according to these. …
>
> [Barbarous states] are still without books in general use, without education among the people at large, without printed laws….
>
> [In Civilized States] laws are enacted to secure to each individual the acquisition of his labor, skill and exertion.[210]

A consistent theme of the civics texts is that governments and written laws are essential features of society. Goodrich's text is explicit already in its subtitle: *Book of Government and Law: Showing Their History, Nature and Necessity*. The other books are no less explicit in their texts. William Sullivan's *Political Class Book* (1830) teaches that "[a]n extensive and varied society … *could not go on* without established laws, and a faithful observance of them."[211] Andrew White Young's *Introduction to the Science of Government* (first edition, 1835), the book most frequently issued, teaches that "government and laws are necessary to social beings," and warns that "[w]ithout laws, there would be no security to person or property; the evil passions of men would prompt them to commit all manner of wrongs against

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[207] Following in the 1840s came new books by James Bayard (1840), Joseph Story (1840), A. Potter (1841), S.G. Goodrich (3d ed. 1843), Charles Mason (1843), Andrew W. Young (*First Lessons in Civil Government*, 10th ed. 1843), Thomas H. Burrows (1846), J.B. Shurtleff (1846), Daniel Parker (1848), and Joseph Bartlett Burleigh (1849).

[208] Because these have little entered the legal discussion, I detail them more than other primary sources of this article.

[209] J. STANSBURY, ELEMENTARY CATECHISM ON THE CONSTITUTION OF THE UNITED STATES FOR THE USE OF SCHOOLS 18 (1828).

[210] GOODRICH, *supra* note 184, at 14, 15, 22.This is the edition available on Google Books and appears to be the last. The first edition is from 1842.

[211] WILLIAM SULLIVAN, POLITICAL CLASS BOOK: INTENDED TO INSTRUCT THE HIGHER CLASSES IN SCHOOLS IN THE ORIGIN, NATURE, AND USE OF POLITICAL POWER. WITH AN APPENDIX UPON STUDIES FOR PRACTICAL MEN; WITH NOTICES OF BOOKS SUITED TO THEIR USE BY GEORGE B. EMERSON 19 (1830).

each other, and render society, (if society can be said to exist without law,) a scene of violence and confusion."[212]

Government is by statutes. That was textbook learning. Goodrich's text explains:

> The system or form of government of the United States, is prescribed in a written constitution, sanctioned by the people. The statutes are the laws enacted by congress, agreeably to this constitution. The administration consists of the president of the United States, his secretaries, &c.[213]

Other texts likewise teach that a government of laws is a rule of laws that guides ruled and rulers alike. So J.B. Shurtfleff's *The Governmental Instructor* (first edition 1845) instructs "[i]n order to aid the chief ruler in ruling in accordance with the wishes of the people, most nations, in modern times, have adopted a *Constitution* and *Code of Laws*, which they have bound themselves to obey, and by which the ruler has bound himself to govern."[214]

A law is a legislatively adopted statute. Later editions of Young's text put it this way: "Law, as the word is generally used, has reference to the government of men as members of the body politic; and signifies an established rule, prescribed by a competent authority in the state, commanding what its citizens are to do, and prohibiting, what they are not to do."[215] John

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[212] ANDREW W. YOUNG, INTRODUCTION TO THE SCIENCE OF GOVERNMENT, AND COMPEND OF THE CONSTITUTIONAL AND CIVIL JURISPRUDENCE; COMPREHENDING A GENERAL VIEW OF THE GOVERNMENT OF THE UNITED STATES AND OF THE GOVERNMENT OF THE STATE OF NEW YORK: TOGETHER WITH THE MOST IMPORTANT PROVISIONS IN THE CONSTITUTIONS OF THE SEVERAL STATES ADAPTED TO PURPOSES OF INSTRUCTION IN FAMILIES AND SCHOOLS 18, 20 (2d ed. 1836). This is the version available on Google Books. The first edition's title from 1835 shows even better that it was teaching a world of written law. Its title: INTRODUCTION TO THE SCIENCE OF GOVERNMENT, AND COMPEND OF THE CONSTITUTIONAL AND STATUTORY LAW. The book went through at least twenty-five editions.

Young may have conquered the market. He subsequently brought out a book for younger students (age 10) and books for older students. The latter included one on comparative government and several books on political history for older students. One book was marketed nearly twenty-five years after his death in 1877. THE GOVERNMENT CLASS BOOK: A MANUAL OF INSTRUCTION IN THE PRINCIPLES OF CONSTITUTIONAL GOVERNMENT AND LAW (1901 ed. by Salter S. Clark).

[213] GOODRICH, *supra* note 184, at 22.

[214] J.B. SHURTLEFF, THE GOVERNMENTAL INSTRUCTOR, OR A BRIEF AND COMPREHENSIVE VIEW OF THE GOVERNMENT OF THE UNITED STATES, AND OF THE STATE GOVERNMENTS, IN EASY LESSONS, DESIGNED FOR SCHOOLS (4th ed., 1846) [emphasis in original]. This is an edition available on Google Books. The first edition is from 1846; the last is from 1871. There was even an edition for German-language schools: DER KLEINE STAATSMANN, ODER, EINE KURZE UND UMFASSENDE UEBERSICHT DER REGIERUNG DER VEREINIGTEN STAATEN UND DER STAATEN-REGIERUNGEN: AUF EINE LEICHT UND FASSLICHE ART DARGESTELLT ZUM GEBRAUCH FÜR SCHULEN (New York, 1845).

[215] ANDREW W. YOUNG, INTRODUCTION TO THE SCIENCE OF GOVERNMENT, AND COMPEND OF THE CONSTITUTIONAL AND CIVIL JURISPRUDENCE OF THE UNITED STATES WITH A BRIEF TREATISE ON POLITICAL ECONOMY. DESIGNED FOR THE USE OF FAMILIES AND SCHOOLS, § 22, at 20 (19th ed., 1850).

Phelps' *The Legal Classic* (1835) teaches: "Law is the work and the will of the legislature in their derivative and subordinate capacity."[216] Charles Mason's *Elementary Treatise* (first edition 1842) similarly says: "The office of the legislative department is to pass laws."[217]The people, through their representatives, make laws. The people must be able to understand laws, not only to follow them but to evaluate them. So Young's text explains the purpose of the book in its preface: "The power to make and administer the laws, is delegated to the representative and agent of the people; the people should therefore be competent to judge when, and how far, this power is constitutionally and beneficially exercised."[218] The texts worked to fulfill the goals expressed already in the Superintendent's 1819 report: "where the people are entrusted with the government of themselves, a knowledge of the constitution and form of government, under which they live, is necessary to enable them to govern with wisdom and to appreciate the blessings of their free and happy condition."[219]

It is the duty of citizens to learn the laws and the duty of the legislature to write laws that citizens can observe. So Sullivan's text teaches youth: "Our first duty then, is, to use the gift of reason in learning the laws which are prescribed to us."[220] Young's text comforts youth that they can do it: "[man's] reason enables him to understand the meaning of laws, and to discover what laws are necessary to regulate human action."[221] Mason's book stresses the importance of the legislature providing comprehensible rules: "As laws are established to be the rules of action, they ought to be expressed in the most clear and intelligible form." [222] Alfred Conkling's *The Young Citizen's Manual* (first edition 1836) lauds the New York legislature for having done so in the criminal code of the 1829 Revised Statutes: "One of the great excellencies of this branch of our written laws, consists in the brevity and precision of language in which it is expressed.[223]

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[216] JOHN PHELPS, THE LEGAL CLASSIC, OR, YOUNG AMERICAN'S FIRST BOOK OF RIGHTS AND DUTIES: DESIGNED FOR SCHOOLS AND PRIVATE STUDENTS 27 (1835). This edition is available in Gale, *Making of Modern Law* series online in subscription or in print-on-demand.

[217] CHARLES MASON, AN ELEMENTARY TREATISE ON THE STRUCTURE AND OPERATIONS OF THE NATIONAL AND STATE GOVERNMENTS OF THE UNITED STATES. DESIGNED FOR THE USE OF SCHOOLS AND ACADEMIES AND FOR GENERAL READERS 27 (1842) This is an edition available on Google Books. There was a second edition in 1843.

[218] YOUNG, INTRODUCTION, 2d ed. 1835, *supra* note 212, at iii.

[219] INSTRUCTIONS, *supra* note 204, at 6. Fifteen years later a successor reported: "On our common schools we must rely to prepare the great body of the people for maintaining inviolate the rights of freemen." ANNUAL REPORT OF THE SUPERINTENDENT OF COMMON SCHOOLS, ASSEMBLY DOCUMENT NO. 8, JANUARY 7, 1835, at 34.

[220] SULLIVAN, *supra* note 211 at 17.

[221] YOUNG, INTRODUCTION, 2d ed. 1835, *supra* note 212, at 19.

[222] MASON, *supra* note 217, at 27.

[223] BEING A DIGEST OF THE LAWS OF THE STATE OF NEW YORK AND OF THE UNITED STATES, RELATING TO CRIMES AND THEIR PUNISHMENTS, AND OF SUCH OTHER PARTS OF THE LAWS OF THE STATE OF NEW YORK RELATING TO THE ORDINARY BUSINESS OF SOCIAL LIFE AS ARE MOST NECESSARY TO BE GENERALLY KNOWN; WITH EXPLANATORY REMARKS. TO WHICH IS PREFIXED, AN ESSAY ON THE PRINCIPLES OF CIVIL GOVERNMENT. DESIGNED FOR THE

Statutes are nothing to fear. Long before American lawyers spoke of "statutorification" textbook writers identified the phenomenon, its cause and its solution. Goodrich tackled the issue head on. The phenomenon was "the law is seen to be everywhere, upon the land and the sea in town and country."[224] The cause of our numerous laws is "[w]henever any evil arises, or any great good is desired, the law-makers seek to avert the one and secure the other by legislation, if it is within their proper reach."[225] The solution is, not to deny statutes, but to deal with them: adopt just statutes, systematize them and enforce them. It explained:

> In a civilized society, the laws are numerous, and as each law is an abridgment of some portion of absolute liberty, would be taken away. But still, it appears that all liberty, essential to happiness, is compatible with a complete system of laws; and in fact where the laws are just, and most completely carried into effect, there is the greatest amount of practical liberty.[226]

The texts teach separation of powers. Stansbury's book states the division. "[Legislators] make the laws, while judges only explain and apply them."[227] Mason's text explains why we need judges and cannot depend on self-application alone: "To the judicial power it belongs to expound and enforce the laws. … Laws would be very inadequate to the purpose for which they are designed, were there not some tribunal competent to decide authoritatively upon their meaning and application, and clothed with power to enforce and effectuate its decisions."[228]

The texts leave little room for judges to make laws. None teaches it. Shetleff's book warns: "If the *judicial* power absorbs or encroaches upon the executive or legislative, or if the *legislative* encroaches upon the executive or judicial, the result is as fatal to liberty as if the executive absorbed the judicial and legislative." Why? Because "All the legislative or law-making power granted by the constitution of the United States, is vested in a congress."[229] The elected representatives of the people make laws.

The civics texts saw that America was exceptional. But the young nation wasn't exceptional because paternal common law judges guarded what they held to be citizens' rights. It was exceptional because the people governed according to law. Stansbury's text tells youth the story that they could see unfold in their later lives:

> In the first place, consider how happy and how highly favored is our country, in having a system of government so wisely calculated to secure the life, liberty, and happiness of all its citizens. Had you lived or travelled in

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INSTRUCTION OF YOUNG PERSONS IN GENERAL AND ESPECIALLY FOR THE USE OF SCHOOLS 28 (2d ed. 1843). This edition is available on Google Books. The first edition was published in 1836.

[224] GOODRICH, *supra* note 184, at 12.

[225] *Id*. at 35.

[226] *Id*. at 31-32.

[227] STANSBURY, *supra* note 209, at 62.

[228] MASON, *supra* note 217, at 27.

[229] SHETLEFF, *supra* note 214, at 44.

> other parts of the world, you would be much more sensible of this, than you can possibly be without such an opportunity of comparing our lot with that of others. But, as your reading increases, particularly in history and in travels, you will be able to form a more just estimate of what you enjoy. When you read of the oppression which has been, and still is exercised, I do not say in Africa and Asia, whose inhabitants are but partially civilized—but even in the most enlightened countries of Europe; under absolute monarchs, a proud and haughty nobility—a worldly, selfish, and ambitious priesthood—a vast and rapacious standing army, and a host of greedy officers of government; and then turn your eyes on your own happy home, a land where none of these evils has any place—where the people first make the laws and then obey them—where they can be oppressed by none, but where every man's person's property, and privileges are surrounded by the law, and sacred from every thing but justice and the public good; how can you be sufficiently grateful to a beneficent Providence, which has thus endowed our country with blessings equally rich and rare?[230]

Common schools taught liberty in laws of Americans' making.[231]

So what did common schools teach of common law—the supposed fabric of their society? If the civic texts they used are any indication, they taught very little. The texts devote pages to legislation. None devotes pages, even sentences, to common law method of making law while applying it. There are only a few thin threads of the common law in the nation's fabric. Most of the texts give common law no more than a dozen or two mentions. These mentions are of two sorts. The one is to show how Americans have overcome common law through written law. Even Justice Story's text, which is the one book to address common law in detail and with favor, relates how Congress abolished the common law of treason with its "savage and malignant refinements in cruelty."[232] Another type of mention is to show how Americans must rely on common law to define certain terms used in the Constitution or in other written laws, *e.g.*, impeachment,[233] murder.[234] In other words,

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[230] STANSBURY, *supra* note 209, at 76.

[231] *See, e.g.*, CONKLING *supra* note 223, at 19 ("strictly speaking, it was not civil liberty that they achieved. It was *National Independence,* and it was nothing more. It was the faculty of self-government—the privilege of framing a government for themselves and of making their own laws, instead of receiving laws from the king and parliament of Great Britain. It was a change from colonial dependence to a state of independency.").

[232] JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES WITH AN APPENDIX AND GLOSSARY. THE SCHOOL LIBRARY PUBLISHED UNDER THE SANCTION OF THE BOARD OF EDUCATION OF THE STATE OF MASSACHUSETTS § 211, 124 ("The offender is to be drawn to the gallows on a hurdle; hanged by the neck, and cut down alive; his entrails taken out, and burned while he is yet alive; his head cut off; and his body quartered. Congress are intrusted with the power to fix the punishment, and have, with great wisdom and humanity, abolished these horrible accompaniments and confined the punishment simply to death by hanging.").

[233] *E.g.*, WILLIAM ALEXANDER DUER, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES: DESIGNED AS A TEXT BOOK FOR LECTURES, AS A CLASS BOOK FOR ACADEMIES AND COMMON SCHOOLS, AND AS MANUAL FOR POPULAR USE 89 (1833).

[234] *E.g.*, SULLIVAN, *supra* note 211, at 31.

common law provides a kind of vocabulary. Occasionally, it fills in gaps, for example, when New York repealed the age of consent for marriage.[235] Most texts make no more than passing mention of the carryover of common law to the American colonies. English common law is only an interim measure. Only three of the ante-bellum texts identified address common law as a topic in any sense to which a class might devote time; only one—that by Justice Story—provides the foundation for a class session. And that class would be largely historical.

Sullivan's text asks the question: "What is the Common Law?"[236] It answers with a paragraph of text, explains common law's basis in English custom, its use to define terms and identifies as its principal role to prescribe "the rules of proceeding in a great majority of all the cases, civil and criminal, which are tried in our courts.[237] This text, by a lawyer, is the only one to even mention the concept of precedent: it does that in a single sentence.[238] Sullivan's text is neither an endorsement of past common law nor of its then present direction of procedure, nor any basis for creating a new common law, substantive or procedural.[239]

The second of the three is one of Young's later civics texts, a longer and denser text than his *Introduction*. Designed for senior students and adults *The Citizen's Manual* adds materials on foreign governments, international law, practical substantive law, and parliamentary procedure. It reports on sixteen areas of substantive laws under the title "Common and Statutory Laws."[240] The sections on substantive law convey what the law generally is, by statute first, and by common law gap-fillers, second. Sometimes they

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[235] *E.g.*, CONKLING, *supra* note 223, at 111.

[236] SULLIVAN, *supra* note 211, at ix.

[237] *Id.* at 30-31.

[238] *Id.* at 37 (explaining why citizens should be interested in exercise of the judiciary power, it notes that "the principle on which the case is decided, may form a precedent affecting his interests materially.").

[239] *See* WILLIAM SULLIVAN, AN ADDRESS TO THE MEMBERS OF THE BAR OF SUFFOLK, MASS. AT THEIR STATED MEETING OF THE FIRST TUESDAY OF MARCH, 1824 (1825) (63 page address on history of the profession and legal methods by author of the text.).

[240] ANDREW W. YOUNG, THE CITIZEN'S MANUAL OF GOVERNMENT AND LAW. COMPRISING THE ELEMENTARY PRINCIPLES OF CIVIL GOVERNMENT; A PRACTICAL VIEW OF THE STATE GOVERNMENT, AND OF THE GOVERNMENT OF THE UNITED STATES; A DIGEST OF COMMON AND STATUTORY LAW, AND OF THE LAW OF NATIONS; AND A SUMMARY OF PARLIAMENTARY RULES FOR THE PRACTICE OF DELIBERATIVE ASSEMBLIES; WITH SUPPLEMENTARY NOTES ON THE GOVERNMENT OF THE STATE OF OHIO, AND THE CONSTITUTION OF THE STATE 173-230 (1853) There is a revised edition of 1859. Subjects addressed are rights of persons, domestic relations, minors, rights of property, wills and testaments, deeds and mortgages, incorporeal hereditaments, leases, contracts in general, contracts of sales, fraudulent sales, principal and agent, partnership, bailment, promissory notes, and bills of exchange. The text explains that this part of the book gives "an abstract of the laws which more particularly define the right, and prescribe the duties, of citizens in the social and domestic relations." These laws are "first, *statute laws*, [and] secondly, the *common law*." Common law is not new law created by judges; it "consists of rules that have become binding by long usage and general custom" and is the "same as that of England. *Id.* at 173-174.

show how Americans have reversed the common law (*e.g.*, allowing aliens to acquire real estate). The common law that Young's text describes is a gap-filler destined to disappear. As if to emphasize the demise of common law and the growth of statute law, the text adds more than twenty-five pages on parliamentary rules.[241]

Justice Story's book, alone, explains English common law at length, its partial adoption in the colonies, and the potential for American judge-made law. In this regard, the 1840 version of the book,[242] which appeared after his 1837 Massachusetts Code Report, is more extensive than that of the 1834 version of the textbook, which appeared before the Code Report.[243] In an historical chapter on colonial governments it answers the question how "the common law of England came to be the fundamental law of all the Colonies?" Story's text answers by explaining the differences among the Colonies, both in their legal status, and in how each chose to accept "only such portions of it, as were adapted to its own wants, and were applicable to its own situation." The text praises the common law as "[t]hus limited and defined by the colonists themselves, in its application, the common law became the guardian of their civil and political rights."[244] But it makes no claims for a common law of the future such as present day proponents do. The text does not assert, as claimed today by English and American judges alike, that "common law provides the tools and flexibility to allow the law to continue to serve the needs of a diverse society in world of rapid change and technological development."[245] Instead, like the other civics texts, it records how constitutions and statutes corrected defects of the common law. Just as do the other texts, it gives chapters to legislation and on the judicial department; it has not one word on precedents.[246]

E. A Century of Civics for Citizens

If common law substance and common law method had been absorbed into American "social culture," as contemporary common law adherents claim, a quick digital check should disclose the common law receiving ubiquitous praise in adult literature. I find no such acceptance. Patriotic addresses and adult civics texts that I have seen track civics texts for common schools:

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[241] *Id.* at 254-282.

[242] Joseph Story, A Familiar Exposition of the Constitution of the United States with an Appendix and Glossary. The School Library Published under the Sanction of the Board of Education of the State of Massachusetts, Vol. XIII (1840). The book was reprinted, but not revised.

[243] Joseph Story, The Constitutional Class Book: Being a Brief Exposition of the Constitution of the United States: designed for the use of the higher classes in common schools (1834).

[244] *Id.* at 20-22.

[245] Common Law, Common Values, Common Rights, Essays on Our Common Heritage by Distinguished British and American Authors viii (American Bar Association, 2000).

[246] More than do the other texts, Story's identifies the institution of the jury with the common law. *See, e.g.*, Story, *supra* note 243, at 25.

glory, laud and honor for legislation and little note of common law substance or method. Other popular adult literature that does address common law sometimes satirizes it.

1. Patriotic Celebrations and Commemorations

Americans have celebrated the 4th of July 1776 since the 4th of July 1777.[247] Long before the Public Broadcasting Service began its series "Capitol Fourth" on the Washington Mall,[248] Americans gathered to fete the Nation's Birthday. The Centennial Celebration of 1876 and the Bicentennial Celebration of 1976 were only the biggest of the parties. In the first century Americans got together in public places and had notables give orations. Many of these addresses—particularly those given in New England—were published.[249] Add to the 4th of July orations addresses for similar commemorations and patriotic addresses multiply. Many have been digitized. If common law content and common law methods are, or were, part of the fabric of the nation, one would think that their threads would be found when the nation gathered to celebrate its nationhood.[250]

a. Fourth of July Orations

I haven't read them all—there are at least 500 published addresses for the Fourth of July alone—but reading and searching, I am yet to find tributes to common law content or to common law methods. [251] What I do find are

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[247] *See* Hannah Keyser, *The First Fourth of July Cele*bration (in 1777) http://mentalfloss.com/article/57633/first-fourth-july-celebration-1777 (excerpting the July 18, 1777 issue of the *Virginia Gazette*. The 4th was an official holiday first in Massachusetts in 1781.). *But see* LEN TRAVERS, CELEBRATING THE FOURTH: INDEPENDENCE DAY AND THE RITES OF NATIONALISM IN THE EARLY REPUBLIC 6 (1997) ("because these orations were consistently delivered by lawyers, clergymen, college professors, and politicians … I question their validity as representative of popular belief.")

[248] John. J. O'Connor, *TV Weekend*, NEW YORK TIMES, July 3, 1981 reports the program. It may have begun sooner.

[249] *See* University of Missouri, Fourth of July Orations Collection, 1791-1925, http://library.missouri.edu/specialcollections/bookcol/rare/fourth/ (458 pamphlets). The Internet Archive, https.archive.org permits a search on "Fourth of July Orations" which returns about 500. *See also* TRUMPETS OF GLORY: FOURTH OF JULY ORATIONS, 1786-1861 (Henry A. Hawken, ed., 1976) (reprinting about twenty); INDEPENDENCE DAY ORATIONS AND POEMS, JULY 4, 1876, NEW YORK TRIBUNE, EXTRA NO. 33 (1876) (printing the five semi-official national orations for the Centennial).

[250] And that is just as true, if not more true, if one accepts Travers' assertion, *supra* note 247, at 7, that many a celebration was intended as much "to do battle with opponents" as "to minimize the conflicts and to assert the idealized (but dubious) unity of the American people."

[251] Even the common law jury seems to make only a few cameo appearances. A Google search of jury in books with title including July 4 published 1776 to 1876 identified only ten orations that even mentioned the jury. See, e.g., ISAAC STORY AN ORATION ON THE ANNIVERSARY OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA, PRONOUNCED AT WORCESTER, JULY 4, 1801, at 11 (1801), which mentioned the jury in passing but focused, at 24, on measuring political doctrines against the Constitution and laws.

commendations of the heroism of the founders. I find that only some orations address law or government. I suspect that there is a common emphasis—the United States created a government of and for the people—but I haven't conducted a study. Contemporary common law enthusiasts should go and make such a study. They should read as many of these pamphlets as the can. Light skeptics of these claims can look at a single volume that might stand for all the celebratory addresses.

b. Eulogies of Adams and Jefferson

On July 4, 1826, the fiftieth anniversary of American Independence, the two men most responsible for drafting and adopting the Declaration of Independence, John Adams and Thomas Jefferson, both died. The coincidence was taken as a marvelous sign from heaven blessing the American enterprise. Across the country there were many joint eulogies. Nineteen of these were collected and issued in a single volume the same year as *A Selection of Eulogies Pronounced in the Honor of Those Illustrious Patriots and Statesmen, John Adams and Thomas Jefferson*. The volume is available on Google Books. What does it suggest?

The book has only two mentions of "common law." The first is that of the young Caleb Cushing, who later would be Attorney General of the United States, commissioner charged with revising the federal statutes, and President Grant's nominee to be Chief Justice of the United States. Cushing in his eulogy remembered that Adams and Jefferson were both educated to the bar. But they were not educated in law as they would have been in England, "to the barbarous technicalities of the common law," but in the American way "where the study is more a study of principles."[252]

The second and last mention of "common law" was by William Wirt, then the Attorney General of the United States and to this day the longest-serving Attorney General ever. Wirt referred to the common law as the mundane part of Jefferson's law studies: "The study of the law he pursued under George Wythe; a man of Roman stamp, in Rome's best age. … Here, too, following the giant step of his master, he travelled the whole round of the civil and common law."[253]

Most of the nineteen eulogists remembered Adams and Jefferson for the government and the legislation that they created. John Tyler, then governor of Virginia and later President of the United States, rejoiced of Jefferson: "The statute book of this state, almost all that is wise in policy or sanctified by justice, bears the impress of his genius …." Tyler recalled that Jefferson's laws abolished the common law of entails and descents.[254] Daniel Webster,

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[252] Caleb Cushing, *Eulogy, Pronounced at Newburyport, Massachusetts, July 15, 1826, in* A SELECTION OF EULOGIES PRONOUNCED IN THE HONOR OF THOSE ILLUSTRIOUS PATRIOTS AND STATESMEN, JOHN ADAMS AND THOMAS JEFFERSON 19, 29-30 (1826).

[253] William Wirt, *Eulogy Pronounced at the City of Washington, October 19, 1826, in* SELECTION OF EULOGIES, *supra* note 252, at 379, 396.

[254] *John Tyler, Eulogy, Pronounced at Richmond, Virginia, July 11, 1826, in* SELECTION OF EULOGIES, *supra* note 252, at 5, 8.

then representative in Congress, orator par excellence, and the nation's most celebrated Supreme Court advocate, recounted the careers of Adams and Jefferson and noted Jefferson's "important service of revising the laws of Virginia …."[255] Less well-known eulogist Sheldon Smith might have spoken for the nation when he said of Adams and Jefferson: "They formed a system of government, and a code of laws, such as the wisdom of man had never before devised."[256] Attorney General Wirt let Jefferson speak for himself; on the last page of the book he quoted the inscription Jefferson directed for his gravestone: "Here was buried: Thomas Jefferson, Author of the Declaration of Independence, Of the Statutes of Virginia, for Religious Freedom, And Father of the University of Virginia."[257]

2. Civics for Adults

The spirit that led to instruction of youth in civics, and that celebrated the government of the people in commemorative addresses, found realization too in the idea of a legally-educated people. A government of laws is not a law for lawyers: it is a law for people. Every citizen should know something of the law. So in 1834 Justice Story addressed the American Institute of Instruction, a professional group for educators, "I do not hesitate to affirm, not only that a knowledge of the true principles of government is important and useful to Americans, but that it is absolutely indispensable, to carry on the government of their choice, and to transmit it to their posterity."[258]

The civics books discussed above were generally denominated for "use of schools." What was meant was for use of common schools for children of perhaps eight to fourteen years of age. But some were marketed to more sophisticated students. These might be older students or students in academies or colleges. At the same time, authors wrote introductory works for law students in self-study, law office study or law school study. These were works for adults to educate themselves. These works presented a picture of a whole legal system, and not just of any one corner.[259] The most distinguished of these—designed to reach all areas of knowledge—was the 13-volume *Encyclopædia Americana* which first appeared between 1829 and 1834. Justice Story provided the principal entries on American law.

Justice Story carried out his convictions in other ways. He turned his scholarly learning into popular instruction. His three-volume *Commentaries on the Constitution of the United States* of 1833 he abridged the same year

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[255] Daniel Webster, *Eulogy, Pronounced at Boston, Massachusetts, August 2, 1826, in* SELECTION OF EULOGIES, *supra* note 252, at 193, 223.

[256] Sheldon Smith, *Eulogy, Pronounced at Buffalo, New-York, July, 22d 1826, in* SELECTION OF EULOGIES, *supra* note 252, at 91, 94.

[257] Wirt, *supra* note 253, at 426.

[258] JOSEPH STORY, [The Science of Government as a Branch of Popular Instruction] A LECTURE DELIVERED BEFORE THE AMERICAN INSTITUTE OF INSTRUCTION, AT THEIR ANNIVERSARY, IN AUGUST, 1834, AT BOSTON (1835), reprinted in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 614 (William W. Story, ed., 1852).

[259] That distinguishes them from subject- or task-focused books. The former might be, for example, books on education; the latter might be the everyman-his-own-lawyer books.

into a one-volume text *for "the use of colleges and high schools."* The next year he further boiled it down to *The constitutional class book: being a brief exposition of the Constitution of the United States: designed for the use of the higher classes in common schools*. Finally, in 1840 he brought out *A Familiar Exposition of the Constitution of the United States with an Appendix and Glossary*. Never revised, it has been repeatedly reprinted and now is available in several heirloom editions.

When states systematized their laws, discussed below in Part IV, and brought them out in one-to-three volumes of compiled or revised statutes, they did so for the benefit of the people at large and not for the legal profession alone. The creators of these works said as much in the introductory matter of their books. Some went further. To make them usable to the public they provided "practical forms … with appropriate directions,"[260] "notes … pointing out the principal alterations made by them in the common and statute law,"[261] and even collections for the general public of what the world now calls Frequently Asked Questions (FAQs).[262]

3. Common Law and Literature

Common law did not figure prominently in adult civics texts. It did, however, make recurrent appearances in satire in the literature of the first century of the Republic. The most famous of these is Charles Dickens' *Bleak House* published in twenty monthly installments in 1852 and 1853. Professors of contemporary common law myth might dismiss that satire as criticism of the English Court of Chancery. But a quarter century before there was the English *Bleak House*, there was the purely American satire of James Kirke Paulding, *The Perfection of Reason*.

Paulding was a popular author already in 1826 when he published *The Perfection of Reason* as one of three stories in his *The Merry Tales of Three Wise Men from Gotham*."[263] The hero in *The Perfection of Reason* was the son of a lover of the common law (*i.e.*, of the "perfection of reason"). The hero lost a lawsuit to recover for a lame horse to his adversary's common law defense of *caveat emptor* (let the buyer beware). Yet when our hero tried

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[260] MANUAL OF THE REVISED STATUTES OF THE STATE OF NEW-YORK; OR, A COMPLETE SERIES OF ALL THE PRACTICAL FORMS, OR PRECEDENTS, REQUIRED BY THE REVISED STATUTES WITH APPROPRIATE DIRECTIONS, EXPLANATIONS AND REFERENCES, TO CASES ADJUDGED IN THE COURTS OF SAID STATE, AND IN THE SUPREME COURT OF THE UNITED STATES IN FIVE PARTS. PREPARED AND COMPILED BY A COUNSELLOR AT LAW (1831).

[261] JOHN CANFIELD SPENCER, NOTES ON THE REVISED STATES OF THE STATE OF NEW-YORK POINTING OUT THE PRINCIPAL ALTERATIONS MADE BY THEM IN THE COMMON AND STATUTE LAW (1830); JOHN CANFIELD SPENCER, ABSTRACT OF THE MOST IMPORTANT ALTERATIONS, OF GENERAL INTEREST, INTRODUCED BY THE REVISED STATUTES; THE PRINCIPAL PART OF WHICH ORIGINALLY APPEARED IN THE ONTARIO MESSENGER (1830).

[262] WILLIAM B. WEDGEWOOD, THE REVISED STATUTES OF THE STATE OF NEW YORK REDUCED TO QUESTIONS AND ANSWERS FOR THE USE OF SCHOOLS AND FAMILIES (1843). Wedgwood brought out a series of these books for other states besides New York.

[263] JAMES KIRKE PAULDING, *The Perfection of Reason*, *in* THE MERRY TALES OF THE THREE WISE MEN OF GOTHAM 144, 166 (1826) (2d ed. 1835; 3d ed. 1839).

to rely on *caveat emptor* to defend in his sale of a ship, the court rejected the defense. Ships were governed by maritime law, where the common law of *caveat emptor* did not apply!

Before digitization there was already substantial interest among scholars about the relationship between letters and law in the early American Republic.[264] Digitization portends substantial increase in knowledge of the people and their law as revealed in literature.

F. A CENTURY OF SELF-GOVERNING

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
>
> Preamble to the United States Constitution (1787)

> The rule being prescribed, [a statute] becomes the guide of all those functionaries who are called to administer it, and of all those citizens and subjects upon whom it is to operate.
>
> Joseph Story, *Encyclopedia Americana* (1834)[265]

Contemporary common law myth assumes that the United States in the first century of the Republic was a "night-watchman" state where people were largely free of being governed. Only later, supposedly, sometime in the 20th century, did Americans create an "administrative state." Recent scholarship challenges that assumption. It shows Americans governing and administering in the 19th century.[266] That governing and administering rested on written laws.

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[264] *See, e.g.*, CHARLES HANSFORD ADAMS, "THE GUARDIAN OF THE LAW": AUTHORITY AND IDENTITY IN JAMES FENIMORE COOPER (1990); ROBERT A. FERGUSON, LAW & LETTERS IN AMERICAN CULTURE (1984); BENJAMIN LEASE, THAT WILD FELLOW JOHN NEAL AND THE AMERICAN LITERARY REVOLUTION (1972); LITERARY CRITICISM OF LAW (Guyora Bindeer & Robert Weisberg, eds., 2000); M. FREDERICK LOCHEMES, ROBERT WALSH: HIS STORY (1941); C. THOMAS TANSELLE, ROYALL TYLER (1967); MADELINE SAPIENZ, MODER CHIVALRY IN EARLY AMERICAN LAW: H.H. BRACKENRIDGE'S LEGAL THOUGHT (1992).

[265] Joseph Story *et al.*, [*Appendix*] *Law, Legislation, Codes*, 7 ENCYCLOPÆDIA AMERICANA 576, 581 (1834).

[266] *See, e.g.*, BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH CENTURY AMERICA (2009); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA (1996). *See also*, OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, MASSACHUSETTS 1774-1861 (Rev'd ed. 1969); William J. Novak, *Making the Modern American Legislative State, in* LIVING LEGISLATION: DURABILITY,

For statutes to govern, Professor Charles Warren rightly wrote, they must be accessible "*for the benefit of laymen as well as lawyers.*"[267] There he saw one of the great benefits of codes and revisions: laymen can read and apply the law themselves without lawyers. People in their occupations and their professions can themselves implement law. People in their daily lives can follow the rules that are imposed on them. Proponents of common law myth claim that the public does not read laws and is not interested in statutes. Codes and revisions are of little use to them more than a listing of court decisions. An 1827 Committee Report to the South Carolina legislature by Thomas Grimké countered that argument. "Not, that the people will read a portion every day, or will even have them in their houses; but that, whenever in the course of public or private business, the people are required to read or hear the law for their guidance, it may be simple clear and concise." Thus, the report continued, "the sovereign authority, above all in a republic, [is duty bound] to prepare the laws in the best possible manner for the use of the people whenever they are called upon to act upon them." Someone charged with applying the law, the Report continued, could find his duties nowhere "concisely and clearly stated. … But in a Code, he would read in a few pages all that concerned him."[268]

Digitization supports Grimké's prognosis: it shows even before Grimké's report the beginnings of an occupational literature of collected statutes that continued to develop long afterwards. By occupational I mean books intended to permit educated laymen to learn and apply the law applicable in their occupations ordinarily without legal consultation. These books give or refer readers to rules that laymen are to apply and assume no further professional involvement. Readers of these books may include lawyers who advise participants in the occupational field. Such books cannot easily persist where judicial precedents predominate, for laymen cannot be expected to possess, find, understand, identify as authoritative or apply precedents.

Already in the first twenty-five years of the 19th century such professional literature began to appear in a variety of fields in numbers of publications and copies printed that may have exceeded case reports in those years. Among the first were guides to military and education law, which often governments distributed free to users. The War Department provided, for "the use of the army," a compilation of all the laws related thereto, including penal laws and laws related to organization and administration. State superintendents of schools provided laws and regulations for the conduct of the new common schools. These were statutes for the people and not for the

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CHANGE, AND THE POLITICS OF AMERICAN LAWMAKING 20 (Jeffrey A. Jenkins & Eric M. Patashnik, eds., 2012).

[267] 1 CHARLES WARREN, *Chapter XXXV: New Law* 1830-1860, *in* HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 234 (1908); CHARLES WARREN, *Chapter XVII: Progress of the Law* 1830-1860, *in* HISTORY OF THE AMERICAN BAR 446 (1911).

[268] REPORT, SOUTH CAROLINA [of the "Committee appointed 20th of December last, to report on the practicability and expediency of a Code of the Statute and Common Law of this State] 9 (1827).

legal profession.[269] They continued to come up to the Centennial and beyond. Here is a sampling of such books focused on those which appeared first in the particular types referenced and which have been digitized. Included in the list are comments from some of the authors relevant to the need of the people for such books and for their systematizing:

- Military,[270]
- laws of war,[271]
- postal service,[272]
- schools,[273]

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[269] ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 74 (1990).

[270] *E.g.*, ADJUTANT-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, LAWS FOR REGULATING AND GOVERNING THE MILITIA OF THE COMMONWEALTH OF MASSACHUSETTS (1803); ISAAC MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW: CONTAINING AN EXPLANATION OF THE PRINCIPLES WHICH GOVERN COURTS MARTIAL AND COURTS OF INQUIRY, UNDER THE AUTHORITY OF AN INDIVIDUAL STATE, AND OF THE UNITED STATES, IN WAR AND PEACE: THE POWERS AND DUTIES OF INDIVIDUALS IN THE ARMY, NAVY, AND MILITIA, AND THE PUNISHMENTS TO WHICH THEY MAY BE LIABLE, RESPECTIVELY, FOR VIOLATIONS OF DUTY: THE NECESSARY FORMS FOR CALLING, ASSEMBLING, AND ORGANIZING COURTS MARTIAL, AND ALL OTHER PROCEEDINGS OF SAID COURTS iii-iv (1813) (treatise and appendix of rules and regulations) ("This treatise was originally undertaken, in compliance with the solicitations of military gentlemen; and solely with a view to the militia. … The militia man is indeed deeply interested in *all* its details, being liable to the same pains and penalties, and to the same rules and regulations, by the articles of war, as the individual of the regular army. Besides this personal interest, which every militia officer has at stake, in these discussions, there is also a public interest involved. … If officers will give themselves the necessary information, those disagreeable delays, so frequently witnessed at court-martial, will be avoided. … The author is not without hope, therefore, that the work as nor presented, will be found interesting and useful, not only to the militia, but to the army and navy of the United States."); ADJUTANT GENERAL'S OFFICE (of Virginia), MILITARY LAWS (1820); TRUEMAN CROSS, MILITARY LAWS OF THE UNITED STATES; TO WHICH IS PREFIXED THE CONSTITUTION OF THE UNITED STATES (1825) (unnumbered iv: "for the use of the army, a compilation of the acts of congress relating thereto. … The propriety of rendering all the *penal* laws accessible to those on whom they are to operate, is sufficiently obvious—and it is believed to be an object of some moment, that the law relating to organization and administration, though repealed or modified, should be placed within the reach of the army.")

[271] General Orders No. 100, promulgated by Lincoln, was not a handbook, but the laws themselves for the guidance of the armies. *See* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012). Its author was Francis Lieber, the creator of the *Encyclopædia Americana*. *See* Paul Finkelman, *Review [of Witt], Francis Lieber and the Modern Law of War*, 80 U. CHI. L. REV. 2071 (2013).

[272] *E.g.*, POST-OFFICE LAW, WITH INSTRUCTIONS, FORMS AND TABLES OF DISTANCES, PUBLISHED FOR THE REGULATION OF THE POST OFFICE (1800); POST-OFFICE LAW, INSTRUCTIONS AND FORMS, PUBLISHED FOR THE REGULATION OF THE POST-OFFICE (1825).

[273] *E.g.*, INSTRUCTIONS FOR THE BETTER GOVERNMENT AND ORGANIZATION OF COMMON SCHOOLS, PREPARED AND PUBLISHED PURSUANT TO A PROVISION IN THE ACT FOR THE SUPPORT OF COMMON SCHOOLS, PASSED APRIL 12, 1819 (Gideon Hawley, Superintendent of Common Schools, 1819); THE SCHOOL OFFICERS' GUIDE, FOR THE STATE OF OHIO; CONTAINING THE LAWS ON THE SUBJECT OF COMMON SCHOOLS, THE SCHOOL FUND, &C,

- universities,[274]
- tax and revenue laws,[275]
- bankruptcy,[276]
- mechanics' liens[277]
- farming,[278]
- land offices,[279]
- military pensions,[280]

TOGETHER WITH INSTRUCTIONS FOR THE INFORMATION AND GOVERNMENT OF SCHOOL OFFICERS (1842).

[274] *E.g.*, LAWS OF THE STATE UNIVERSITY: ACTS OF CONGRESS AND LAWS OF THE MISSOURI LEGISLATURE RELATING TO THE UNIVERSITY OF MISSOURI AND AGRICULTURAL AND MECHANICAL COLLEGE, AND SCHOOL OF MINES AND METALLURGY TOGETHER WITH THE BY-LAWS OF THE BOARD OF CURATORS: WITH AN APPENDIX (1872).

[275] *E.g.*, L. ADDINGTON, A DIGEST OF THE REVENUE LAWS OF THE UNITED STATES: WHEREIN ARE ARRANGED, UNDER DISTINCT HEADS, THE DUTIES OF COLLECTORS, NAVAL OFFICERS, SURVEYORS, MERCHANTS, MASTERS, AND ALL OTHER PERSONS CONNECTED WITH THE IMPOSTS (1804); ALEXANDER SIDNEY COXE, THE SYSTEM OF THE LAWS OF THE UNITED STATES IN RELATION TO DIRECT TAXES AND INTERNAL DUTIES INACTED IN THE YEAR 1813, CONTAINING THOSE LAWS AT LARGE WITH SOME EXPLANATIONS; AND A COPIOUS INDEX (1813).

[276] *E.g.*, THOMAS COOPER, THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND (1801) (reprinting U.S. and English statutes, providing a guide to proceedings).

[277] *E.g.*, PETER ARRELL BROWN, A SUMMARY OF THE LAW OF PENNSYLVANIA SECURING TO MECHANICS AND OTHERS: PAYMENT FOR THEIR LABOUR AND MATERIALS IN ERECTING ANY HOUSE OR OTHER BUILDING CONTAINING THE SEVERAL ACTS OF ASSEMBLY ON THE SUBJECT; AND THE DECISIONS THAT HAVE TAKEN PLACE UNDER THEM (1814) (statute printed followed by questions and answers explaining it).

[278] *E.g.*, JOHN M'DOUGAL, THE FARMER'S ASSISTANT, OR, EVERY MAN HIS OWN LAWYER (1813) (collection of forms, not statutes).

[279] *E.g.*, JOHN KILTY, THE LAND-HOLDER'S ASSISTANT, AND LAND-OFFICE GUIDE; BEING AN EXPOSITION OF ORIGINAL TITLES, AS DERIVED FROM THE PROPRIETARY GOVERNMENT, AND MORE RECENTLY FROM THE STATE OF MARYLAND: DESIGNED TO EXPLAIN THE MANNER IN WHICH SUCH TITLES HAVE BEEN, AND MAY BE, ACQUIRED AND COMPLETED v (1808) (the preface includes four pages of fine type on creation and use of the book, *e.g.*, "I have believed that it would not fail to engage the perusal of that respectable description of citizens for whose use it is professedly designed.").

[280] *E.g.*, THE PENSION LAWS, OF THE UNITED STATES, INCLUDING SUNDRY RESOLUTIONS OF CONGRESS, FROM 1776 TO 1833: EXECUTED AT THE WAR DEPARTMENT… COMPILED BY ROBERT MAYO, M.D. iv (1833) ("the Secretary of War has thought proper to charge an humble individual in the Pension Office, with the task of compiling this system of laws …. To dignify the Pension laws of our country, with a place in the nomenclature of systems, may seem ridiculous to those who view these laws in a detached sense, or in the order of their dates only. But he who will take a survey of the prominent enactments, connected with the minute details growing out of each as they are developed, though they were commenced and progressed under the dictates of justice and gratitude, without any view to system building, will nevertheless discover and admire therein, that beautiful symmetry and order of parts, which constitute system in any branch of science or law, natural or civil.")

- poor,[281]
- canals,[282]
- commerce,[283]
- maritime,[284]
- slavery laws for abolitionists,[285]

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[281] *E.g.*, JONATHAN LEAVITT, A SUMMARY OF THE LAWS OF MASSACHUSETTS, RELATIVE TO THE SETTLEMENT, SUPPORT, EMPLOYMENT AND REMOVAL OF PAUPERS (1810).

[282] *E.g.*, A COLLECTION OF THE LAWS RELATIVE TO THE CHESAPEAKE AND DELAWARE CANAL: PASSED BY THE LEGISLATURES OF THE STATES OF MARYLAND, DELAWARE, AND PENNSYLVANIA, SUBSEQUENT TO THE YEAR 1798: PUBLISHED JUNE 1, 1823 (1823).

[283]*E.g.*, J. C. GILLELAND, THE COUNTING-HOUSE ASSISTANT, OR, A BRIEF DIGEST OF AMERICAN MERCANTILE LAW: EMBRACING THE LAW OF CONTRACT (1818) (statement of rules for self-application to avoid lawsuits); JOSHUA MONTEFIORE, THE AMERICAN TRADER'S COMPENDIUM: CONTAINING THE LAWS, CUSTOMS, AND REGULATIONS OF THE UNITED STATES, RELATIVE TO COMMERCE: INCLUDING THE MOST USEFUL PRECEDENTS ADAPTED TO GENERAL BUSINESS (1811) (alphabetical listing of concepts with some forms).

[284] *E.g.*, JOSEPH BLUNT, THE MERCHANT'S AND SHIPMASTER'S ASSISTANT; CONTAINING INFORMATION USEFUL TO THE AMERICAN MERCHANTS, OWNERS, AND MASTERS OF SHIPS iii (1832) ("a work of this nature has long been imperiously required by the shipmaster, the merchant, the lawyer, and the statesman. … [It includes] As much of the common law, relative to bills of exchange, factorage, and freight, as is necessary to guide a person in the ordinary course of business, is next presented. … A digest is then given of the laws of Congress …. The commercial statutes of the different states follow the acts of Congress. …. Without regarding the different legislative jurisdiction to which he is subjected at different times, a master naturally acts as if the same law was in force throughout the United States, and becomes liable to penalties, which a little acquaintance with the statutes would have enabled him to avoid. In enacting laws relative to commerce, the state legislatures have evidently seldom, if ever, consulted the provisions on the same subject in the sister states; and in this independent method of legislation, a system discordant in its provisions, overburdened with details, and incongruous in itself, has grown up with the increase of our trade, to the vexation and dismay of the owners and masters of ships."); *id.*. (1st ed, 1822; 9th ed. 1857); German edition, BESTIMMUNGEN ÜBER HANDEL UND SCHIFFFAHRT DER VEREINIGTEN STAATEN VON NORD-AMERIKA … NACH J. BLUNT'S AMERIKANISCHEM WERKE (Carl F. Loosey, transl., 1855) (published in Vienna, but by an Austrian in New York City).

[285] *E.g.*, NEW YORK MANUMISSION SOCIETY, SELECTIONS FROM THE REVISED STATUTES OF THE STATE OF NEW YORK: CONTAINING ALL THE LAWS OF THE STATE RELATIVE TO SLAVES, AND THE LAW RELATIVE TO THE OFFENCE OF KIDNAPPING; WHICH SEVERAL LAWS COMMENCED AND TOOK EFFECT JANUARY 1, 1830, TOGETHER WITH EXTRACTS FROM THE LAWS OF THE UNITED STATES, RESPECTING SLAVES (1830); GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA v-vi (1827) (Preface: "Having been under the necessity of bringing together the laws of so large a number of independent states, it must be obvious that considerable difficulty existed in assigning to each part its proper place and giving to each its due effect, and, at the same time, preserving the appearance of symmetry in the whole." … "Of the *actual* condition of slaves this sketch does not profess to treat. In representative republics, however, like the United States, where the popular voice so greatly influences all political concerns,—where the members of the legislative departments are dependent for their places upon *annual* elections,—the laws may be safely regarded as constituting a faithful exposition of the sentiments of the people, and as furnishing, therefor, strong evidence of the practical enjoyments and privations of those whom they are designed to govern.") (2d ed., 1858).

- slavery laws for slave owners,[286]
- roads and highways,[287]
- railroads,[288] and,
- as is noted below, the Centennial Guards that provided security at the Centennial exposition.[289]

At their best, they instruct the users in how to carry out the tasks with which they are charged. They find their forerunners in manuals for justices of the peace of the first half-century of the Republic.[290] Well-conceived and

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[286] *E.g.*, JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY. BEING A COMPILATION OF ALL THE DECISIONS MADE ON THAT SUBJECT, IN THE SEVERAL COURTS OF THE UNITED STATES, AND STATE COURTS. WITH COPIOUS NOTES AND REFERENCES TO THE STATUTES AND OTHER AUTHORITIES, SYSTEMATICALLY ARRANGED (1837).

[287] *E.g.*, WILLIAM DUANE, A VIEW OF THE LAW OF ROADS, HIGHWAYS, BRIDGES AND FERRIES IN PENNSYLVANIA (1848) (professional manual with procedures and extracting statutes); A COUNSELOR AT LAW, PLANK ROAD MANUAL, INCLUDING THE GENERAL LAW OF PLANK ROADS AND TURNPIKES OF THE STATE OF NEW YORK, WITH THE REFERENCES TO THE REVISED STATUTES, ALSO AN APPENDIX, CONTAINING A SHORT ESSAY ON THE CONSTRUCTION OF PLANK ROADS, AND ALL THE NECESSARY FORMS AND PRECEDENTS TO BE USED UNDER THE ACTS (1848).

[288] *E.g.*, MOSES M. STRONG (ATTORNEY OF THE COMPANY), A COMPILATION OF THE SEVERAL ACTS OF THE LEGISLATURE OF WISCONSIN AFFECTING THE LA CROSSE & MILWAUKEE R.R. COMPANY: TOGETHER WITH THE BY-LAWS OF THE COMPANY: ALSO, SOME GENERAL LAWS OF THE STATE IN RELATION TO RAIL ROAD (1856); BONNEY, CHARLES CARROLL. RULES OF LAW FOR THE CARRIAGE AND DELIVERY OF PERSONS AND PROPERTY BY RAILWAY: WITH THE LEADING RAILWAY STATUTES AND DECISIONS OF ILLINOIS, INDIANA, MICHIGAN, OHIO, PENNSYLVANIA, NEW YORK AND THE UNITED STATES: PREPARED FOR RAILWAY COMPANIES AND THE LEGAL PROFESSION (1864) ("This book is designed for the guidance of railway companies, their agents, employes [*sic*] and patrons, in the receipt, transportation and delivery of persons and property; and for the convenience of the profession in advising thereof. … In other words, I have endeavored to make a book in which the rights, duties and liabilities of passengers, consignors, engineers, consignees and other persons concerned in or affected by the usual course of railway business, may readily be found distinctly presented, and plainly expressed. The statutes are rarely found complete, outside of the State in which they belong; and the decisions condensed and reported, are scattered through so large a number of volumes, as to be unavailable for every-day use." i. "I cannot resist the conviction, that a familiarity with the subject-matter of this treatise, by the non-professional persons for whose use it is, in part, designed, would prevent many of the losses and accidents which now occur."); EDMUND F. WEBB (COMPILER),THE RAILROAD LAWS OF MAINE : CONTAINING ALL PUBLIC AND PRIVATE ACTS AND RESOLVES, RELATING TO RAILROADS IN SAID STATE, WITH REFERENCES TO DECISIONS OF SUPREME JUDICIAL COURT: ALSO A DIGEST OF THE DECISIONS OF THE COURTS OF SAID STATE, ON THE SUBJECT OF RAILROADS: AND COPIES OF ALL MORTGAGES, DEEDS OF TRUST, LEASES, AND CONTRACTS, MADE BY SAID RAILROADS (1875) ("The object of this volume is to present the entire body of the railroad law of this State in a convenient and accessible form. … Railroad laws have so multiplied as to embarrass those having occasion to trace them through so many volumes. It is hoped this compilation may abridge their labors." Unnumbered Preface.).

[289] *See* note 490 *infra*.

[290] The classic English work is Michael Dalton's *Countrey Justice* of 1619, which continued to appear for nearly two centuries.

executed such books give the statutes that they support true effectiveness. People can carry out the laws themselves.

Occupational literature has limits that restrain wide-spread distribution: it needs to be authoritative. That means any one book is practically limited to one jurisdiction, or to a group of closely related jurisdictions where it is possible to spell out variations. Useful occupational literature depends on the user being able to rely on the book. That means the law the book reports needs to be comprehensible and stable and not undermined by courts.

V. PROGRESS IN SYSTEMATIZING LAWS FOR THE PEOPLE

Government of the people, by the people, for the people.

Abraham Lincoln (1863)[291]

In 1788, a dozen years after the beginning of the Republic's first century, James Madison foretold in *Federalist No. 62:* "It will be of little avail ***to the people***, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."[292]In 1861, fifteen years before the end of the Republic's first century, President Abraham Lincoln in his first state of the union message called on Congress to make the statute laws "as plain and intelligible" and as "small compass" as possible. "Well done," a revisal would "greatly facilitate" the administration of the laws and "would be a lasting benefit ***to the people***, by placing before them in a more accessible and intelligible form the laws which so deeply concern their interests and their duties."[293]

The Centennial Writers were asked to write about progress in American law. Progress meant systematizing. For the first century of the Republic and for another decade thereafter, Americans systematized their laws. Today, that Americans have what I call "collated laws," *i.e.*, a more organized form of compiled laws, is not due to lack of popular desire for systematized laws, but to failures of the political system to carry out their out wishes and deliver a government of laws. No one ever voted for common law.

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[291] ABRAHAM LINCOLN, GETTYSBURG ADDRESS (1863).

[292] [James Madison], *The Senate, Federalist No. 62*, INDEPENDENT JOURNAL, February 27, 1788. [Emphasis added.]

[293] Abraham Lincoln, *Annual Message to Congress, December 3, 1861, in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 35 (1953). [Emphasis added.] An English journal, in an article reprinted in Canada, already in August 1860, reported a movement to revise federal statutes and that the U.S. Senate had agreed to a resolution "for the appointment of a commissioner to revise the public statutes; to simplify their language; to correct their incongruities; to supply their deficiencies; to arrange them in order; to reduce them to one connected text; and to report them thus improved to Congress for its final action, to the end that the public statutes, which all are presumed to know, may be in such form as to be more within the apprehension of all." *Codification of Law in America*, 4 SOLICITORS' J. AND REP. 833 (1860), *reprinted in* 6 UPPER CANADA L.J. (OLD SERIES) 222 (1860). Lincoln the systematizer has recently been hailed as the codifier of the laws of war. *See* WITT, *supra* note 271.

A. THE NECESSITY OF SYSTEMATIZING

Systematizing of laws may be likened to building a library of books. For rules to guide, for books to be useful, rules and books, and their contents, must be accessible. When one has only a few laws or only a few books, one can skim through them all to find the rules or information that one needs. When one has more than a few laws, or more than a few books, one organizes the laws or the books to enable finding what one needs. Systematizing is a normal development of written laws. Even such a short set of laws as the biblical Ten Commandments is systematized: the commandments begin with affirmative duties to God, continue with affirmative duties to parents, and conclude with prohibitions of acts harmful to one's fellow men. Systematizing is necessary to a government of laws. In a government of laws, law must be accessible to people. Without system, laws become unknowable, inconsistent and incoherent. Tyrants, not laws, govern. In the 19th century proponents of systemization likened its absence to the reign of the Roman Emperor Caligula, who "published" laws in such ways that no one could read them.[294]

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[294] *See, e.g.*, J. Louis Tellkampf, *On Codification, or the Systematizing of the Law*, 26 AM. JURIST & L. MAG. 113 (1841), 283, 288 (1842), *reprinted* in J.L. TELLKAMPF, ESSAYS ON LAW REFORM, ETC. 3, 44 (1st ed., London, 1859) (2d ed., Berlin, 1875) ("To hang up the laws on a high pillar, as … the tyrant did, so that no citizen could read them; or, which amounts to the same thing, to bury them under all the materials of learned books, customs, scattered statutes, and collections of decisions or conflicting judgments and opinions, so that a knowledge of jurisprudence can be attained by only a few of the people; such a state of things can in no wise be justified."). *See also, On the Promulgation of the Laws*, 6 AM. L.J. 152k, 152m [*sic*] (1817); John Adair, *Legislature of Kentucky* [Governor's Message, Oct. 16, 1821], 21 NILES' WEEKLY REG. 185, 189-190 Nov. 17, 1821) ("In free states where the people either make the laws, or choose those who do, the principle of the government is corrupted whenever the people cease to understand those laws."); Joseph Desha, *[Governor's Message]*, JOURNAL OF THE HOUSE OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY 14, 15 ("Unintelligible laws are no better than unpublished laws, known only to the tyrant who makes them.") (Dec. 26, 1827); BENJAMIN JAMES, A DIGEST OF THE LAWS OF SOUTH-CAROLINA, …; A COMPENDIOUS SYSTEM OF THE GENERAL PRINCIPLES AND DOCTRINES OF THE COMMON LAW, … THE WHOLE BEING DESIGNED, CHIEFLY, FOR THE INSTRUCTION AND USE OF THE PRIVATE CITIZEN AND INFERIOR MAGISTRATE x (1822); James Brown Ray, [*Governor's Address, December 4, 1827*], JOURNAL OF THE SENATE OF THE STATE OF INDIANA: BEING THE TWELFTH SESSION OF THE GENERAL ASSEMBLY; BEGUN AND HELD … ON MONDAY THE THIRD DAY OF DECEMBER, 1827, 9, 26 (1827); Maynard Davis Richardson, *Codification, in* THE REMAINS OF MAYNARD DAVIS RICHARDSON 93, 96 (1833); WILLIAM SCHLEY, A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA; … xvii-xviii (1826) ("hence the ignorance of many in regard to this branch of our laws, which was as much out the reach of the people, as were the laws of Caligula."); Leland Stanford, *Annual Message of the Governor, January 7th, 1863*, JOURNAL OF THE SENATE OF THE STATE OF CALIFORNIA DURING THE FOURTEENTH SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA: 1863, 27, 44-45 [page 52 of the JOURNAL OF THE ASSEMBLY] ("no person, not versed in law, can with any certainty of correctness, turn to the pages of our statute book to ascertain what the law is");E.W. [presumably Emory Washburn], *We Need a Criminal Code*, 7 AM. L. REV. 264, 266 (1872).

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Three reasons for systematizing stand out: ***governing*** rationally through knowable laws, ***unifying*** laws in governed areas and ***reforming*** laws. The relative importance of each of these reasons has varied from place-to-place and time-to-time. In many instances, perhaps in most and contrary to intuition, law reform is not the major reason for systematizing, but is only incidental to rationalization or unification.[295]

Principal arguments made for systematizing have been similar over time and place.[296] Systematized law is law knowable by the people; it is law they can abide by. Where a legal answer cannot be known beforehand, systematized law can give transparency to how decisions will be made. Systematized law can control and direct those who govern. Systematized law, as unified law, brings together people in one legal order. Systematized law, as reformed law, as consistent law, promotes equal justice under law.

Principal arguments against systematizing laws, likewise, have remained steady. Systematized laws, it is said, are inflexible and adjust less well to changes in society over time. Because written law focuses on language and system, if it is the exclusive source of law, it is said to tie the hands of decision makers in individual cases and to make it harder for them to reach just or pragmatic solutions.[297] Systematized law, as unified law, denies legal diversity.

Arguments against systematizing laws often go beyond theory to focus on practicalities. Systematizing laws costs too much. It is too difficult. Its

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The metaphor originates in SUETONIUS, THE LIVES OF THE TWELVE CAESARS, paragraph 41 (A.D. 121), and was used in England and Germany as well. *See, e.g.*, *On the Promulgation of the Laws*, 1 J. JURISPRUDENCE 241, 242 (1821). Tellkampf, followed Hegel closely and, like Hegel, referred (incorrectly) to the tyrant Dionysius instead of Caligula. *See* T.M. KNOX, HEGEL'S PHILOSOPHY OF RIGHT TRANSLATED WITH NOTES 358 n. 64 (1952). *See also* [James Madison], *The Senate, Federalist No. 62*, INDEPENDENT JOURNAL, February 27, 1788 ("Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed? Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people.").

[295] *E.g.*, *Report of the Committee*, THE CODE OF THE STATE OF GEORGIA PREPARED BY R.H. CLARK, T.R.R. COBB AND D. IRWIN v, viii (1861).

[296] *See, e.g.*, in reverse chronological order, HUGH COLLINS, WHY EUROPE NEEDS A CIVIL CODE 2-3 (2013); DAVID DUDLEY FIELD, *Codification*, 20 AM. L. REV. 1 (1886) *reprinted in* 3 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 238 (Titus Munson Coan, ed., 1890); DAVID DUDLEY FIELD, *Reasons for the Adoption of the Codes, Substance of an address before the Judiciary Committee of the Lower House of the Legislature, at Albany, on the 19th of February, 1873, on the Codes*, *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 361 (A.P. Sprague, ed., 1884); [Joseph Story *et al.*], [*Appendix] Law, Legislation, Codes*, 7 ENCYCLOPÆDIA AMERICANA 576, 581, 586-592 (1834).

[297] Field asserted that "Every argument against a code is, in my judgment, full of sophistry. The only one I shall stop to consider, is that the judges should be left to make the law as they go along." DAVID DUDLEY FIELD, LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD, REPRINTED FROM THE AMERICAN LAW REVIEW OF AUGUST, 1891, WITH SOME CHANGES AND NOTES 20 (1891).

benefits are too few. Some arguments are political: lack of trust in the systematizers or in the systematization or disapproval of changes in law systematized. The practical response of proponents of systematizing is to point to experiences of places that have systematized: who has ever had codes and reverted to no codes?

The persistence in the United States of these arguments against systematizing is remarkable. Today they are recited with the same conviction of truth as they were two hundred years ago. Yet, in the meantime, the world has developed modern legal methods.[298] The world has seen the successes of French and German code-based methods and has imitated them. It has seen the failures of American contemporary common law methods. Yet the United States remains without codes.[299] Is there another staple of modern society that the world has which the United States lacks?

* * *

Systematizing requires an inventory of applicable laws that are available for consultation. In American parlance, laws passed individually over years by legislatures are "compiled" in a single volume, usually, of still applicable statutes. Often they are arranged in chronological or alphabetical order. Compiling is a first step in systematizing laws but not the last.300 Laws exist to govern daily life. When compiling statutes, inconsistencies become apparent; likewise it becomes obvious that some statutes have become obsolete. A government of laws deals with inconsistencies and obsolescences. No man can follow contrary commands. No man should be required to follow laws that have lost their reason for being. In American parlance, systematizing to make laws consistent and current is to "revise" laws.

Revised laws do not fulfill fully the promise of systematization. To apply law well, one should be able to find and interpret easily the particular laws that govern. One should need to consult as few laws as is commensurate with the complexity of the matter at hand. Historically a common way to make law accessible in this sense has been through "codifying" laws into a limited number of codes. Codes in this sense are systematic statements of particular areas of law. They thus can state laws in ways that facilitate the learning and the applying of the legal rules that they contain. Codifying, more than revising, changes existing law, in form or substance or both.

In American parlance "code" is often used in a different sense that does not include systematizing, at least systematizing beyond compiling. "Code"

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[298] *See* James R. Maxeiner, *Scalia & Garner's* Reading Law*: A Civil Law for the Age of Statutes?,* 6 J. CIVIL L. STUDIES 1 (2013).

[299] *See* James R. Maxeiner, *The Cost of No Codes,* 31 MISSISSIPPI COLLEGE L. REV. 363 (2013), *also* in THE SCOPE AND STRUCTURE OF CIVIL CODES (J. César Rivera, ed., IUS GENTIUM vol. 32, 2014). *See generally* WOLFGANG FIKENTSCHER, DIE METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG (5 vols., 1975-1977).

[300] In 1838 the *American Jurist* explained that even a compilation is a "great good": "The first step is thus taken towards the formation of a written code of laws, in which the whole body of common and statute law shall be amalgamated into one homogenous mass." *Revised Statutes of North Carolina* [Review], 19 AM. JURIST & L. MAG. 484, 485 (1838).

may refer only to a mere compilation. Similarly,"code" may be a shorthand for the complete body of a state's standing laws.

At other times, "codes" in American usage are systematized bodies of laws aspiring to, if not ever reaching, the systematization of French or German codes. "Revised laws" may be functionally equivalent to codes in this modest sense[301]. What sets these American codes apart from their Continental counterparts is not so much the lesser level of systematization, as it is the different treatment by the courts. Continental courts start legal reasoning from codes and give codes priority over other sources of law. American courts may ignore codes and defer to other sources of law.[302]

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The enormity of the work of systematizing well done is hard to appreciate even for legislators, lawyers and judges, not to speak of laymen, historians or law teachers.[303] Legislators when they commission a code seem to expect to get it back, said one advocate of systmatizing, "by return mail".[304] Lawyers in practice 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, provide for all possible cases, even though they well know that they cannot anticipate all possible cases. Good lawmakers capture in a few understandable words what they want people to do, even when they themselves may not know what they want people to do in some cases. Good lawmakers make their laws consistent internally and with other laws. Positivist legal philosopher John Austin famously said that this "the technical part of legislation, is incomparably more difficult than what may be styled the ethical.[305]

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[301] For discussions of the distinctions, see THE FIRST CENTURY OF THE REPUBLIC at 451; ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 85 (1990). The former draws a sharp line between codes and revised statutes.

[302] As a result, proponents of codes have long seen fit to insert "fundamental rules for ... interpretation and application." REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS, OR ANY PART THEREOF. MADE TO HIS EXCELLENCY THE GOVERNOR, JANUARY, 1837, at 24-25 (1873).

[303] *Cf., Revised Code of Pennsylvania* 19 AM. Q. REV. [Robert Walsh], 399, 403, 409 (1836) ("The amount and complexity of their labours in this respect are not to be judged by the bulk of their production. Not a trace of two-thirds of the actual expense of time and study, which are necessary to the rejection of what maybe supposed to be redundancies, as to the adoption of new provisions, appears upon the face of the reported bills.")

[304] JOHN WORTH EDMONDS, AN ADDRESS ON THE CONSTITUTION AND CODE OF PROCEDURE AND THE MODIFICATIONS OF THE LAW EFFECTED THEREBY 46 (1848).

[305] 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).

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American professors of contemporary common law myth denigrate systematizing as part of a chimerical quest for what they see as unattainable legal certainty.[306] Contemporary American legal historians discount benefits of systematizing for the legal system as a whole, for public policy, for justice and for law-abiding. For example, Professor Lawrence Friedman writes: "it is hard to see how society can be changed by reforms which only rearrange law on paper."[307] Professor Kermit Hall saw codifiers as "unconcerned about the effects of codification on the poorer classes, stressing instead the lack of uniformity and certainty in U.S. law, especially in matters affecting commercial relations."[308] Hall and others trivialize codifying. If they note it at all, they dismiss it as "a critical response to the judicial creation of an American common law."[309]

Critical legal studies Professor Robert W. Gordon suggests that the idea that the "unruly mess" of the mid 19th century could through rule reform be remedied was "a kind of collectively maintained fantasy of what society would like if everyone played by the rules." According to Gordon, this "fantasy" explains why the proponents of codes in the 1870s and 1880s "should have invested most of their public energy in what may seem to us a relatively sterile and peripheral activity: the improvement of legal science."[310] So today the United States remains a land without a science of law (in the sense of what the Germans call *Rechtswissenschaft*).

Such thinking explains the practical disappearance of statutes and their systematizing from American legal consciousness. That which the Centennial Writers saw as the way "to the direct and practical amelioration of mankind,"[311] lawyers on the eve of the sesquicentennial in 1926 suppressed as

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[306] *See* James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VALPARAISO L. REV. 517 (2006). *But see*, James R. Maxeiner, *Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?*, 15 TULANEJ. INT'L & COMP. L. 541 (2007).

[307] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 354 (1973) ("Behind the work of the law reformers was a sort of theory: that the legal system is best, and works best, and does the most for society, which conforms to the ideal of legal rationality—the system which is most clearly, orderly, systematic (in its formal parts), which has the most structural beauty, which most appeals to the modern, well-educated jurist. The theory was rarely made explicit, and of course never tested. It was in all probability false ….") The third edition, 2004, at 304-305, is similar.

[308] KERMIT L. HALL THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 126 (1989).

[309] KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 139 (2 d ed., 2009) (giving codifying one page out of 465). *See also* G. EDWARD WHITE, AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION (2014) (not even a footnote in 149 pages).

[310] Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 53-55 (Gerard W. Gawalt, ed., 1984).

[311] *Law in America: 1776-1876*, 122 N. AM. REV. at 174.

an un-American attempt "to supplant the parent Common Law" and "to forsake our English heritage and follow the lead of Imperial Rome."[312] Bicentennial writers—in the middle of the ''Age of Statutes"—celebrated *Common Faith and Common Law* and took no note of statutes or codes.[313] Millennial American and English writers jointly celebrated *Common Law, Common Values, Common Rights*, with no mention of statutes of the century just past, such as the American Civil Rights Act of 1964 or the U.K. Human Rights Act 1998.[314]

[312] 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, 15 (reporting the consensus of the bar at the meeting).

[313] POLITICAL SEPARATION AND LEGAL COMMUNITY: COMMON FAITH AND COMMON LAW (Harry W. Jones, ed., 1976).

[314] COMMON LAW, COMMON VALUES, COMMON RIGHTS, ESSAYS ON OUR COMMON HERITAGE BY DISTINGUISHED BRITISH AND AMERICAN AUTHORS (2000). In this book, British indifference to statutes is remarkable; almost no one writing in the book observed the Regulations and Directives of the European Union which envelop every Member State's law including that of the United Kingdom.

B. A CENTURY OF SYSTEMATIZING LAWS[315]

The laws are not made for the lawyers but for the people.
American Law Journal (1813)[316]

In the first century of the Republic all American states and the federal government systematized their laws. All compiled their laws; all did so before they published official reports of the decisions of their courts. All published some form of revision or codification. There is no room for the idea that statutes and their systematization were ever foreign to America or for the thought that case law, that is, judge-made common law, was the one and only true law.

1. The Urgency of Systematizing

Systematizing was—and is—necessary to a well-functioning modern state; in importance it may be second only to the written constitution itself.[317]Americans can congratulate themselves on the alacrity with which

[315] Until recently American law professors had to look to outsiders, either American historians or foreign jurists, for scholarship on pre-1890 systematizing. *See, e.g.*, CHRISTINA BÖRNER, KODIFIKATION DES COMMON LAW. DER CIVIL CODE VON DAVID DUDLEY FIELD (Dr. jur. diss., Faculty of Law, University of Zurich, 2001) (a related English language essay of the author is Christina Börner, *The Institutional Backgrounds for the Field Civil Code in New York (1865) and California (1872),* 1 GLOBAL JURIST ADVANCES Issue No. 3 (2002)); CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (Ph. D. diss., Dept. of History, University of Maryland College Park, published Greenwood 1981); CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA 1772-1804 (Ph. D. diss., Corcoran Dept. of History, University of Virginia, 1971, published Garland, 1987); WILLIAM D. DRISCOLL, BENJAMIN F. BUTLER: LAWYER AND REGENCY POLITICIAN (Ph. D. diss., Dept. of History, Fordham University 1965, published Garland 1987); MICHAEL JOSEPH HOBER, THE FORM OF THE LAW: DAVID DUDLEY FIELD AND THE CODIFICATION MOVEMENT IN NEW YORK, 1839-1888 (Ph.D. diss., Dept. of History, University of Chicago, 1975); PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY (Ph. D. diss., Dept. of History, University of Illinois, Champaign, 1961, published Garland, 1986); MAURICE EUGEN LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA (Dr. jur., University of Leiden 1924, published Amsterdam, 1924); DONALD JOSEPH SENESE, LEGAL THOUGHT IN SOUTH CAROLINA, 1800-1860 (Ph. D. diss., Dept. of History, University of South Carolina, 1970); STEPHAN SOBOTKA, DAVID DUDLEY FIELD UND DIE KODIFIKATIONSBESTREBUNGEN IM STAAT NEW YORK IM 19. JAHRHUNDERT, -- UNTER BESONDERER BERÜCKSICHTIGUNG DES "CIVIL CODE" (Dr. jur. diss., Faculty of Law, University of Cologne, 1973); DAUN ROELL VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW (Ph.D. diss., Dept. of History, Johns Hopkins University, 1974). These works are mostly not yet digitized. One which is, is Gunther A. Weiss, *The Enchantment of Codification in the Common Law World*, 25 YALE J. INT'L L. 435 (2000).

[316] Introductory remarks to John Treadwell, Enoch Perkins & Thomas Day, Report of a Committee, *Of the Laws of Connecticut* (1808), *in* 4 AM. L.J. 222 (1813).

[317] *See, e.g.*, *Revision of the Laws in Massachusetts*, 13 AM. JURIST & LAW MAG. 344, 378 (1835) ("The formation of a code is a magnificent enterprise, worthy of a State; success in

they undertook—against substantial difficulties—the seemingly mundane task of compiling. Jefferson, before he could focus on reform of substantive law, collected statutes. James Wilson, who had the same task, explained to the Pennsylvania Assembly, "How can I make a digest of the laws, without having all the laws upon each head in my view?"[318]

In the early Republic even the task of compiling required a Herculean effort.[319] In the 1790s James Wilson in Pennsylvania and John F. Grimké in South Carolina each reported dealing with over 1700 statutes in their respective states.[320] They had no clerical staffs and no means of reproduction of laws other than manual copying.[321] Communications were slow and mail services lacking. Finding all laws to be compiled could be practically impossible. Had Jefferson not been the avid book collector that he was, had he not had access to his own personal library and the personal libraries of others, he could not well have drafted his revisal.

Nevertheless, by 1800 all of the original thirteen states and the federal government had compiled their laws: Connecticut (1784); Delaware (1797); federal government (1797); Georgia (1800); Maryland (1799); Massachusetts (1788); New Hampshire (1789); New Jersey (1800); New York (1789); North Carolina (1791); Pennsylvania (1793-1797); Rhode Island (1798); South Carolina (1790); and Virginia (1794).[322] In 1837, at the 50th anniversary of the United States Constitution, the *American Jurist & Law Magazine*

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which is one of the most glorious events in the annals of any community…. If well accomplished, it is, next to the formation of a frame of government, pre-eminently the most important and social achievement."). *Cf.* George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 ARK. L. REV. 1 (2001) (comparing the French and German Civil Codes with the United States Constitution).

[318] 1 THE WORKS OF HONORABLE JAMES WILSON, L.L.D. Preface (Bird Wilson, ed., 1804), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 418 (Kermit L. Hall and Mark David Hall, eds., 2007).

[319] The task was no less in England. *See*, RICHARD WHALLEY BRIDGMAN, REFLECTIONS ON THE STUDY OF THE LAW 43 (1804) ("the code of statute laws has swollen to a mass so burthensome as to become insupportable even by an *Atlas* or *Hercules*, and to call for the aid of a second *Justinian* to digest, simplify, and reduce them." [emphasis in original]).

[320] THOMAS FAUCHERAND GRIMKÉ, *Preface*, THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA, FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790, INCLUSIVE ….(1790).

[321] Difficulties of copying dealt a body blow to Edward Livingston's proposed penal code. It was destroyed in a fire the night before he was to deliver it to the printer. JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 335 (2014). The sheer technical demands of handwriting continued until the invention of the typewriter introduced to America at the Philadelphia Centennial Exposition. *Cf.*, REPORT OF THE CODE COMMISSIONERS OF THE STATE OF CALIFORNIA, NOVEMBER 15TH, 1873, at 3 ("The work of copying four Codes, consisting of fourteen thousand one hundred and sixty-five sections, or about twenty thousand one hundred and seventy-six folios, required much time and occupied two Secretaries constantly nine months.") [I could not locate a digitized copy of this Report.].

[322] CHECK-LIST OF STATUTES OF STATES OF THE UNITED STATES OF AMERICA, INCLUDING REVISIONS, COMPILATIONS, DIGESTS, CODES AND INDEXES (Grace E. Macdonald, compiler, 1937). *See also* STATE LIBRARY OF MASSACHUSETTS, HAND-LIST OF LEGISLATIVE SESSIONS

presented a 25-page detailed list of the most recently published revisions, digests and collections of the 25 states and the Federal government including short critical notices. This it did, not so much to satisfy academic interests, but more to facilitate lawyers answering legal questions: "the labor of the inquirer is greatly diminished, by having recourse, in the first instance, to some general collection, behind which it is unnecessary to extend his examination."[323] It found "worthy of remark" that nearly fifty years of legislation of the Federal government had never been revised under the authority of the government.[324] It criticized some works, *e.g.*, Delaware (without "systematic arrangement")[325] and Maryland ("not revised or digested, but merely arranged and published in the order of their enactment"),[326] and praised others, *e.g.* Georgia ("carefully and skillfully made)[327] and Louisiana ("the theory of obligations, … comprising, in a condensed form, one of the most satisfactory digests of the general principles on that subject").[328]

By the Centennial in 1876 there were thirty-seven states. New states, as they joined the Union (and some even before as territories), adopted, compiled, revised and codified laws. New states did not write on blank slates. They, too, faced challenges in compiling. Where original states sometimes could not find the laws that they had passed, new states sometimes could not tell which laws were their laws and where they applied. In the first century of the Republic, American political boundaries changed dozens of times. New states had legal inheritances of laws from as many as six or more different states, territories and even countries.[329]

The Centennial Writers expected that systematizing would advance beyond compiling. *The North American Review* wrote "The practical administration of law depends … upon its simplicity …. No nation, in modern times, can afford to go on accumulating vast masses of authoritative decisions and statutes, without occasionally stopping to digest decisions and to revise written laws."[330] "[Practical administration] can only be attained … by resorting to the expedient of codification."[331] Harper's *First Century of*

AND SESSION LAWS, STATUTORY REVISIONS, COMPILATIONS, CODES, ETC., AND CONSTITUTIONAL CONVENTIONS (1912).

[323] *A Notice of the Most Recent Revisions, Digests, and Collections of the Statute Laws of the United States and of the Several States,* 18 AM. JURIST & L. MAG. 227 (1837) (emphasis in original).

[324] *Id.* at 228.

[325] *Id.* at 232.

[326] *Id.* at 241.

[327] *Id.* at 233.

[328] *Id.* at 235.

[329] *Cf., e.g.*, George H. Hand, *Preface*, THE REVISED CODES OF THE TERRITORY OF DAKOTA A.D. 1877 iii (1877) ("During their existence as territories, the boundaries and extent of these divisions have been subject to frequent and marked changes, and new names have appeared and old ones have disappeared or become permanent in statues formed out of a part, rendering, until recently, the political geography of the territories more like the figures in the kaleidoscope.").

[330] *Law in America: 1776-1876,* 122 N. AM. REV. at 179.

[331] *Id.*

the Republic reported that by 1876 nearly every one of the by then 37 states—including rebelling states—had revised or codified its laws since 1860.[332] It was, as one contemporary wrote, "a necessity, and from the earliest dawnings of law has been so considered."[333]

Revising and codifying are more challenging than compiling. One systematizer can speak for many. In 1835 Mississippi's reviser in reporting to the legislature on his progress in prepare a Revised Code, explained his delay: "The consolidation of numerous statutes into one uniform law, embracing the whole subject of them, requires great care and deliberation. The foundations of the law are to be examined, prior legislation is to be revised and weighted, and the legitimate consequences of the principles embodied, logically deduced. However easy all this may appear to a cursory observer, yet certain I am, that whoever shall attempt the labor, will find an ample field for mental exertion."[334] He fulfilled his commission, but the legislature did not adopt his work.[335]

In the Republic's first century work toward revising and codifying was nearly everywhere—at least at some time,—and nearly every moment —at least somewhere. Often leaders in revising and codifying were leaders in the legal system generally. The amount of energy they and the public put into compiling, revising and codifying was enormous and is unrecognized today.

Compilations were non-controversial. Revisions and codifications, on the other hand, were controversial and, at best, partially successful. The records of compilations are fat bound volumes. Records of revisions and codifications often are ephemeral: draft laws, committee reports, legislative debates, public discourses, pamphlets, journals, and newspapers. But those works exist in quantity: a *Bibliography of Codification and Statutory Revision*[336] from 1901 is 57 pages long, lists over a thousand entries drawn from

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[332] THE FIRST CENTURY OF THE REPUBLIC at 451 (excluding possibly Pennsylvania and Tennessee). *See also Chapter XXXV. Revised Statutes, in* WILLIAM B. WEDGWOOD, THE GOVERNMENT AND LAWS OF THE UNITED STATES: A COMPLETE AND COMPREHENSIVE VIEW OF THE RISE, PROGRESS, AND PRESENT ORGANIZATION OF THE STATE AND NATIONAL GOVERNMENT 112 (1866) (stating that every state by 1866 had published "Revised Statutes of the State"). One can confirm the assertion by consulting either of the lists in note 322, *supra*. From the lists, one cannot well tell systematizing revisions from mere compilations.

[333] P.N. Bowman, *Interstate Revision and Codification*, 3 SO. L. REV. (New Series) 573, 575 (1877).

[334] Letter of P. Rutilius R. Pray, dated January 15th, 1835, to the Honorable P. Briscoe, President of the Senate, *in* JOURNAL OF THE SENATE OF THE STATE OF MISSISSIPPI AT A CALLED SESSION THEREOF, HELD IN THE TOWN OF JACKSON [commencing January 19, 1835] 84, 85 (1835).

[335] A. HUTCHINSON, CODE OF MISSISSIPPI; BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE, … FROM 1798 TO 1848 …. at 67. *See* R. RUTILIUS R. PRAY, NOTES TO THE REVISED STATUTES OF THE STATE OF MISSISSIPPI (1836).

[336] It is appended to a 75 page report on *Statute Law in New York, From 1609 to 1901* which itself is a *Supplement* to [New York (State) Legislature], REPORT OF THE JOINT COMMITTEE OF THE LEGISLATURE OF 1900 ON STATUTORY REVISION COMMISSION BILLS, which itself is available on Google Books as an attachment to the REPORT OF THE SPECIAL COMMITTEE OF

only six libraries in New York State. Hard to find in libraries, today most of these entries are on digital desktops.

It is unhelpful to characterize systematization as a social, political or religious movement. It has no particular proponents and no particular beneficiaries. It has no particular place in time. It is, as the Centennial Writers and their contemporaries saw, more a natural phenomenon of modern government, such as democracy. If it is to be counted a movement, then it is a movement like public education. Public education is an apt analogy: proponents of the one were often proponents of the other.[337] Their shared goal was and is an educated public.

2. The Ubiquity of Systematizing

Systematizing spread across the North American continent with the people who settled it. It was ubiquitous. In every state some measure of systematizing occurred. Systematizing was part of the law. Systematizing was something leaders in law did. Systematizing was something the people expected. To merely say that it was ubiquitous—in the face of a century of denial—is not enough to challenge contemporary common law myth. I beg the reader's patience to show some of the many manifestations of systematization in the first century of the Republic, first to the Civil War, and then at the "Centennial Moment":

Jefferson's Revisal of Virginia Laws. As noted above, the first century of the Republic began with Jefferson rushing home to Virginia to initiate his Revisal of Virginia laws. Throughout the original thirteen states, jurists compiled their states' laws. Virginia was the leader in revising. Bill-by-bill its legislature considered Jefferson's handwork.[338] Jefferson credited Madison for overcoming the opposition of "endless quibbles, chicaneries, perversions, vexations of lawyers and demi-lawyers."[339] When Madison went off to the Constitutional Convention in Philadelphia, others in Virginia picked up where he left off.[340] As for the importance of the work for the people, one publisher of the revised Virginia laws opined: "it is plain that every family in the commonwealth, should, if possible, possess a copy of it."[341] But Vir-

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THE ASSEMBLY OF THE LEGISLATURE OF 1901 ON STATUTORY REVISION COMMISSION BILLS 1901.

[337] Examples are Thomas Jefferson in Virginia and Horace Mann and Joseph Story in Massachusetts.

[338] *See* JULIAN P. BOYD (ED.), PAPERS OF THOMAS JEFFERSON, vols. 1 to 3 (1950) (giving bill-by-bill descriptions).

[339] THE AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790, TOGETHER WITH A SUMMARY OF THE CHIEF EVENTS IN JEFFERSON'S LIFE 71 (Paul Leicester Ford, ed. 1914; New Introduction by Michael Zuckerman, 2005).

[340] ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 80 (1990). The successor *Revised Code of 1792* was characterized by another author as "merely a compilation." Henry E. Ross, *History of Virginia Codification*, 11 VA. L. REG. 91 (1905).

[341] *Preface*, A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE v (Samuel Pleasants, Jun. &

ginia was not alone in taking up revision; it was just the first and most successful. South Carolina,[342] North Carolina (with later Associate Justice Iredell) and Pennsylvania (with Associate Justice Wilson) also made starts in the 18th century.

Toulmin's Southwest Digests. The influence of Virginia and of Jefferson extended to Kentucky, the new state formed out of Virginia, and to Mississippi and Alabama to the south. Jefferson helped Harry Toulmin, an immigrant Englishman, become President of the Transylvania Seminary.[343] From there Toulmin become second Secretary of State of Kentucky (1796-1804). While Secretary of State he compiled Kentucky's laws[344] and wrote a multivolume treatise on criminal law intended to be prefatory to a criminal code.[345] In 1804 Jefferson appointed Toulmin federal judge for the Territory of Mississippi (1804-1819). While Territorial Judge Toulmin compiled the Territory's laws.[346] When the State of Alabama was created in the old Mississippi territory, Toulmin compiled its laws.[347]

Louisiana Purchase. In 1803 the United States doubled its size when it purchased the Louisiana territory that had been variously under the civil law systems of France and Spain. The Territory of Orleans, the later state of Louisiana, was separated from the rest already in 1804. In 1808 that territory adopted the civil law-based *Digest of the Civil Laws in Force in the Territory of Orleans*. In 1812 the Constitution of the new state of Louisiana included an anti-reception clause designed to prevent the kind of adoption

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Henry Pace, 1803). This preface gives particular attention to practical conditions of cost and portability: "In riding ten, or fifteen miles to a county court-house, a gentleman does not always think it worth while to take a portmanteau along with him." *Id.* at ii-iii.

[342] 1 JOSEPH BREVARD, AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA xvii (1814).

[343] On Toulmin, *see* Paul M. Pruitt Jr., *Harry Toulmin: A Frontier Justinian*, *in* PAUL M. PRUITT, JR. TAMING ALABAMA: LAWYERS AND REFORMERS, 1804-1929 (2010).

[344] HARRY TOULMIN, SECRETARY TO THE COMMONWEALTH OF KENTUCKY, COLLECTION OF ALL THE PUBLIC AND PERMANENT ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY WHICH ARE NOW IN FORCE, ARRANGED AND DIGESTED ACCORDING TO THEIR SUBJECT; TOGETHER WITH ACTS OF VIRGINIA xv (1802) ("The very confused and undigested state in which the acts of the Legislature of Kentucky have hitherto remained, rendered an arranged collection of them highly necessary both to professional gentlemen and to the public at large."). Toulmin included *A Summary of the Criminal Law of Kentucky as Applicable to Freeman*, at xxviii.

[345] HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF KENTUCKY (2 vols., 1804).

[346] THE STATUTES OF THE MISSISSIPPI TERRITORY, REVISED AND DIGESTED BY THE AUTHORITY OF THE GENERAL ASSEMBLY (Harry Toulmin, compiler, 1807).

[347] DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING THE STATUTES AND RESOLUTIONS IN FORCE AT THE END OF THE GENERAL ASSEMBLY IN JANUARY, 1823 (Harry Toulmin, compiler, 1823).

by reference of English law that some other states had accomplished.[348] Notwithstanding popular perceptions, Louisiana was never under the Code Napoleon.[349] Louisiana has, however drawn on French codes in adopting its own laws and has defended its civil law inheritance against common law intrusions.[350] Louisiana law has introduced French law to Americans.[351]

On the frontier the object of legislation was clearer than the means. In 1822 at the first meeting of the Legislative Council of the Territory of Florida, the newly chosen President apologized for his lack of "practical experience of the forms of legislation." The Governor told the Council: "The uncertainty as to the laws actually in force in Florida, renders it your duty to give to the territory the basis of such a code, as can be clearly and certainly understood by the great body of the people." The Governor was none too clear about where that would come from. Notwithstanding "serious objections to the common law," he advised that "common law be adopted as the basis of our code." His more general counsel: "combine whatever is excellent in both systems, and avoid whatever is objectionable in either, as a distinct code."[352] Clear from that message is, whether substantive rules be common law or civil law origin, they should be rules of written law.

Livingston's Laws. Through Edward Livingston, a New Yorker and younger brother of Robert Livingston, is the way most Americans in the first century of the Republic learned of Louisiana law. Louisiana engaged Livingston (with others) to revise the 1808 digest as a civil code, to draft a code of procedure and to prepare a criminal code.[353] Livingston is known outside Louisiana better for the criminal law work, which was not adopted, than for

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[348] LA. CONST. 1812 art. IV, sect. 11 ("the legislature shall never adopt any system or code of laws, by general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact.").

[349] The territory was transferred four months before the French Code Civil came into force. In any event, however, Louisiana was transferred back to France from Spain for only a few weeks in 1803. It had for decades prior been under Spanish rule and laws.

[350] *See, e.g.*, SHAEL HERMAN, THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES (1993) (with a bibliography of relevant materials); RICHARD HOLCOMBE KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839 (1987) (discussing, *inter alia*, the debate over sources for the 1808 digest); Augustín Parise, *Private Law in Louisiana: An Account of Civil Codes, Heritage, and Law Reform, in* THE SCOPE AND STRUCTURE OF CIVIL CODES (Julio César Rivers, ed., IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE Vol. 32) 429 (2013).

[351] *See* E. Evariste Moise, *Two Answers to Mr. Carter's Pamphlet*, 29 ALB. L.J. 267 (1884); *Jurisprudence of Louisiana*, 4 AM. QUARTERLY REV. 53 (Robert Walsh, ed., 1828).

[352] *Florida*, 23 NILES' WEEKLY REGISTER 23-24 (Sept. 14, 1822) (including the July 22, 1822 message of Governor William P. Duval).

[353] LOUISIANA LEGAL ARCHIVES, [two volumes in one] VOLUME 1, A REPUBLICATION OF THE *PROJET* OF THE CIVIL CODE OF LOUISIANA OF 1825, VOLUME 2, A REPUBLICATION OF THE *PROJET* OF THE CODE OF PRACTICE OF LOUISIANA 1825 (1937); EDWARD LIVINGSTON, SYSTEM OF PENAL LAW, PREPARED FOR THE STATE OF LOUISIANA; COMPRISING CODES OF OFFENCES AND PUNISHMENTS, OF PROCEDURE, OF PRISON DISCIPLINE AND EVIDENCE APPLICABLE AS WELL TO CIVIL AS TO CRIMINAL CASES. AND A BOOK, CONTAINING DEFINITIONS OF ALL THE TECHNICAL WORDS USED IN THIS SYSTEM (1824).

the civil law work, which was.[354] The criminal law proposals were reprinted, some in part, beginning already in 1824 in England, France, Germany and Quebec.

In 1828 Congress printed Livingston's proposed *System of Penal Law* for the House of Representatives as Livingston had revised it as Congressman for the United States.[355] In 1832 a Congressional committee included Livingston's proposal as the criminal law component of a complete code for the District of Columbia.[356] Livingston's work gave encouragement to later codifiers.[357] In 1856 Henry Maine called him "the first legal genius of modern times" and said that it was his "code, and not the Common law of England, which the newest American States are taking for the substratum of their laws."[358]

Digitization promises to disclose influences not previously known. One colorful example that I found is in Indiana. In 1827 the new state's young (age 33) governor, proposed that he would write a code based on the "Napoleon or Livingston codes" so as "to enable the people generally to form a tolerable correct idea of that system which controls their actions." It would help in "shaking off this disreputable stigma" of control by British laws. He implored the bar not to suppose "that this attempt to promulgate the laws

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[354] *See, e.g.*, *The Livingston Code*, in JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 332 (2014). From the first century of the Republic, see, *e.g.*, *Edward Livingston and His Code*, 9 U.S. MAG. & DEMOCRATIC REV. 3, 211 (2 parts, 1841); CHARLES HAVENS HUNT, LIFE OF EDWARD LIVINGSTON WITH AN INTRODUCTION BY GEORGE BANCROFT (1864).

[355] EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE UNITED STATE OF AMERICA, CONSISTING OF A CODE OF CRIMES AND PUNISHMENTS; A CODE OF PROCEDURE IN CRIMINAL CASES; A CODE OF PRISON DISCIPLINE; AND A BOOK OF DEFINITIONS, PRINTED BY ORDER OF THE HOUSE OF REPRESENTATIVES (1828).

[356] Edward Livingston, *System of Penal Law for the District of Columbia*, *in* A SYSTEM OF CIVIL AND CRIMINAL LAW FOR THE DISTRICT OF COLUMBIA AND FOR THE ORGANIZATION OF THE COURTS THEREIN, REPORTED BY THE JOINT COMMITTEE APPOINTED FOR THE PURPOSE IN OBEDIENCE TO A RESOLUTION OF THE FIRST SESSION OF THE TWENTY-SECOND CONGRESS, DOCUMENT NO. 85, *in* VOLUME II. CONTAINING DOCUMENT No. 85, of PUBLIC DOCUMENTS PRINTED BY ORDER OF THE SENATE OF THE UNITED STATES, SECOND SESSION OF THE TWENTY-SECOND CONGRESS … BEGUN DECEMBER 3, 1832 … IN TWO VOLUMES, at pp. 291-685 (1833).

[357] *E.g.*, *The Statute Laws of Tennessee*, 8 AM. JURIST 298, 314 (1832) ("It must be gratifying to Mr. Livingston to see … his labors have been duly appreciated, and have been signally useful in softening the rigor of the criminal law in one, at least, of the neighbor states, and in improving the style of their composition.").

[358] H.J.S. Maine, *Roman Law and Legal Education*, 1856 CAMBRIDGE ESSAYS 1, 17 (1856), *reprinted in* HENRY SUMNER MAINE, VILLAGE-COMMUNITIES IN THE EAST AND WEST 330, 360 (3rd and enlarged ed., 1880). For a contemporary account of Livingston's life, see CHARLES HAWES HUNT, LIFE OF LIVINGSTON WITH AN INTRODUCTION BY GEORGE BANCROFT (1864).

of the land, will be aimed at their useful profession, or condemn its practicality, until they see the book."[359] One wonders how serious he was when one learns what came of his proposal.

Three years later, in 1830, when the Senate had not received the promised code from the Governor and itself was considering revision, it formally inquired how far he "had progressed in the codification of the laws of the State."[360] The Governor responded that he had been doing it on his own time and that it could not form any part of the revision the Senate was contemplating.[361] There then followed a two month long dispute between the Governor and the Senate over ownership and possession of what was apparently the only copy of the Louisiana Civil Code in the State of Indiana. Also involved were the Secretary of State, the State Auditor, the State Treasurer, the State Librarian and the State Librarian's predecessor in office. The heart of the dispute the Governor identified as "an evident determination to wrest it from my hands, on the part of those who cannot endure the idea of having a code of laws for Indiana."[362] The book ended up in the State Library and Indiana ended up without a Livingston-like code.[363]

Napoleon's Five Codes. In the first decade of the 19th century France systematized its law: it adopted Napoleon's five codes, *i.e.*, the *Code Civil* (the "Napoleonic Code," the most famous of the five, first in 1804), as well as codes of Commerce, Civil Procedure, Criminal Procedure and Criminal Law. Americans took note. In 1814, notwithstanding negative perceptions of France under Napoleon, and "the powerful coalition … arrayed against her," New York attorney John Rodman, in his translation of the Commercial Code, reported that it was "generally admitted that the new system of jurisprudence adopted in France was entitled to the highest commendation, as a production of wisdom and learning."[364] He offered the Commercial

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[359] James Brown Ray, [*Governor's Address, December 4, 1827*], JOURNAL OF THE SENATE OF THE STATE OF INDIANA: BEING THE TWELFTH SESSION OF THE GENERAL ASSEMBLY; BEGUN AND HELD … ON MONDAY THE THIRD DAY OF DECEMBER, 1827, 9, 25-26 (1827), also in MESSAGES AND PAPERS RELATING TO THE ADMINISTRATION OF JAMES BROWN RAY: GOVERNOR OF INDIANA 1825-1831 (Dorothy Riker & Gayle Thornbrough, eds., 1954).

[360] JOURNAL OF THE SENATE OF THE STATE OF INDIANA: BEING THE FIFTEENTH SESSION OF THE GENERAL ASSEMBLY; BEGUN AND HELD … ON MONDAY THE SIXTH OF DECEMBER, 1830, 61 (1830 [*sic*]).

[361] Letter of Dec. 10, 1830, *id*. at 63-64.

[362] Letter of Jan. 10, 1830, *id*. at 500.

[363] The story is told in the pages of the *Journal*, *supra* note 360, at 49-50, 63-64, 169, 249-250, 277-278, 500-509, 518-519, 546-553, Appendix (d).

[364] JOHN RODMAN, THE COMMERCIAL CODE OF FRANCE, WITH THE MOTIVES, OR DISCOURSES OF THE COUNSELLORS OF STATE, DELIVERED BEFORE THE LEGISLATIVE BODY, ILLUSTRATIVE OF THE PRINCIPLES AND PROVISIONS OF THE CODE iii-iv (1814). Rodman's was already the *second* American translation of the French Commercial Code of 1807. Robert Walsh had already included in the second volume of his journal, *The American Review of History and Politics*, translations of both the Commercial and the Criminal Codes. *Commercial Code of the French Empire. Translated for the American Review, with Explanatory Notes*, 2 AM. REV. HIST. & POLITICS—APPENDIX 91 (Oct. 1811); *Penal Code of the French Empire*, 2 AM. REV. HIST. & POLITICS—APPENDIX 1 (July 1811). Rodman, to increase the reform value

Code as an aid to "throw off the shackles of antiquated [common law] rules and precedents, unfounded in reason and truth, and diligently endeavor to ingraff into our system of jurisprudence those pure principles of equity and justice …."[365] Throughout the 19th century Americans pointed to Napoleon's codes as examples of the success of written law. Digitization facilitates new examinations of the influence of the French codes in America. In England they inspired Jeremy Bentham the most famous publicist of codes ever.

Bentham—Legislator of the World.[366] Bentham never visited America, but he made his influence felt in the new world. In 1811 he wrote to President Madison, himself famous for legislation, and offered his services to codify American law. He made the same offer to other leaders, including to the Czar of Russia. Madison let the letter sit for five years—the two countries were at war—before he respectfully declined. Bentham then wrote to the governors of states and got some modest interest. Bentham's influence was with leaders rather than with the public, and even there it was uneven, for Benthamism was as much about utilitarianism as about codifying. He is said to have had the greatest influence on Edward Livingston,[367] but he also befriended a wide range of notables including John Quincy Adams and influenced other code proponents including David Dudley Field.[368] At the end of the Republic's first century *The Nation* wrote that "The various attempts made, with more or less success, in this country no less than in England, to codify the law are also distinct results of the teachings of Bentham and Austin."[369] Today digitization permits scholars further to plumb the depths of Benthamism in American law systematization.

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of his translation, added what we call today in American English, the legislative history, *i.e.*, the *Motives*. He lamented that he had been unable to get enough subscribers to support publication of his translation of the larger Civil Code. RODMAN, *supra* at iv-v.

[365] *Id*. at xiii.

[366] *See generally* JEREMY BENTHAM, 'LEGISLATOR OF THE WORLD': WRITINGS ON CODIFICATION, LAW, AND EDUCATION" (Philip Schofield & Jonathan Harris, eds., 1998); JEREMY BENTHAM, PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION: INCLUDING CORRESPONDENCE WITH THE RUSSIAN EMPEROR, AND DIVERS CONSTITUTE AUTHORITIES IN THE AMERICAN UNITED STATES (1817).

[367] C.W. Everett, *Bentham in the United States of America*, *in* JEREMY BENTHAM AND THE LAW: A SYMPOSIUM (George W. Keeton & Georg Schwarzenberger, eds.) 185, 193 (1948).

[368] PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY (Ph. D. diss., Dept. of History, University of Illinois, Champaign, 1961, published Garland, 1986). King devotes one chapter to three befriended politicians (Aaron Burr, John Quincy Adams, and Albert Gallatin), another to three intellectuals (Thomas Cooper, David Hoffman, and Richard Hildreth), and a third to three code proponents (Livingston, David Dudley Field and Richard Vale).

[369] *Modern English Law* [Review], 22 THE NATION 273, 274 (1876), *reprinted in* 3 CENTRAL L.J. 728 (1876). The same review commented on English attempts to codify: "Other causes, no doubt, have contributed to the failure of English reformers to produce a code, but the nature of the House of Commons is the most obvious cause of their want of success." *Id*. at 274.

Grimké & Cooper—Systematizing in South Carolina. In an 1828 article on *Codification in the United States of America*, an English journal, after reporting on Bentham's communications, turned to the then ongoing work to codify law in South Carolina. The governor had proposed appointment of special committee to take up the matter and the legislature unanimously approved. At first limited to statute law, the legislature amended the resolution to include common law. To confine the measure to consolidation of statutes, according to one criticism, "might benefit the bar, but would leave the citizens in their present state of ignorance of 'the HYDRA, the COMMON LAW,' nurtured by the profession …."[370] Noted jurist Thomas S. Grimké (who would later be eclipsed by his famous abolitionist sisters)[371] led a drive for a code and chaired the committee.[372] One supporter of the project following its demise identified the "serious difficulties" the "friends of codification encounter[ed]": "indifference to action, a dread of consequences, the prejudices of education, all are against them. The laws of Carolina, inconsistent and unintelligible as they are, were the laws of our forefathers."[373] That no code came of the effort has been attributed in a modern study to lawyer opponents who feared that codification "might destroy the stability of law and threaten the very existence and fabric of society."[374]

Systematizing was not, however, at an end in South Carolina. Thomas Cooper, a Jefferson protégé whom the third president described as "one of the ablest men in America and that in several branches of science", after resigning as President of what became the University of South Carolina, took up the legislature's commission to,[375] as he described it, "to make a collection of our laws that shall form the basis of any future revision, condensation, or

[370] *Codification of the Laws of the United States of America,* 2 JURIST Q.J. JURIS. & LEGIS. 47, 50 (1828).

[371] *See* MARK PERRY, LIFT UP THY VOICE: THE GRIMKÉ FAMILY'S JOURNEY FROM SLAVEHOLDERS TO CIVIL RIGHTS LEADERS (2001).

[372] *See* THOMAS S. GRIMKÉ, ORATION, ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING THE WHOLE BODY OF THE LAW TO THE SIMPLICITY AND ORDER OF A CODE, DELIVERED IN THE CITY-HALL BEFORE THE SOUTH-CAROLINA BAR ASSOCIATION (18[27]; Thomas S. Grimke], REPORT. SOUTH CAROLINA [of the Committee appointed 20th of December last, to report on the practicability and expediency of a Code of the Statute and Common Law of this State by Thomas S. Grimké) (1827).

[373] W.W. STARKE, SPEECH … ON CODIFYING THE LAWS DELIVERED IN THE HOUSE OF REPRESENTATIVES IN DECEMBER 1828 at 5 (1830).

[374] DONALD JOSEPH SENESE, LEGAL THOUGHT IN SOUTH CAROLINA, 1800-1860 at 412 (Ph. D. diss., Dept. of History, University of South Carolina, 1970).

[375] DUMAS MALONE, THE PUBLIC LIFE OF THOMAS COOPER 1783-1839, at 198, 371-373 (2nd ed. 1961).

digest."[376] It was a fitting memorial in retirement for a man who decades before published the first American edition of the *Institutes of Justinian*.[377]

Sampson's New York Discourse.[378] The same 1828 English article on *Codification in the United States of America*, after addressing South Carolina, passed on to consider William Sampson, an Irish-American lawyer. In 1823 Sampson, challenged common law in an address in New York. The journal reported Sampson's "considerable influence" in moving Americans away from common law and toward codification.[379] His influence was later called "electrifying" and seen as leading to the *New York Revised Statutes* of 1829.[380] That legislation catapulted New York into a leadership among all states that it held so long as systematizing remained a live issue.

New York may have been destined to become the nation's leader in revising and codifying. It was, and is, after all, the "Empire State". New York City was, and is, the nation's commercial capital; it was first political capital under the Constitution. For the first century of the Republic, with very little let-up, even in war, statutes were a topic of pubic debate. If there had been no other activity in the United States, that in New York would disprove contemporary common law myth that common law dominated to the near exclusion of statutes.

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[376] 1 THOMAS COOPER, THE STATUTES AT LARGE OF SOUTH CAROLINA; EDITED, UNDER AUTHORITY OF THE LEGISLATURE (in five volumes) iii (1836) (according to MALONE, *supra* note 375, at 407, it was the "final work of Cooper's life and the chief monument to his legal learning.").

[377] THOMAS COOPER, INSTITUTES OF JUSTINIAN WITH NOTES (1812) (2d ed. 1841) (3d ed. 1852).

[378] SAMPSON'S DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS, UPON THE HISTORY OF THE LAW, WITH THE ADDITION OF SEVERAL ESSAYS, TRACTS, AND DOCUMENTS, RELATING TO THE SUBJECT. COMPLIED AND PUBLISHED BY PISHEY THOMPSON (1826). This is a collection of many comments on Sampson's discourse and gives an idea that he did get attention for his ideas.

[379] *Codification of the Laws of the United States of America*, 2 JURIST Q.J. JURIS. & LEGIS. 47, 54 (1828) (reporting his writings "have had considerable influence in the United States, and have been greatly instrumental in drawing the attention of the profession, and the public of that country, to the necessity and practicability of amending the law by a mature and decided revision of its principles and present state, especially the common law.");

[380] CHARLES P. DALY, THE COMMON LAW: ITS ORIGIN, SOURCES, NATURE, AND DEVELOPMENT AND WHAT THE STATE OF NEW YORK HAS DONE TO IMPROVE UPON IT 54 (1894) ("it electrified the public mind. … and led within a decade thereafter to the enactment of the Revised Statutes. What it urged was felt to be necessary,—a thorough revision and reconstruction of the entire system then existing in this State"). *Accord*, James Dunwoody Brownson De Bow, *Louisiana*, 1 COMMERCIAL REV. 386, 417 note † (1846), *reprinted* 1 J.D.B. DE BOW, THE INDUSTRIAL RESOURCES, ETC., OF THE SOUTHERN AND SOUTHWESTERN STATES 417, 433 note † (1846). Just before Sampson gave his address, Henry Sedgwick published THE ENGLISH PRACTICE: A STATEMENT SHOWING SOME OF THE EVILS AND ABSURDITIES OF THE PRACTICE OF THE ENGLISH COMMON LAW, AS ADOPTED IN SEVERAL OF THE UNITED STATES, AND PARTICULARLY IN THE STATE OF NEW YORK … BY A LOVER OF IMPROVEMENT (New York: 1822). Three years later David Dudley Field joined Sedgwick's firm, first as clerk and then as associate.

New York began dealing with statutes already in the colonial era.[381] It was quicker to compile laws after the Revolution than most states, and sooner to regularize the practice. Already in 1792, 1801 and 1813 it published compilations. A fourth, initiated in 1825, led to the *Revised Statutes of 1829* that provided the legal framework for New York through to the end of the 19th century.

Butler's & Duer's New York Revised Statutes. The *New York Revised Statutes* of 1829 were a code in the modest American sense in all but name. The 1825 Act that authorized them appointed three eminent jurists, Chancellor James Kent, Erastus Root and Benjamin F. Butler, to do the work. When Kent declined to serve the governor appointed another prominent jurist, John Duer. Butler and Duer set out to do more than compile statutes: they proposed a complete revision of New York laws. Unexpectedly, the legislature agreed.[382] The result four years later was the *New York Revised Statutes* of 1829.

The *New York Revised Statutes* find no place in contemporary common law myth. Although ignored in the academy, their history is told in contemporary reports and in secondary works.[383] They were a product of a rational give-and-take between drafters and legislators.[384] Their authorization followed according to the proposal debated in 1825. In 1826 the revisers reported on their progress. In 1827 the revisers delivered six volumes of printed reports of their proposals published.[385] After months of consideration in legislative session, the legislature adopted the *Revised Statutes* in 1828 and they were published in 1829 in three large volumes.

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[381] The British government is reported to have encouraged the colonies to create collections of their statues for use by the public and government officials. *See* Erwin C. Surrency, *Revision of Colonial Laws*, 9 AM. J. LEGAL HIST. 189 (1965).

[382] Root, who wanted to follow the old approach, was replaced by Henry Wheaton, Supreme Court Reporter, who himself was later replaced by John C. Spencer. Spencer was later Secretary of War and sponsor of an early translation of Alexis de Tocqueville's *Democracy in America*.

[383] *See* ERNEST HENRY BREUER, THE NEW YORK REVISED STATUTES – 1829. ITS SEVERAL EDITIONS, REPORTS OF THE REVISERS, COMMENTARIES AND RELATED PUBLICATIONS UP TO THE CONSOLIDATED LAWS OF 1909 (Typescript, University of the State of New York, New York State Law Library, 1961); Robert Ludlow Fowler, *Observations on the Particular Jurisprudence of New York, 1821-1846*, 25 ALBANY L.J. 166 (1882); John W. Edmonds, *Introduction, Extracts from the Original Reports of the Revisers* [of 1827], in 5 STATUTES AT LARGE OF THE STATE OF NEW YORK, COMPRISING THE REVISED STATUTES, AS THEY EXISTED ON THE 1ST DAY OF JULY 1862, at 235-49 (1863).

[384] For a sharp contemporary criticism of the proposal, see *Review "Revision of the Laws,"* 2 ATLANTIC MAGAZINE 458-466 (1825).

[385] Although published in print runs of 750, complete sets of these volumes are "very scarce." Breuer, *supra* note 383, at 5-6, reports only two sets. The only digitization of which I am aware is *Extracts from the Original Reports of the Revisers*, in 5 STATUTES AT LARGE OF THE STATE OF NEW YORK, COMPRISING THE REVISED STATUTES, AS THEY EXISTED ON THE 1ST DAY OF JULY, 1862, 251-435 (John W. Edmonds, ed., 1863). I own a copy of volume 4 from the library of T. Sedgwick & D.D. Field.

The *New York Revised Statutes* were seen abroad "as a practical specimen of the procedure and principles of American codification."[386] At home, they served as inspiration and model in other states. For example, nearly thirty years later, Judge Thomas Cooley compiled Michigan laws "after the manner of the Revised Statutes of New York."[387] Closer to home in distance and in time were their apparent influences on Pennsylvania and Massachusetts in the 1830s and 1840s.

Revised Code of Pennsylvania of 1836. In 1830 the Pennsylvania legislature provided for appointment of a commission to "render the statute laws of Pennsylvania more simple, plain and perfect." The Commissioners worked six years to general approval. The legislature spent almost an entire session on just thirteen of the bills that the "Commissioners to revise the Civil Code" presented.[388] Lamented was that the work was not complete and was limited to statute law.[389] Still, Harvard's Professor Charles Warren early in the 20th century wrote that what was done, was done "so thoroughly as practically to construct a Civil Code."[390]

Massachusetts Revised Statutes of 1836. If New York was leader, Massachusetts was a close follower for nearly thirty years—and sometimes itself leader.[391] February 24, 1832 the Massachusetts legislature authorized the governor to appoint three Commissioners "to revise, collate and arrange … all general statutes of the Commonwealth."[392] The Commissioners started from the example of the *New York Revised Statutes* and hoped to effect "a general conformity among the codes of the different States of the Union."[393] Although styled "Revised Statutes," the *American Jurist and Law Magazine* considered the revision to be a code. The journal in discussing the project

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[386] *Codification of the Laws of the United States of America,* 2 JURIST Q.J. JURIS. & LEGIS. 47, 59 (1828).

[387] 1 THE COMPILED LAWS OF THE STATE OF MICHIGAN, COMPILED AND ARRANGED BY THOMAS M. COOLEY iv (1857).

[388] *Advertisement* in 2 BENJAMIN PARK & OVID F. JOHNSON, A DIGEST OF THE REVISED CODE AND ACTS, FORMING WITH PURDON'S DIGEST OF 1830, A COMPLETE DIGEST OF THE LAWS OF PENNSYLVANIA TO THE PRESENT TIME, TWO VOLUMES IN ONE (1837).

[389] GEORGE SHARSWOOD, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW 260-61 (1870). For positive and extensive contemporary accounts, see *Revised Code of Pennsylvania,* 13 AM. Q. REV. 30 (Robert Walsh, ed., 1833), and *Revised Code of Pennsylvania,* 19 AM. Q. REV. 399 (Robert Walsh, ed., 1836).

[390] 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 259 (1908).

[391] The July 1859 issue of the *American Law Register* illustrates the competition nicely. First, it gives three pages to note publication of the 1389 page STATE OF MASSACHUSETTS-REPORT OF THE COMMISSIONERS ON THE REVISION OF THE STATUTES ("We are seldom called upon to pass upon labors of greater magnitude than those now before us.") and follows those pages immediately with three pages noting publication of STATE OF NEW YORK—FIRST REPORT OF THE COMMISSIONERS OF THE CODE (designed "to reduce into a systematic code such of the laws of that State as were not comprised in the codes of civil and procedure already completed"). *Notices of New Books,* 7 AM. L. REG. 568, 571 (1859) (respectively).

[392] *Revision of the Laws in Massachusetts,* 13 AM. JURIST & LAW MAG. 344, 347 (1835).

[393] *Id.* at 351, 355-56.

addressed what a good code would look like. It noted that the issue of codification no longer had the "direful import" it once had, since the two sides had come considerably closer. By 1835 the "advocates of each form of the law, admit[ed] that there must be some of both forms; they only disagree[d] as to the proportional amount."[394] The *American Jurist* applauded the Commissioners' suggestion that their final report should be "*sent to all town officers, that the public judgment upon its merits might be early matured*, and such errors as might be detected be set right."[395] A little over a year later, the *American Jurist* returned to review the adopted and published *Revised Statutes of the Commonwealth of Massachusetts*. It pronounced the close of "this great and important undertaking" and "the improved state to which, by means of it, our statutory law has been advanced."[396] The *Revised Statutes of Massachusetts* were noted abroad—as was the "extraordinary amount of labor" given to them: three years to prepare the final report, fifty one days of a special joint committee and special session of the whole legislature.[397]

Justice Story's 1836 Massachusetts Code Commission. Massachusetts did not stop its systematizing with its own *Revised Statutes*. In the very year of their publication—1836—the governor proposed, the legislature authorized, a blue ribbon panel headed by Justice Joseph Story was appointed, and the panel reported upon the "practicablity and expediency of reducing to a written and systematic code the Common Law of Massachusetts or any part thereof."[398] The Commissioners reported favorably: much, but not all common law, they counseled, was suitable for codification. Proponents of codification took Story's Report as an endorsement of codification and at least twice reprinted it years later.[399]

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[394] *Id.* at 341.

[395] *Id.* at 352 [emphasis in original].

[396] *Revised Statutes of Massachusetts*, 15 AM. JURIST & LAW MAG. 294, 294-295 (1836). The journal added an endorsement for legislation: "How far the changes introduced are judicious, is a question to be settled, in the main, by time and experience; and the felicity of legislation is so great, that a statutory evil can be remedied, the moment the pressure is felt." *Id.* at 318.

[397] *Law Commission, Report of the Commissioners for Revising and Consolidating the Laws*, *in* JOURNAL OF THE LEGISLATIVE COUNCIL OF THE PROVINCE OF NEW BRUNSWICK, FROM 7TH JANUARY TO 7TH APRIL 1852 at 356, 359 (1852) and *in* 1 THE REVISED STATUTES OF NEW BRUNSWICK vii, xiii (1854). The Report noted that Maine paralleled Massachusetts in systematizing its statutes.

[398] REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS OR ANY PART THEREOF (1837).

[399] LAW REFORM TRACTS NO. 3. CODIFICATION OF THE COMMON LAW. REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE, THE COMMON LAW OF MASSACHUSETTS, PUBLISHED UNDER THE SUPERINTENDENCE OF A LAW-REFORM ASSOCIATION (1852); CODIFICATION OF THE COMMON LAW, LETTER OF JEREMY BENTHAM, AND REPORT OF JUDGES STORY, METCALF AND OTHERS (David Dudley Field, ed., 1882).

Story was a lifelong practitioner of systematization.[400] In an oft-reprinted address to the Suffolk County Bar Association, he alerted the bar to "the fearful calamity which threatens us of being buried alive … in the labyrinths of the law," for which he knew "of but one adequate remedy, and that is, by a gradual Digest, under legislative authority," through which "we may pave the way to a general code, which will present in its authoritative text the most material rules to guide the lawyer, the statesman, and the private citizen." He held up the "modern code of France" as "perhaps the most finished and methodical treatise of law that the world ever saw." He called on "the future jurists of our country and England, to accomplish for the common law what has been so successfully demonstrated … in the jurisprudence of other nations."[401]

Story was a "codifier."[402] Yet, while promoting codifying, he affirmed a role for "the forming hand of the judiciary."[403] It is suggestive of the strength of contemporary common law myth that some of the most careful of American scholars of legal history might turn 'Story the codifier' into 'Story the common law champion'[404] who accepted codification only with "serious reservations"[405] and sometimes was even "hostile" to it.[406] Why

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[400] When still a relative youth, he published the first collection of precedents of pleadings (an important part of applying law in common law pleading). As a junior legislator, he oversaw printing of one of the first compilations of Massachusetts laws. THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM NOVEMBER 28, 1780 TO FEBRUARY 28, 1807, 3 VOLS IN 1 at [unnumbered vi] (1807). As young Supreme Court Justice he oversaw the most frequently cited collection of federal laws (so SURRENCY, *supra* note 340, at 105), THE PUBLIC AND GENERAL STATUTES PASSED BY THE CONGRESS OF THE UNITED STATES OF AMERICA FROM 1789 TO 1827 INCLUSIVE … PUBLISHED UNDER THE INSPECTION OF JOSEPH STORY …, (3 vols., 1828). He began his treatise publishing career with American editions of English law treatises, and ended up in the 1830s publishing the first editions of his systematic commentaries on various branches of law.

[401] It was first printed as the first article in the first volume of the *American Jurist and Law Magazine*. *An Address delivered before the Members of the Suffolk Bar, at their anniversary, on the fourth of September, 1821, at Boston*, 1 AM. JUR. AND LAW MAG. 1, 31-32 (1829). It was reprinted, not only in several editions of Story's collected works, but also abroad, in Scotland, as A DISCOURSE ON THE PAST HISTORY, PRESENT STATE, AND FUTURE PROSPECTS OF THE LAW (1835) as LAW SERIES NO. II: THE CABINET LIBRARY OF SCARCE AND CELEBRATED TRACTS, and in England in an article titled *Improvement and Study of the American Laws*, 11 LEGAL OBSERVER OR J. JURISPRUDENCE 510 (Supplement for April, 1836).

[402] HALL, *supra* note 195, at 126 (1989).

[403] Story, *supra* note 401, 1 AM. JURIST at 31.

[404] *See* JAMES R. STONER, JR., COMMON LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 14 (2003).

[405] R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 274 (1986).

[406] G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, OLIVER WENDELL HOLMES DEVISE HISTORY, VOLS. III-IV, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 150-151 (1988). *Cf.*, Arthur Rolston, *An Uncommon Common Law: Codification and the Development of California Law, 1849-1874*, 2 CAL. LEGAL HIST. 143,

should it be so important to call into question Story's advocacy of codifying? Professors of contemporary common law myth may think that code-based systems leave no room for judicial innovation, but code-system jurists do not. There is room for both civil and common law methods in one system.[407]

Perhaps hostility to codifying is there somewhere in Story's work, but I have not seen it. Shouldn't digitisation show it, not just in his writings, but in how his contemporaries understood them? Moral philosopher Jasper Adams resided at Harvard nearly contemporaneously with Story's writing of the Massachusetts Code Commission Report. Adams included in his moral philosophy chapters supporting codification, with no hostility evident. In his preface he thanked Justice Story for consulting with him "as often as it suited me" and acknowledged that "several of my chapters have derived the greatest advantages from the consultations which were thus encouraged."[408] Story's own son, William Wetmore Story, wrote of his father's work on the Code Commission: "The Report goes on to state the objections which have been urged against codification and triumphantly answers them."[409] Out in the old west, one of Story's best students, Timothy Walker, took up the cause of codifying.

The old West: Story's "worthy Son in Law" Timothy Walker & the young Salmon P. Chase. Timothy Walker, perhaps more than any other student of Story's, was the Justice's "worthy Son in Law;"[410] Walker was also the leading advocate of codification in the old West in the antebellum era.[411] He left for Ohio already in his first year at Harvard in 1830. In Cincinnati he became friends and collaborated with later Supreme Court Chief Justice Salmon P. Chase. In 1833 and 1834 Chase published a multi-volume innovative compilation of the laws of Ohio. Chase designed it with professional practice in mind, to deal with the "perplexity" caused by "the huge mass of law which the legislation of forty-three years had accumulated."[412] In 1835 Walker addressed the Cincinnati Legislative Club on codification.[413] In 1837 he published the first edition of his pro-codification and highly successful,

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146-147 (2007) (reading the report to conclude that codifying the common law was "neither possible nor expedient" in general but allowing for limited codification).

[407] *See* Maxeiner, *Scalia & Garner's* Reading Law, *supra* note 3.

[408] JASPER ADAMS, ELEMENTS OF MORAL PHILOSOPHY xii (1837).

[409] 2 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY, EDITED BY HIS SON, WILLIAM W. STORY 247 (1851). The paragraph continued: "It then proceeds to recount its advantages with great clearness and force, and recommends that the labors of codification should be specially devoted to these three branches of law." *Id.*

[410] WALTER THEODORE HITCHCOCK, TIMOTHY WALKER, ANTEBELLUM LAWYER, Introduction (1990).

[411] Hall speaks of the two together as the leaders of a second block of codifiers. HALL, *supra* note 402.

[412] 1 THE STATUTES OF OHIO EDITED BY SALMON P. CHASE 5 (1833). Charles Warren described Chase's work as "exceptionally able." HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 259 (1908).

[413] Timothy Walker, *Codification—Its Practicability and Expediency—Being a Report Made to the Cincinnati Legislative Club, in* 1835, WESTERN L.J. 433 (1844).

Introduction to American Law discussed below in the next section.[414] Walker's codifying work was cut short when he was run down by a drunken driver and died of his injuries.[415]

As result of Story's Code Commission Report, Massachusetts appointed a commission to codify criminal law. It completed its work in 1841; finally in 1844 the legislature rejected the project.[416] Despite that rejection, ten years later the legislature returned to systematizing. In 1854 it resolved that the governor should appoint three Commissioners, "on the basis, plan and general form and method of the Revised Statutes," for "consolidating and arranging the general statutes of the commonwealth."The Commissioners completed their "revision" in fall 1858 and presented it in print form in 1859, when the legislature considered in about eighty days of hearings of a joint special committee during the recess of the legislature, and then in a special session of the legislature in the last four months of the year.[417]

Constitutional Commitments to Codification Countrywide. In 1846 New York held a constitutional convention to draft a new constitution for the state. Proponents of codification secured inclusion in the Constitution of a mandate that the legislature appoint two commissions to codify the substantive and procedural laws. One, the "Code Commission," was "to reduce

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[414] A recent review of legal literature in Ohio can be taken as a marker of the power of contemporary common law myth. Notwithstanding Walker's national renown, a two volume work on Ohio legal history gives Walker's work few words and then largely reports his work's deprecation by others and demise after more than 75 years. John F. Winkler, *The Legal Literature of Ohio, in* 2 THE HISTORY OF OHIO LAW 501, 510-512, 522 (M.L. Benedict and J.F. Winkler, eds., 2004). This history of Ohio law gives case reporters more notice. Digitization—not available in 2004—shows alternative views in Ohio besides Walker. One critic in 1855, in an unlikely place, a report on schools in Cincinnati, called condemned common law and called for codification: "The slow progress of our Universities and Colleges, has been averted to, but the perfection—not of human reason, but of the power to stand still in this go-ahead age, is to be found in our adherence to the common law. … The codification of laws has always been spoken of as a desideratum, but no steps have ever been taken by those who have adopted the English common law system, to accomplish this object, notwithstanding the universal acknowledgment of its expediency." JOHN P. FOOTE, THE SCHOOLS OF CINCINNATI AND ITS VICINITY 23-24 (1855) (reprinted 1970). Foote's criticism of American law is unvarnished. He had particular scorn for law administered to the Indian natives. "We have invented one kind of law, which is peculiar to our nation …. It is neither based on the law of nations, the law of God, or the law of humanity. … It is not even Lynch law." *Id*. at 25.

[415] Gordon A. Christenson, *A Tale of Two Lawyers in Antebellum Cincinnati: Timothy Walker's Last Conversation with Salmon P. Chase*, 71 U. CIN. L. REV. 457 (2002).

[416] The governor initially proposed a Commission to codify the common law. The legislative committee concurred, but the whole legislature demurred, and authorized instead, a Commission to consider the issue. The story is told in CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 173-181 (1981).

[417] *Preface, in* THE GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS: REVISED BY COMMISSIONERS APPOINTED UNDER A RESOLVE OF FEBRUARY 16, 1855, AMENDED BY THE LEGISLATURE, AND PASSED DECEMBER 29, 1859, iii, iv (1860).

into a written and systematic code the whole body of the law of the state."[418] The other, the "Practice Commission," was to "revise, reform, simplify and abridge the rules of pleadings, forms and proceedings of the courts of record of this State."[419] David Dudley Field eventually led both commissions. A Belgian contemporary saw the constitutional direction as a way to overcome historic "Anglo-Saxon" opposition to codification and written law.[420] In Illinois the Committee on Law Reform at the 1847 Constitutional Convention proposed a similar provision that would, in today's terms, sunset common law and English statutes after 1870.[421] The Illinois Convention did not adopt it.

The New York Constitution of 1846 was not the first state constitution to mandate systematizing. Already the Indiana Constitution of 1816 mandated codification of part of the law, *i.e.*, criminal law: "It shall be the duty of the General Assembly, as soon as circumstances will permit, to form a penal code, founded on principles of reformation, and not of vindictive justice."[422] The Alabama Constitution of 1819 copied the Indiana language exactly.[423] In another separate section the Alabama Constitution directed that within five years, and every ten years thereafter "the body of our laws, civil and criminal, shall be revised, digested, and arranged under proper heads, and promulgated."[424] The Missouri Constitution of 1820 included similar language limited, however to "all the statute laws."[425]

The New York Constitution of 1846 was also not the last state constitution to mandate systematizing. The Kentucky Constitution of 1850, the Maryland Constitution of 1851, the Indiana Constitution of 1851 and the short-lived Reconstruction Arkansas Constitution of 1868 all had provisions substantively similar to those of the New York Constitution.[426] The Ohio Constitution of 1851 had a similar provision limited to civil process.[427] The author of notes to the Maryland Constitution described the seventeenth section as embracing "some of the most useful provisions that are to be found

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[418] N.Y. CONST. of 1846, art. 1, sect. 17.
[419] N.Y. CONST. of 1846, art. 6, sect. 24.
[420] LUCIEN JOTTRAND, LA NOUVELLE CONSTITUTION DE NEW-YORK POUR 1847. AVEC UN COMMENTAIRE 7 (1847). *Cf.,* ROBERT BAIRD, THE CHRISTIAN RETROSPECT AND REGISTER: A SUMMARY OF THE SCIENTIFIC, MORAL AND RELIGIOUS PROGRESS OF THE FIRST HALF OF THE XIXTH CENTURY 176-177 (1851).
[421] JOURNAL OF THE CONVENTION, ASSEMBLED AT SPRINGFIELD, JUNE 7, 1847 … FOR THE PURPOSE OF ALTERING, AMENDING, OR REVISING THE CONSTITUTION OF THE STATE OF ILLINOIS 309 (1847).
[422] IND. CONST. of 1816, art. IX, sect. 4.
[423] ALA. CONST. of 1819, art. 6, sect. 19.
[424] ALA. CONST. of 1819, art. 6, sect. 20.
[425] MO. CONST. of 1820, art. III, sect. 35. Maine, which entered with Missouri as part of the Missouri Compromise, inherited the Perpetual Statutes of Massachusetts.
[426] KY. CONST. of 1850, art. VIII, sect. 22; MD. CONST. of 1851, III, sect. 17; IND. CONST. of 1851, art. VII, sect. 20; ARK CONST. of 1868, art. XV, Sect. Eleven
[427] OHIO CONST. of 1851, art. XIV.

in the whole Constitution."[428] The debates in Kentucky show the influence of other states and of popular opinion. "This is the day of reform. Our sister states have set us a glorious example of legal reform: our constituents expect it, they demand it, at our hand."[429] Opponents focused, not on principle, but on practicality. One conceded for that most members of the body "agree that the object aimed at is desirable, provided it can be attained without too much expense and labor."[430] Other opponents argued that they did not believe the legislature was technically competent to codify.[431]

Criminal Codes Countrywide. Constitutional mandates specific to criminal law are reminders that already in the first century of the Republic the American penchant for codifying seen by the Centennial Writers manifested itself, not only in system-wide revisions, but in specific areas of law.[432] In my readings, no area of substantive law appeared as often as criminal law. The reason for focus on criminal law is obvious: two basic principles of criminal law are "no crime without statute" (*nullum crimen sine lege*) and "no punishment without statute" (*nulla poena sine lege*). Nowhere is the need for written law to guide and control the governors, as well as to guide and protect the governed more firmly felt than in criminal law.[433]

Digitization gives access to the many specifically criminal law codification projects of the first century of the Republic.[434] Although not all systematization projects were successful, statutory rather than common law crimes

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[428] EDWARD OTIS HINKLEY, THE CONSTITUTION OF THE STATE OF MARYLAND … WITH MARGINAL NOTES AND AN APPENDIX 78 (1851) ("This State has long been suffering for want of a proper Codification of its laws."). William Price had five years before agitated in the state for codification as the only solution: "What other remedy can be suggested for the hugeness and discordance of the mass of materials from which the most ordinary rule of Law must be drawn and which existing in an hundred different phases, can only be applied in one, but which one is to govern his case, no man can tell." [WILLIAM PRICE], PARAGRAPHS ON THE SUBJECT OF JUDICIAL REFORM IN MARYLAND: SHEWING THE EVILS OF THE PRESENT SYSTEM, AND POINTING OUT THE ONLY REMEDY FOR THEIR CURE 66 (1846). Price hoped for a code that "in all its general features, should be the same over the entire Union …. " *Id.*

[429] REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 905 (1849) (remarks of Mr. Gholson). Referenced in the debates were, *inter alia,* Justinian, Bacon and Brougham in England, Livingston and Louisiana, and New York.

[430] *Id.* at 903 (remarks of Mr. Triplett).

[431] 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 319-320, 32 (1851) 1 (remarks, respectively of Mr. Merrick and Mr. Harbine).

[432] Such a sectorial approach is the approach of contemporary systemization proponents such as the Uniform Laws Commission and of the American Law Institute.

[433] Success has been elusive. *See, e.g.,* ELIZABETH DALE, CRIMINAL JUSTICE IN THE UNITED STATES, 1789-1939, at 5 (2011) ("Ultimately, the picture that emerges from this study is that of a criminal justice system that was far more a government of men than one of laws in the first 150 years after ratification of the Constitution.") For a study of the principle in American law, see STANISŁAW POMORSKI AMERICAN COMMON LAW AND THE PRINCIPLE *NULLUM CRIMEN SINE LEGE* (2d, revised and enlarged ed. [first in English], 1975).

[434] To name only a few examples through the decades of the first century of the Republic: HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF KENTUCKY (2 vols.,

have been the American norm since the 19th century. Already in 1812 the United States Supreme Court rejected a federal common law of crimes.[435] In 1834 one Ohioan proudly wrote: The leading characteristic of our *criminal law*, is, that it is all of statutory provision. … We acknowledge no part of the common law in regard to crimes. Our criminal code is probably the most humane and the most simple, that has been tried in modern times."[436]

One would expect that a statutory criminal law is an explicit rejection of contemporary common law myth. Yet some professors of that myth today teach, and their students today believe, that criminal law is a common law subject.[437]

David Dudley Field's New York and World Codes. If the first century of the Republic were bereft of all systematizing except Jefferson's Revisal at the beginning of the century and Field's codes at the end, contemporary common law myth would still be untenable. Both Jefferson and Field legislated as did no other Americans. Both legislated for what was at each respective time the most populous state in the Union. Both overturned common law and substituted modern statutory law. Both had stature outside the United

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1804); REPORT, MADE BY JARED INGERSOLL, ESQ., ATTORNEY GENERAL OF PENNSYLVANIA, IN COMPLIANCE WITH A RESOLUTIONS OF THE LEGISLATURE, PASSED THE THIRD OF MARCH, 1812, RELATIVE TO THE PENAL CODE 5 (1813) (endeavoring "to systematize and arrange all the acts for the punishment of crimes that are to be found in the statute book"); CODE OF CRIMINAL LAW PREPARED FOR THE LEGISLATURE OF NEW JERSEY, BY VIRTUE OF A RESOLUTION OF THE COUNCIL AND GENERAL ASSEMBLY ADOPTED FEBRUARY 27, 1833 [Lucius Q.C. Elmer], iii (1834) ("an effort has been made to present a systematicdigest of the criminal law, and to introduce some improvements") [this is a personal copy; I have not located a digitized version]; PRELIMINARY REPORT OF THE COMMISSIONERS OF CRIMINAL LAW [Willard Phillips, Preliminary Report of the Commissioners for reducing so much of the Common Law as relates to crimes and punishments, and the incidents thereof, to a written and systematic code], MASS. SENATE NO. 21 (February 1839); PLAN OF A PENAL STATUTE, PROPOSED FOR ADOPTION TO THE LEGISLATURE OF KENTUCKY [S.S. Nicholas] vii (1850) ("How are our citizens [to know what the law has forbidden, and what it has enjoined] unless the legislature affords them the means for its acquisition? … It is a mere mockery to refer us to the unwritten law of England."); H.S. SANFORD, THE DIFFERENT SYSTEMS OF PENAL CODES IN EUROPE; ALSO, A REPORT OF THE ADMINISTRATIVE CHANGES IN FRANCE, SINCE THE REVOLUTION OF 1848, 33D CONGRESS, 1ST SESS., SENATE, EX. DOC. NO.68 (1854); E.W. [presumably Emory Washburn], *We Need a Criminal Code*, 7 AM. L. REV. 264 (1872).

[435] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (February 13, 1812). The Court held that "Although this question is brought up now for the first time to be decided by his Court, we consider it as having been long since settled in public opinion." Although cast in jurisdictional terms, it can reasonably be understood, in part, as a manifestation of the popular demand for written law that stood behind constitutional mandates of criminal law codification. *See generally*, Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267 (1968).

[436] *Ohio Legislation*, 11 AM. JURIST & L. MAG. 91, 93 (1834) [emphasis in original].

[437] *See* Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U.L.J. 1285 (2004) (relating the survival of that belief).

States. Field was *the* American codifier.[438] With first-hand youthful exposure to European legal systems behind him, in the late 1830s he began a fifty-year long personal campaign to rationalize and systematize American law in all its branches. To relate even ten percent of his work would consume this entire article. On his death in 1894 he was praised as "the most conspicuous legal figure of the world for the last half century."[439]

Field's first major success in law reform came in 1842 when the Committee on the Judiciary of the New York State Assembly reported his bill: "An Act To improve the administration of justice." Field was not a member of the legislature, so he accompanied his proposal with a fifty-page (printed) letter on law reform.[440] Field supported adoption of the provisions of the Constitution mandating process and substantive law codification and creation, respectively, of Process and Code Commissions.

Although not originally appointed to either commission, he succeeded to a vacancy on the Process Commission and soon became its leader. In 1848 the Commission reported a Code of Civil Procedure (first reported 1848,[441] reported complete 1850) and in 1850 a Code of Criminal Procedure (first reported 1849,[442] reported complete 1850). The former the legislature passed immediately; the latter it did not adopt until three decades later. In 1857, after both Commissions expired without the Code Commission ever having taken action, Field secured that commission's reestablishment and his appointment to it. He self-funded its work. Between 1858 and 1865 Field's Code Commission drafted three codes, a Political Code (reported complete 1860), a Civil Code (first reported 1862, reported complete 1865), a Penal Code (first reported 1864, reported complete, 1865). The legislature did not take them up at the time, but turned to them more than a dozen years later after the Centennial. That is addressed below in Part VI. *Epilogue and Conclusion*.

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[438] ARTHUR T. VANDERBILT, MEN AND MEASURES IN THE LAW 86 (1949) ("Field almost became the American Justinian.")

[439] Irving Browne, *David Dudley Field*, 6 GREEN BAG 245 (1894). For a brief biography, see James R. Maxeiner, *Field, David Dudley, Jr*. [biography] in 7 AMERICAN NATIONAL BIOGRAPHY 878 (1999).

[440] *A Letter from D.D. Field Esq. of New-York, on Law Reform, in Appendix, To the Report of the Committee on the Judiciary, in Relation to the More Simple and Speedy Administration of Justice, in An Act To Improve the Administration of Justice, in* State of New-York, Doc. No. 81, *In Assembly, March 2, 1842, Report in Part of the Committee on the Judiciary, in Relation to the Administration of Justice, in* 5 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, SIXTY-FOURTH SESSION [*sic*, 65th] at 19 (1842). Professor John Head states concisely Field's problem through five decades: "his enthusiasm far outstripped his authority." John Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMP. & INT'L L.1, 86 (2003).

[441] *Sub nomine* FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING: CODE OF PROCEDURE (1848).

[442] *Sub nomine* FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING: CODE OF CRIMINAL PROCEDURE (1849).

After the Civil War Field began working independently on a Code of International Law. He floated the idea already in 1867.[443] He published "draft outlines" in 1872,[444] an enlarged edition in 1876,[445] and in French in 1881.[446] From 1873 to 1875 he spent two years in Europe as first President of the Association for the Reform and Codification of the Law of Nations, which he had helped found. Except for those two years, in the decade after the Civil War, Field was active in high profile disputes, *i.e.*, constitutional litigation,[447] the 1876 election controversy,[448] and commercial litigation.[449] Those high profile disputes later cost him support in seeking adoption of his codes.

For Field codification was a matter of course. "[W]hether a code is desirable," he wrote, "is simply a question between written and unwritten law." That that question ever could have been debatable, was "one of the most remarkable facts in the history of jurisprudence." Of course rules are written. "If the law is a thing to obeyed, it is a thing to be known; and, if it is to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it." Written laws are on a plane with written constitutions. "If a written constitution is desirable, so are written laws."[450] Codification chooses the legislature over the judiciary as the principal source of law: "[t]he true function of the legislature is to make the law, the true function of the judges is to expound it."[451]

Field's five codes for New York paralleled Napoleon's five codes for France: Field and Napoleon each had codes of civil law and civil procedure and codes of criminal law and criminal procedure. They differed in only one of the five codes: Field had a political code where Napoleon had a code of

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[443] DAVID DUDLEY FIELD, AN INTERNATIONAL CODE, ADDRESS ON THIS SUBJECT, BEFORE THE SOCIAL SCIENCE ASSOCIATION, AT MANCHESTER, OCTOBER 5, 1866. In this address he did not discuss the wartime codification of Lincoln and Lieber of the laws of war. *See* note 271 *supra*.

[444] DAVID DUDLEY FIELD, DRAFT: OUTLINES OF AN INTERNATIONAL CODE (1872).

[445] DAVID DUDLEY FIELD, OUTLINES OF AN INTERNATIONAL CODE (1876).

[446] DAVID DUDLEY FIELD, PROJET D'UN CODE INTERNATIONAL (Alberic Rolin, trans., 1881).

[447] *Ex parte* Milligan, 71 U.S. 2 (1866); Cummings v. Missouri, 71 U.S. 277 (1867); and *Ex parte* McCardle, 74 U.S. 506 (1869). He returned to the Court in the Centennial year to argue United States v. Cruikshank, 92 U.S. 542 (1876).

[448] DAVID DUDLEY FIELD, THE VOTE THAT MADE THE PRESIDENT (1877).

[449] On behalf the reviled railroad magnates Jay Gould and James Fisk in the Erie railroad and the infamous "Boss" Tweed of the infamous Tammany Hall machine *See* HOBER, *Chapter VI: The Un-making of a Reputation, 1866-1879*, *supra* note 315, at 318; Renée Lettow Lerner, *Thomas Nast's Crusading Cartoons*, 2011 GREEN BAG ALMANAC 59, 66-77.

[450] FINAL REPORT OF THE CODE COMMISSION, FEBRUARY 13, 1865, *reprinted in* 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 317, 321 (A.P. Sprague, ed., 1884).

[451] REPORT OF THE SPECIAL COMMITTEE APPOINTED TO CONSIDER AND REPORT WHETHER THE PRESENT DELAY AND UNCERTAINTY IN JUDICIAL ADMINISTRATION CAN BE LESSENED, AND IF SO, AND BY WHAT MEANS? (1885) *reprinted in* ANNUAL REPORT OF THE 8TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 323, 348 (1885).

commerce. Not only did Field follow the division into four fields of the French prototype, in style he followed it too. Professor Lawrence Friedman describes Field's code of civil procedure of 1848 as "a colossal affront to the common-law tradition." It was, Friedman observes, "couched in brief, gnomic, Napoleonic sections, tightly worded and skeletal; there was no trace of the elaborate redundancy, the voluptuous heaping on of synonyms, so characteristic of Anglo-American statutes. In short it constituted a code in the French sense, not a statute. It was a lattice of reasoned principles, scientifically arranged, not a think thumb stuck into the dikes of common law."[452]

The code that is known as the "Field Code" was Field's Code of Civil Procedure. It was the most successful of them all.[453] Already before the Civil War eight states and territories, all in the West, had adopted it.[454] In 1873 Field boasted that by then 23 states and territories (plus the consular courts in Japan!) had introduced some or all of it.[455] Eleven years later *The New York Mail* took pride that the "State of New York has given laws to the world to an extent and degree unknown since the Roman Codes followed Roman conquests." It reported that as of 1884 twenty-three other states and territories as well as four provinces in India (!) had adopted the Code of Civil Procedure; seventeen other states (and India) had adopted the Code of Criminal Procedure (adopted by New York only in 1881); two other states or territories had adopted the criminal code (adopted by New York), two states or territories had adopted the Civil Code (still not enacted in New York although twice passed the legislature), and one state the Political Code (still not considered by New York). By the end of the 19th century most states had modeled their civil procedure laws on Field's Code. Four states had adopted his other codes: California, Montana, and North and South Dakota. New York never did adopt his Civil Code and disfigured his Code of Civil Procedure beyond recognition.

Field's Process Codes in California. In 1848 the United States annexed California. As a consequence of discovery of gold, American immigrants flooded California. In 1849, still under military government, the unorganized territory held a constitutional convention in the summer and adopted by popular vote the proposed Constitution in the fall. California became a state September 9, 1850.

The Constitutional Convention considered what California's future laws would be. The Convention considered but decided against mandating code commissions along the lines of the New York Constitution of 1846. When the legislature met for the first time in January 1850, eighty lawyers petitioned it to adopt American common law; seventeen lawyers submitted a counter-petition calling for the legislature to retain civil law in California and to adopt a code based on Louisiana law. In February the legislature's

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[452] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 293 (3d ed. 2007).

[453] It was reviewed at length abroad in 12 L. REV. & QUARTERLY J. OF BRIT. & FOREIGN JURIS. 366-398 (1850).

[454] *Id.* at 295.

[455] FIELD, *Reasons for the Adoption of the Codes, supra* note 296, at 365.

Judiciary Committee reported in favor of common law.[456] The legislature that year adopted a reception statute. It also, however, adopted laws governing civil and criminal procedure largely based on Field's original drafts of his code.

Meanwhile, Field's younger brother, former law firm partner and later U.S. Supreme Court Associate Justice, Stephen J. Field in late December 1849, arrived in California seeking his fortune. In November 1850 the younger Field was elected to the state legislature. He reworked his brother's codes as reported complete in New York in 1851 and brought about their adoption in California.

3. Summary of Systematizing in the First Century of the Republic

From the foregoing pages, it should be clear that the Centennial Writers were right: "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*."[457] Legal methods were not assumed in the first century of the public, but were under construction. The Centennial Writers did not claim success for systematizing.[458] They hoped for future success. *The First Century of the Republic* begged for understanding: "These achievements of Jurisprudence, when compared with the works of her sisters in other fields of labor, appear moderate, plain, and plodding, rather than rapid, brilliant or extensive. But then, for many, many centuries, Jurisprudence has had no gift of new powers. … All we can say for her in the century now closing is that, with her antique tools, 'she had done what she could.'"[459]

Systematizing in the first century of the Republic was a story of high hopes and disappointing delivery. Everywhere people worked on systematizing. Complete success was nowhere, while disappointment was just about everywhere. Sometimes work was rejected out-of-hand. More often, what was done was less than what the systematizers had hoped would be done. Systematizers had to settle: not all laws, but only some laws; not a codification of statutes and common law, but only a revision of statutes. Usually, what they did do was greeted with appreciation, but not always.[460]

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[456] *Report on Civil and Common Law* (February 27, 1850), *printed at* 1 CAL. 588 (1850).

[457] *Law in America, 1776-1876,* 122 N. AM. REV. at 174 [emphasis in original].

[458] For a critical comparative view of American skills with legislation at the time, see *German Legislation,* 10 AM. L. REV. 270 (1875).

[459] THE FIRST CENTURY OF THE REPUBLIC at 452, 453. The quotation is from Mark 14:8. Its author, Abbott was such a disappointed systematizer. The Revised Statutes of the United States on which he had worked he called "a simple consolidation." *Id.* at 451.

[460] The 1831 revision in Tennessee, apparently, was one such failure. The preface acknowledged the criticism and appealed for understanding. James Whiteside, *Preface,* in 1 STATUTE LAWS OF THE STATE OF TENNESSEE OF A PUBLIC AND GENERAL NATURE; REVISED AND DIGESTED BY JOHN HAYWOOD AND ROBERT L. COBBS (1831) ("The fault is the materials out of which the work is made; and indeed, nothing short of an entire remodeling of the Statute Law of the State, will divest any work of the kind from the same objections, to

Perhaps reasons for lack of success of systematizing may be found in what was not much discussed in the first century of the Republic: nationalizing and institutionalizing systematizing. Both topics came to the top of discussion in the years just after the Centennial. As far as nationalizing goes, the assumption was that codes in one state would be copied in another. To an extent this occurred, but less often than was expected. As far as institutionalizing goes, the most substantial manifestation were constitutional mandates to revise laws on a continuing basis.

C. A Century of Systematizing in Legal Education

If common law methods had the hold on America that contemporary common law myth imagines, American lawyers today would study law in law offices: their learning would, in today's language, be wholly experiential. In 1776 there was no teaching of law in classrooms. Aspiring lawyers taught themselves law, most often while working as copy clerks in law offices.[461]

Formal legal education in classrooms and outside of law offices got off to a rocky start in the New Republic. It took three different tacks: chairs of law within colleges, proprietary law schools, and law schools affiliated with colleges. The first two, created in the first years of the Republic, largely disappeared by about 1835. The latter, the university professional schools of today, were created only as the former disappeared, did not achieve stability until the 1850s, and did not achieve their present dominance until the second century of the Republic. In 1876 most lawyers were still law office trained.

By the Centennial year, however, university law schools had established themselves. In the decade after the Civil War more university law schools were founded (about thirty) than were founded in the eight decades before. Something monumental had happened. Before the Civil War law school studies were seen as "ornamental appendages to the office instruction," but by 1876 they were becoming indispensible. [462] Legal education was moving from the law office into the law school classroom. Still in the future was the peculiar American development of classroom study displacing law office

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which the present one may be considered obnoxious.") One reviewer gave it no sympathy. *The Statute Laws of Tennessee*, 8 AM. JURIST 298, 305 (1832). ("As matters lie, at present, our legislators are in the condition of an ignoramus to whom the management of an apothecary's shop with mislabeled bottles has been committed. Confusion, terror, and death are scattered all about." *Id.* at 305. "The digesters … were to touch the confused statute book with the wand of harmony, and out of a chaos they were to produce order. Instead of which confusion has been worsened." *Id.* at 315.) On systematizing in Tennessee, see Samuel E. Williams, *A History of Codification in Tennessee (two parts)*, 10 TENN. L. REV. 61, 165 (1932).

[461] Lest there be any misunderstanding in this day of office printers, copy clerks copied legal documents longhand. Among the first office "type-writers" were those displayed at the 1876 Philadelphia Exposition. *See* Robert Messenger, *The World of Typewriters* 1714-2014,
http://oztypewriter.blogspot.com/2012/11/on-this-day-in-typewriter-history_10.html.

[462] WM. G. HAMMOND, AMERICAN LAW SCHOOLS IN THE PAST AND IN THE FUTURE, at 9 and 4 respectively (1881).

study altogether. The fundamental issue of legal education at the Centennial was how legal education should be divided between law schools and law offices.[463]

In the first century of the Republic, legal education established itself by working to provide that which the profession could not provide: systematization of law. Teachers of law in the first century were few in number, but most were leaders in systematizing. It is an irony of American legal history that in the second century of the Republic, when the bar no longer had use for copy clerks and gave up its role in professional instruction, the academy assumed that instructional role and largely abandoned its scientific role in systematization.[464]

No matter which venue—college, proprietary law school, or professional law school—the leading teachers of American law in the first century of the Republic systematized. They taught rules for law applying and not skills for law synthesizing. They taught law as a science: not as a natural science (as Harvard's Langdell later would claim), but as a systematizing science. The great advantage of law school learning was systematic study. Legal educators understood that systematic law is more easily learned than the alternative of unsystematic law. [465]They characterized law office study as drudgework that interfered with real learning.[466]

1. College Chairs

A statute started classroom legal education in America. Jefferson's Revisal authorized a professorship of law at the College of William & Mary. As governor of Virginia Jefferson saw the chair into being and the appointment to it of his Revisal's co-author, George Wythe. [467]

Although Wythe and his successor, St. George Tucker, enjoyed some success at William & Mary in attracting students, similar attempts at other

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[463] *See* THEODORE W. DWIGHT, EDUCATION IN LAW SCHOOLS IN THE CITY OF NEW YORK COMPARED WITH THAT OBTAINED IN LAW OFFICES. A LECTURE DELIVERED TO THE STUDENTS OF COLUMBIA COLLEGE LAW SCHOOL, ON MONDAY EVENING FEBRUARY 7, 1875 (1876).

[464] *See* JAMES R. MAXEINER, EDUCATING LAWYERS NOW AND THEN: AN ESSAY COMPARING THE 2007 AND 1914 CARNEGIE FOUNDATION REPORTS ON LEGAL EDUCATION AND A REPRINT OF THE 1914 REPORT THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS BY JOSEF REDLICH (2007); same without Redlich Report, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method,* 35 INT'L J. LEGAL INFO. 1 (2007),

[465] *See, e.g.,* JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS vi, viii (1832) ("was originally made for instruction of *Students at Law*" … "to render the doctrines of Pleading *more intelligible and more easy of attainment*" [emphases in original]). *See also,* Vanderlinden, *supra* note **, at 13.

[466] *See, e.g.,* JOSIAH QUINCY, PRESIDENT, AN ADDRESS DELIVERED AT THE DEDICATION OF DANE LAW COLLEGE IN HARVARD UNIVERSITY, OCTOBER 23, 1832 (1832).

[467] ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 116 (CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING BULLETIN No. 15, 1921).

colleges failed. In some, Harvard and Yale, plans were discussed, but did not come to fruition until much later. In others, Pennsylvania College, Columbia, and Maryland, professors were named and began work—James Wilson at Pennsylvania, James Kent twice at Columbia, David Hoffman at Maryland—only to suspend lectures for want of students.

What the colleges' professors left behind were important works of systemization. For Wythe, it was Jefferson's Revisal. For the others, the legacies were systematizing texts: Wilson's *Lectures on Law*, Kent's *Commentaries on American Law*, Tucker's edition of *Blackstone's Commentaries*, and Hoffman's *Course of Legal Studies*. These addressed both statutory law and common law.

2. Proprietary Law Schools

Contemporaneous with the college appointments, practitioners established independent proprietary law schools to conduct law training more closely tied to practice. Where college teaching anticipated supplemental law office study, proprietary law schools did not. One, the school in Litchfield Connecticut (1780-1833), was a great success. Most others failed; some eked out an existence with a small number of students. They were creatures of the lawyers who created and conducted them. When the lawyers died or retired, their schools came to an end. [468] One might suppose that the proprietors of these law schools would have focused on practice skills and have ignored systematizing.[469] Yet that does not seem to have generally been the case. Many proprietors practiced systematizing:

Zephaniah Swift, proprietor of the law school in Windham Connecticut, prepared the first compilation of federal laws (The Folwell edition of 1797), wrote the first all-encompassing treatise of an American state's law, *A System of the Laws of the State of Connecticut* (6 vols. 1795) as well as the first American treatise on the law of evidence.[470]

Henry St. George Tucker, proprietor of the Winchester Law School in Virginia, wrote a Blackstone-based students' text for his state, *Commentaries on the Laws of Virginia* (1831).

Theron Metcalf, after conducting the short-lived law school at Dedham Massachusetts (1828-1829), became co-reviser with famous educator Horace Mann of the Massachusetts Revised Statutes. In 1837 he was one of five

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[468] *See* CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 133-177 (1993) (listing proprietary schools and giving statistics).

[469] One short-lived proprietary school did rely principally on moot courts. CREED TAYLOR, JOURNAL OF THE LAW-SCHOOL AND OF THE MOOT-COURT ATTACHED TO IT: AT NEEDHAM, IN VIRGINIA v (1822) ("The *law-school* was established, not with a view to lectures by the patron, but for the purpose of aiding and assisting the student in the art and science of pleading.").

[470] ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES (1810).

Commissioners of the Massachusetts Code Commission of 1837 chaired by Justice Story.[471]

Peter van Schaak was one of the revisers of the colonial laws of New York[472] before conducting a long-lived law school at Kinderhook New York.

Tapping Reeve and James Gould, proprietors of the highly successful Litchfield Law School, published three texts intended to organize the law of husband and wife, descents and pleading.[473] Although they taught the common law, The *American Quarterly Journal* in a survey of American education institutions reported that Litchfield's proprietors taught rules and the principles on which they rested. [474] Reeves, in his *Treatise on the Law of Descents in the Several United States of America* (1825), set out the statutory law of all of the then fifteen states.[475] American legal historian Craig Evan Klafter concludes that proprietors taught common law critically with a view to replacing it through statutes.[476]

3. College Professional Schools

College related professional law schools grew out of the older models. In 1816 Harvard finally appointed a professor of law, Isaac Parker. In 1824 Yale took over a proprietary school. The risk of failure was high. In 1831, were nine "law schools," counting all three types of approach, which by a

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[471] REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCE OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS OR ANY PART THEREOF, MADE TO HIS EXCELLENCY THE GOVERNOR, JANUARY, 1837, at 48 (House No. 8, 1837).

[472] PETER VAN SCHAACK (ed.), LAWS OF NEW-YORK, FROM THE YEAR 1691 TO 1773, INCLUSIVE: PUBLISHED ACCORDING TO AN ACT OF THE GENERAL ASSEMBLY (2 vols., 1774).

[473] TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, OF GUARDIAN AND WARD, OF MASTERS AND SERVANT Preface (1816) ("to bring into one connected view" …"beneficial to the learner") (3d ed. 1867); TAPPING REEVE, A TREATISE ON THE LAW OF DESCENTS IN THE SEVERAL UNITED STATES OF AMERICA (1826); JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS vi, viii (1832).

[474] *See Education and Literary Institutions*, 5 [AMERICAN] QUARTERLY REGISTER 273 (1833). "The lectures, which are delivered every day, and which usually occupy an hour and a half, embrace every principle and rule falling under the several divisions of the different titles. The examinations, which are held every Saturday, upon the lectures of the preceding week, consist of a thorough investigation of the principles of each rule, and not merely of such questions as can be answered from memory without any exercise of judgment."

[475] REEVE, *supra* note 473, at ii. He lamented that "When we became a nation, we found ourselves divided into a number of distinct sovereignties; each possessing the power to enact laws affecting the property within its own jurisdiction, with the federal government, binding all the states together with political bands, had not the remotest concern. … Thus what has probably fallen to the lot of no other civilized country, this nation may be justly said to have no general law of descents."

[476] KLAFTER, *supra* note 468. *See also*, ELLEN HOLMES PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC 175-176 (2011).

partial count showed six faculty and 127 students.[477] Among notable failures were those of New York University in 1838 and the College of New Jersey (the later Princeton) in the 1840s. Harvard and Yale had both to be "re-founded." Not until the 1850s did university law schools begin to achieve stability. In 1863 there were eighteen law schools, some attached to colleges and others independent.[478] Among the most important of legal educators of the 1830s to the early 1850s were Justice Story at Harvard (died 1845)[479] and his student (his "worthy Son in Law"), Timothy Walker at Cincinnati (died 1856).[480] Both were famous for their involvement in systematizing. They were succeeded in the late 1850s by Theodore Dwight at Columbia.

In the 1850s Theodore Dwight, first at Hamilton College and then, from 1858, invigorated law schools with the "Dwight" method of instruction. Dwight departed from a straight lecture format and used interactive lecture or recitation format. Dwight later in the 1880s would oppose codifying. In 1870 Christopher C. Langdell introduced the case method of instruction. It did not reach beyond Harvard until well into the second century of the Republic.

D. *The Centennial Moment*

The Centennial Writers had good reasons to look forward to codes in a second century of the Republic. They witnessed—one participated in—fifteen years of codification around the world. At home, Lincoln's proposed revision of Federal laws of 1861 came to fruition with the publication in 1874 of the first edition of the *Revised Statutes of the United States*. Benjamin Vaughan Abbott, Harper's Centennial Writer, had been one of Commissioners of *the Revised Statutes*.

In 1862 Field's New York Commission had published the first draft of a New York Civil Code. In Georgia, the pre-war Code of *all laws of every type* went into effect.[481] In 1864 the New York Commission, published the first draft of a Penal Code, and in 1865 the final draft. In the latter's forward, Field thanked Abbott for his help. Also in 1865 the Commission published the final draft New York Civil Code. In 1867 the Dakota Territory adopted

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[477] *United States, Professional Schools* 18 THE EDINBURGH ENCYCLOPÆDIA, … CONDUCTED BY DAVID BREWSTER … THE FIRST AMERICAN EDITION, CORRECTED AND IMPROVED BY THE ADDITION OF NUMEROUS ARTICLES RELATIVE TO THE INSTITUTIONS OF THE AMERICAN CONTINENT 229, 860 (1832) ("They are all of recent origin, and are here presented rather to give a ground to conjecture what will in future be the method of conducting legal studies than to show what is the course now pursued.")

[478] George-A. Matile, *Les Écoles de Droit aux États-Unis*, 9 Revue HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 539, 543-44 (1863), *translated in* 1 SHEPPARD 319, 321 (Steve Sheppard, ed., 1999).

[479] *See* text at 116-119 *supra*.

[480] *See* text at 119 *supra*.

[481] THE CODE OF THE STATE OF GEORGIA PREPARED BY R.H. CLARK, T.R.R. COBB & D. IRWIN iii (1861) (the legislature commissioned a code that would bring together all law "whether derived from the common Law, the Constitutions, the Statutes of the State, the decisions of the Supreme Court, or the Statutes of England, of force in this State").

all five Field codes.[482] In 1872 California, followed.[483] In the 1870s New York—not to Field's pleasure—revised much of Field's 1848 Civil Procedure Code in a Code of Remedies.[484] Most other states, as the Centennial Writers noted, revised or codified laws in the fifteen years before the Centennial. Iowa, under the leadership of legal educator William Gardiner Hammond, was among the leaders. And, important for Americans for future legal metaphors, the National League of Professional Baseball Clubs adopted a Constitution and Playing Rules.[485] The Centennial Celebration itself even had its own rules. [486]

Abroad, in both "civil" and "common" law worlds, there was palpable enthusiasm for codes. In Germany and in Italy civil wars in the 1860s were followed by adoption of unifying national codes.[487] In Latin America, the largest countries, Mexico, Argentina, Brazil and Columbia, all adopted codes. Even in the British Empire codifying was in the air. Beginning in the

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[482] *See* William B. Fisch, *The Dakota Civil Code: Notes for an Uncelebrated Centennial,* 43 N.D.L. REV. 485 (1967) & 45 N.D.L. REV. 9 (1968).

[483] On codifying in California there is recent scholarship. *See* Rolston, *Uncommon Common Law: Codification and the Development of California Law, 1849-1874,* 2 CAL. LEGAL HIST. 143 (2007); Lewis Grossman, *Codification and the California Mentality,* 45 HASTINGS L.J. 617 (1994). Field's brother, Stephen J. Field, led the effort there. Another Western state, Montana, on admission in 1889, did the same. *See* Andrew P. Morriss *et al*., *Montana Field Code Debate,* 61 MONT. L. REV. 370 (2000); Andrew P. Morriss, Decius S. Wade's The Common Law, 59 MONT. L. REV. 225 (1998).

[484] *See* MONTGOMERY H. THROOP, THE CODE OF REMEDIAL JUSTICE; SHALL IT BE REPEALED OR COMPLETED? A COMMUNICATION TO THE JUDICIARY COMMITTEES OF THE LEGISLATURE OF THE STATE OF NEW YORK BY … ONE OF THE COMMISSIONERS TO REVISE THE STATUTES 4-5 (1877) (discussion of revision work undertaken 1870 to 1876).

[485] CONSTITUTION AND PLAYING RULES OF THE NATIONAL LEAGUE OF PROFESSIONAL BASE BALL CLUBS (1876). *See* HEARING ON THE NOMINATION OF JOHN ROBERTS TO BE CHIEF JUSTICE OF THE SUPREME COURT BEFORE THE SENATE JUDICIARY COMMITTEE, 109TH CONG., 1ST SESS. 56 (Sept. 12, 2005) (testimony of John Roberts: "I will remember that it's my job to call balls and strikes and not to pitch or bat.").

[486] Although it had no law exhibit, it did have its own "Bureau of Protection" complete with police force (the "Centennial Guard," at first, of over 1000 officers) and its own magistrate's court. For a picture, see FRANK LESLIE'S HISTORICAL REGISTER OF THE UNITED STATES CENTENNIAL EXPOSITION, 1876 at 296 (1877). The Director-General didn't wait for his court to develop precedents to govern the Guard but promulgated rules. He reported: "The rules and regulations for the government of the Centennial Guard were issued in a manual of convenient size, and each member was supplied with a copy, and required to familiarize himself with its contents before he was permitted to enter on his duties. The manual contained information and instructions in detail, and specifically on the following subjects, viz.: the organization of the Guard, discipline, duties of officers and patrolmen, rank and command, promotions, punishments, resignations and discharges, reports, arrests, laws of arrest, prisoners, fires, pay, property, responsibility for uniforms and accouterments, drill, roll-call, orders and communications, lost children and lost property, tobacco, liquor, etc." *Department of Protection* [Report] in 2 UNITED STATES CENTENNIAL COMMISSION, INTERNATIONAL EXHIBITION, 1876, REPORT OF THE DIRECTOR-GENERAL, INCLUDING THE REPORTS OF BUREAUS OF ADMINISTRATION 679, 680 (1879).

[487] Franz von Holtzendorff, *Imperial Federalism in Germany,* 5 INT'L REV. 82, 88 (1878).

1830s Britain imposed codes on India.[488] In 1857 the Legislative Assembly of the Province of Canada, commissioned a codification in English of the civil law of Lower Canada, *i.e.,* New York's next-door neighbor Québec, which was duly made and took effect in 1866.[489]

Britain itself debated not whether to systematize, but how and when. In 1863 the Lord Chancellor called for revision of the laws to get "a harmonious whole, instead of having, as at present, a chaos of inconsistent and contradictory enactments."[490] Code proponents were "unwilling that the work of codification should be postponed."[491] One writer in an English law review in 1869, noting conditions in New York, commented: "At the present day, the subject of Codification has passed out of the domain of theory and has become a practical question."[492] In 1873 the *London Quarterly Review*, in reviewing Sheldon Amos' 1873 book, *An English Code*, commented: "Codification has engaged the attention of the minds of great statesmen in every civilised country." The review catalogued more than a dozen places, including "several states of the North American Union," that had made "laudable, if not perfectly successful, attempts." In reviewing Amos' book on "difficulties" of an English code, and "modes of overcoming them," it found "every reason to believe that ere long" England would join other civilized nations and accomplish something systematic in the way of codifying its law.[493]

The community of nations began work on a code of the law of nations. As noted above, Field took up public international law into his portfolio of codes.[494] Soon he worked on creating an international body to promote codifying of international law. In June 1873 invitations were sent out from America and in October the founding meeting of the Association for the Reform and Codification of the Law of Nations was held in Brussels.[495] In the

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[488] For a recent recounting, see ELIZABETH KOLSKY, COLONIAL JUSTICE IN BRITISH INDIA Chapter 2 (2010).

[489] *See* THE CIVIL CODE OF LOWER CANADA … BY THOMAS MCCORD, ADVOCATE, SECRETARY TO THE CODIFICATION COMMISSION v-x (1867), *reviewed in* 2 AM L. REV. 331 (1868); BRIAN J. YOUNG, THE POLITICS OF CODIFICATION: THE LOWER CANADA CIVIL CODE OF 1866 (1994). At the same time, a code of civil procedure was adopted.

[490] *The State of English Law: Codification* [reviewing Speech of the Lord Chancellor on the Revision of the Law], 83 WESTMINSTER REV.—AM. ED. 210, 219 (1865) (excerpting the speech at pp. 23-27).

[491] *Id*.

[492] T.L. Murray, *The Codes of New York*, 27 LAW. MAG. AND LAW REV. 312 (1869). On proposals to codify English law see, *inter alia*, SHELDON AMOS, AN ENGLISH CODE; ITS DIFFICULTIES, AND THE MODE OF OVERCOMING THEM (1873) (positive for codification, but Chapter V views New York codes as a negative example)*;*

[493] *Review: An English Code; Its Difficulties, and the Mode of Overcoming Them, by Sheldon Amos*, 40 THE LONDON QUARTERLY REV. 499 (1873).

[494] That there might be a similar code for resolving conflicts of laws in private transactions was seen as of no less importance. *A Code of Private International Law*, 2 AM. L. REV. 599 (1868).

[495] JAMES B. MILES, ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS: A BRIEF SKETCH OF ITS FORMATION, BY [ITS] GENERAL SECRETARY, BOSTON, U.S.A., PREPARED FOR THE CONFERENCE AT THE HAGUE, SEPT. 1ST, 1875, at 11 (1875).

Centennial Year James B. Angell, President of the University of Michigan, in an address in Detroit in May, observed that "The question of framing a code of international law is one which is now earnestly engaging the attention of many distinguished publicists. … Most of the arguments *pro* and *contra* are as applicable to the codification of international as of municipal law."[496] Field, practically on the actual date of the Centennial, published a second edition of his *Draft Outlines of a Code of International Law*. In September the international organization held a meeting in the Centennial Celebration's main conference hall; Field himself addressed the meeting.[497]

VI. EPILOGUE

At the Centennial of Independence there was little of Blackstone's common law left in the United States.[498] America's legislators by statute had overturned the bulk of it: property law, civil procedure, and criminal law and procedure.[499] Ironically, contract law and tort law, which had had lesser basis in Blackstone's common law,[500] had become (and remain) the bastions of substantive judge-made law. In 1876, not just the Centennial Writers, but many Americans expected that codes would soon displace judge-made law altogether.[501]

They were disappointed.

A. THE CAMPAIGNS OF ALBANY AND SARATOGA SPRINGS

According to Professor Friedman, codification was crushed in one of "the set pieces of American legal history." That set piece, according to Friedman, "has its hero, Field; its villain is James C. Carter of New York …. Codification was wrong, Carter felt, because it removed the center of gravity

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[496] THE PROGRESS OF INTERNATIONAL LAW READ AT DETROIT, MAY 13, 1876, at 8 (1876).

[497] *International Law. A General Court of Nations. The International Code Committee as Philadelphia—Papers by Elihu Burritt, Ex-Gov. Washburn, A.P. Sprague, and David Dudley Field—Careful Discussion of Important Matters,* N.Y. TIMES (Sept. 30, 1876).

[498] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1765).

[499] *Accord,* John F. Dillon, *A Century of American Law,* in PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION … DEC. 14TH AND 15TH, 1887 (1888), *reprinted in* PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION, THIRTEENTH ANNUAL MEETING, … ALSO, REPORTS FOR THE YEAR 1889, at 249 (1890).

[500] Joseph H. Beale, Jr., *The Development of Jurisprudence During the Past Century, Address delivered before the Congress of Arts and Science at St. Louis, September 20, 1904, in the Division of Jurisprudence,* 18 HARV. L. REV. 271, 272 (1905); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT, LAW AND IDEOLOGY IN AMERICA, 1886-1937, 46 (tort law), 102-103 (contract law) (1998).

[501] *E.g.*, the *Albany Law Journal* wrote: "It would be sheer blindness not to perceive the fact that the jurisprudence of the whole world is rapidly and irresistibly tending toward codification." *Book Notices,* 13 ALBANY L.J. 151 (February 28, 1876). Codification was, Professor Reimann notes, "on the verge of success." Mathias Reimann, *Transatlantic Models: Influence between German and American Law,* 41 SEOUL L.J. 229, 242-243 (2000).

from the courts [to] the legislature—the code enacting body ...."[502] For Friedman, the defeat of codification was a personal "snub" to Field and not of importance for the legal system. "One child labor act or one homestead act can have more potential impact than volumes of codes."[503]

1. Albany—23 Times

So what does this set piece look like? It's hyperbole, but if it's a set piece, let's make it dramatic. Much as the Declaration of Independence marked the beginning of a thirteen-year struggle for an American Constitution—a framework for democratic government of laws and not men—the Centennial of the Declaration marked the beginning of a thirteen-year struggle for the laws of that government. Only in the later struggle the lawyers in New York City won and the American people lost.

In the 1870s and 1880s Field and his friends repeatedly took three of his four un-adopted codes (the Civil Code, the Penal Code, and the Code of Criminal Procedure) to the New York Legislature. Over-and-over again the people's representatives approved them; over-and-over again the lawyers of New York City overruled the people's representatives. In 1879, the legislature approved all three codes. The governor vetoed all three. In 1880, the legislature again approved the Code of Criminal Procedure. The governor again vetoed it. In 1881, however, it began to look as if all three codes were on their way to becoming law. The legislature again approved the Penal Code and the Code of Criminal Procedure. Only this time, the governor did too.

Alarmed by developments in Albany, March 15, 1881 the Association of the Bar of the City of New York established a Special Committee "To Urge the Rejection of the Proposed Civil Code." Before the special committee could "perfect its organization" the Assembly, *i.e.*, the lower house of the legislature, passed the Civil Code by an overwhelming vote of 83 to three. The Special Committee sprang into action and arranged for an April 21 hearing before the Senate committee considering the bill. The Civil Code died in committee: the legislature adjourned in July without taking action.[504]

So the struggle continued like that for nearly a decade. Field's supporters took the Civil Code to the legislature and the City Bar opposed it. The Special Committee was reappointed and delivered its annual report. Ten annual reports there were in all. In 1882 the City Bar had to rely again on a

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[502] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 302 (3d ed. 2004), 351 (1st ed. 1973).

[503] *Id.* at 305 (3d ed.), at 354 (1st ed.).

[504] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;" APPOINTED MARCH 15TH, 1881. PRESENTED OCTOBER 21ST, 1881, at 5-7 (1881). The special committee reported that "the proposed Code is intended to exterminate the Common Law as a system of jurisprudence." *Id.* at 8.

gubernatorial veto to stop the Civil Code.[505] James C. Carter, who joined the Special Committee that year, took the role of lead advocate; Theodore W. Dwight joined then and in 1883 became chair.[506] Each side let loose plagues of pamphlets as each year the Code made its appearance in legislative committee and sometimes on the floor.[507] The two sides battled for victory. The City Bar's pamphlets railed against codes and not for better codes.

In 1887 the Assembly again passed the Civil Code. This time the governor had committed to approve the Code. Carter testified before the Judiciary Committee and there, as in 1881, the Code again died. In testifying against the Civil Code, Carter made his attack personal against Field. More significant he conceded that his arguments against the Civil Code were inapplicable to public law. He claimed a common law advantage only for private law.[508] That distinction has long been lost sight of.

In 1888 the Senate passed the Civil Code, but the Assembly voted it down.[509] The *New York Times* reported that this was the twenty-third time that adoption had eluded the Civil Code. The article commented:

> it remains for some other legislature to give to the people of the State the benefit of a codification of the common law of the State. The lawyers had their say for and against the code to-day, and few laymen were presumptious [*sic*] enough to discuss the question. Most of them voted as their lawyer leaders indicated, without any conception of the code, and few of them seemed to even know what a code is.[510]

Professor Friedman says of Field's Code: "New York would have none of it."[511] It was not New York that would have none it: it was the Association of the Bar of the City of New York that would have none of it. Years later

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[505] The Special Committee printed the governor's veto message in its report. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;" REAPPOINTED NOVEMBER 1, 1881. PRESENTED OCTOBER 10TH, 1882, at 8-9 (1882). The reappointed special committee increased in size from six to sixteen and added two of the principal antagonists: James C. Carter and Theodore W. Dwight.

[506] It was an interesting pairing, as at the time Dwight was Dean of Columbia Law School. Carter had secured Langdell's appointment as Dean at Harvard and was a principal benefactor of that school. Langdell's case method disciples would at decade's end bring about the ouster of Dwight from Columbia.

[507] The special committee was authorized to print its reports in substantial numbers (*e.g.*, 2500 copies). The Reports now are scarce; I have never seen one offered for sale. But most have been digitized. Several of the pamphlets they gave rise to do appear on the used book market.

[508] 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. But a Louisiana lawyer noted it already in Carter's earlier writings. E. Evariste Moise, *Two Answers to Mr. Carter's Pamphlet*, 29 ALB. L.J. 267 (1884).

[509] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, EIGHTH ANNUAL REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;" REAPPOINTED DECEMBER 11TH, 1888. ADOPTED DECEMBER 11TH, 1888, at 7 (1889).

[510] *Politics in the Senate … The Field Code Defeated*, N.Y. TIMES, May 2, 1888, at 5.

[511] FRIEDMAN, *supra* note 502.

the Association crowed about its great accomplishment "in saving the people of the State."[512]

2. Saratoga and Other Battles Around the Country

After the governor vetoed the Civil Code in 1882, Field took the fight for codes national: to the newly-founded American Bar Association ("ABA", founded 1878), to other newly-founded bar associations and to newly important law schools. For a time, it looked like Field might triumph nationally. In 1886 the American Bar Association adopted Field's resolution that "The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute."[513]

All across the country lawyers took up the subject of codification. In 1887 the President of the Tennessee Bar Association reported that thanks to the "very careful consideration" that the ABA had given codification at its annual meetings, the topic had been subject to "very numerous" discussions around the country and that legal literature was "replete" with the discussion. He told of his personal experience with this "perplexing" topic: "it is a matter that will not down at our bidding. It is a question that has been learnedly discussed in able and eloquent addresses at every State Bar Association to which I have had access."[514] I have not counted all the states where codes were considered at a state bar meeting, but I have found many. I would be surprised if more than one or two state bar associations did not at a meeting in the 1880s or 1890s at least once take up codification.

Field, as he had before the Civil War, took the campaign to the academy. He personally addressed the Law Academy of Philadelphia in April 1886;[515] a supporter gave the Yale Law School commencement address in June 1884.[516] Field probably counted as sympathizers two contemporary leaders in legal education, Simeon Baldwin, Dean at Yale, and William Gardiner Hammond Dean, Dean at Washington University in St. Louis in the Midwest. But Harvard, Columbia and Hastings in California seem to have

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[512] EDWARD W. SHELDON, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, HISTORICAL SKETCH 1870-1920, PREPARED FOR THE SEMI-CENTENNIAL CELEBRATION, FEBRUARY 17TH, 1920, at 49.

[513] REPORT OF THE NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 72, 74 (1886).

[514] W.C. Folkes, *President's Address*, PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE BAR ASSOCIATION OF TENNESSEE, HELD AT MEMPHIS, THURSDAY, JULY 1, AND FRIDAY, JULY 2, 1887, at 90, 92. One early 20th century retrospect remarked: "It may seem difficult to imagine any phase of codification that has not been discussed and exhausted at the meetings of our bar associations and kindred learned bodies since David Dudley Field joined issue with James Coolidge Carter." Nathan Isaacs, *The Aftermath of Codification*, 43 ABA REP. 524 (1920).

[515] DAVID DUDLEY FIELD, CODIFICATION: AN ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA … APRIL 15, 1886 (1886).

[516] GEORGE HOADLY, CODIFICATION IN THE UNITED STATES: AN ADDRESS DELIVERED BEFORE THE GRADUATING CLASSES AT THE SIXTIETH ANNIVERSARY OF THE YALE LAW SCHOOL, ON JUNE 24TH, 1884 (1884).

lined up against him. Field's number 1 opponent, James C. Carter, who spearheaded the City Bar's opposition, was closely tied to Harvard Law School and its Dean Christopher Columbus Langdell.[517] Theodore Dwight, Dean at Columbia and no friend of Langdell's new teaching method, was himself Chairman of the City Bar's opposition committee. In the far West, John Norton Pomeroy, the first Dean at Hastings College of Law, who had been an early supporter of Field's Codes in California, was so widely cited in posthumous opposition, that his earlier support is forgotten.[518]

Meanwhile, Field continued to promote an international code. In 1890 President Benjamin Harrison presented a draft code to Congress that had been proposed at an international congress.[519] For a moment in the fall of 1886, it looked like codes might triumph so well as to exclude common law. A scant six weeks after the ABA approved of Field's Resolution, one of the Centennial Writers, Bispham, came to the defense of common law. He made the "progressive capacity of the unwritten law," the theme of his introductory lecture at the Law Department of the University of Pennsylvania. He worried that statute law might practically displace judge-made law altogether.[520]

But victories with bar associations did not translate into adoption of the Civil Code in New York or in other major states. In 1888 Field was elected President of the American Bar Association. In 1889, he presided over the ABA's first annual meeting away from Saratoga Springs. In a centennial year of the Constitution, he closed his address as President calling on his colleagues one last time: "you must … give speedy justice to your fellow-citizens, more speedy than you have yet given, and you must give them a

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[517] Carter had been instrumental in the selection in 1870 of Langdell as Dean, was a founder and the first President of the Harvard Law Alumni Association and endowed a chair at the Harvard Law School.

[518] Lewis Grossman, *supra* note 483. *Compare* JOHN NORTON POMEROY, THE HASTINGS LAW DEPARTMENT OF THE UNIVERSITY OF CALIFORNIA, INAUGURAL ADDRESS, AUGUST 8, 1878 (1878) with JOHN NORTON POMEROY, THE "CIVIL CODE" IN CALIFORNIA … REPRINTED FROM THE WEST COAST REPORTER (1885). Joel Bishop, a prolific treatise writer whom one might have supposed would have been neutral or inclined toward codes, came out in defense of common law methods. JOEL PRENTISS BISHOP, COMMON LAW AND CODIFICATION; OR, THE COMMON LAW AS A SYSTEM OF REASONING,— HOW AND WHY ESSENTIAL TO GOOD GOVERNMENT; WHAT ITS PERILS, AND HOW AVERTED. AN ADDRESS DELIVERED BEFORE THE SOUR CAROLINA BAR ASSOCIATION, AT COLUMBIA, DECEMBER 8, 1887.

[519] *See, e.g.*, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING A REPORT OF THE INTERNATIONAL CONFERENCE TOUCHING A UNIFORM CODE OF INTERNATIONAL LAW, 51ST CONG., 1ST SESS., SENATE, EX. DOC. NO. 283 (1890); PAPERS ON THE REASONABLENESS OF INTERNATIONAL ARBITRATION, ITS RECENT PROGRESS, AND THE CODIFICATION OF THE LAW OF NATIONS (Henry Richard, ed., London, 1887).

[520] OF UNWRITTEN LAW. AN INTRODUCTORY ADDRESS DELIVERED BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA, OCTOBER 1ST, 1886, 7-8 (1886). For emphasis in his talk Bispham reported the original version: "all law should be reduced as far as possible, to the form of the statute."

chance to know their laws."[521] It was a swan song and not a call to action. Two years later in August 1891, nearing the end of his long life, he published a retrospect on *Law Reform in the United States and Its Influence Abroad*.[522]

Field died Friday the 13th of April 1894.[523] That was the end of American campaigns for codes. Never again would America seriously contemplate a civil code such as France then already had had for ninety years, or such as Japan and Germany would adopt only two years later. Like the gravestone Jefferson, Field's gravestone in the family plot at the cemetery in Stockbridge Massachusetts remembers his life's work for written law:

> He devoted his life to reform the law
>
> To codify the common law
>
> To simplify legal procedure
>
> To substitute arbitration for war
>
> To bring justice within the reach of all men

B. *THE GILDED AGE AND THE AMERICAN LEGAL SYSTEM OF TODAY*

When Field died, contemporary observers saw the American campaign for codification as going dormant.[524] But codifying soon slipped from dormancy into oblivion and is forgotten today. Field's world is gone. The day when one talked about building a government of laws is gone. The "modern" world of contemporary common law myth has displaced it. That world of American common law was not legislated; it arose by default of legislation and code methods of application. The Gilded Age changed the face of American law. It ushered in today's legal system and contemporary common law myth. America did not suddenly in 1900 find itself in an age of statutes. If anything, in 1900 it gave up on statutes.[525] From the Centennial in 1876 to the century's end in 1900, in "The Gilded Age," the contours of the American legal system of the 20th and 21st centuries took shape.[526] Institutional changes worked against revisiting codifying. Some of these were:

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[521] *Address of David Dudley Field, of New York, President of the Association*, REPORT OF THE 12TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 149, 234 (1889).

[522] DAVID DUDLEY FIELD, LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD REPRINTED FROM THE AMERICAN LAW REVIEW OF AUGUST, 1891, WITH SOME CHANGES AND NOTES (1891).

[523] He was buried in Stockbridge, Massachusetts. Coincidentally, the day before, William Gardiner Hammond, a like-minded voice in the academy in the Midwest, died.

[524] *See, e.g.*, RICHARD FLOYD CLARKE, THE SCIENCE OF LAW AND LAWMAKING: BEING AN INTRODUCTION TO LAW, A GENERAL VIEW OF ITS FORM AND SUBSTANCE AND A DISCUSSION OF THE QUESTION OF CODIFICATION (1898).

[525] *See, e.g.*, William B. Hornblower, *A Century of Judge-Made Law, Address Before the School of Law of Columbia University, June 16, 1907*, 7 COLUMBIA L. REV. 453 (1907). And Hornblower was among those responsible for statutory revision!

[526] I intend to address some or all of these in my planned book tentatively titled *Failures of American Lawmaking in International Perspective*.

1. From State to National Law

A national economy demanded national law. In 1887 Congress adopted the Interstate Commerce Commission Act. In 1890 it produced the Sherman Anti-Trust Act. In 1892 what is now the Uniform Laws Commission went to work to create uniform state statutes for specific areas of law (e.g., sales, marriage.)

2. The Bench: From Applying Law to Making It[527]

At the turn of the 20th century judges asserted not only judicial supremacy over constitutional validity of statutes,[528] but over statutes' meanings as well.[529] In 1912 Congressman Robert Lafollette, practical leader of the Progressive movement, charged that by "presuming to read their own views into statutes without regard to the plain intention of the legislators, [judges] have become in reality the supreme law-making and law-giving institution of our government."[530]

It is no coincidence that at the same time as judges claimed superiority over statutes they gave up the theory that they only declared common law. Soon legal scholars put forward the claim of judges making law. Other developments of the time worked to promote lawmaking judges: supreme court judges were relieved of circuit-riding responsibilities, intermediate appellate courts were created and trial judges were given books of form jury instructions.

3. The Bar: from Legislation to Litigation

State-wide bar associations newly founded in the last quarter of the 19th century were established in an earlier tradition of public service rather than

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[527] 2 THE WORKS OF JAMES WILSON 502 (Robert Green McCloskey ed.,1967) (1804) ("[E]very prudent and cautious judge.., will remember, that his duty and his business is, not to make the law, but to interpret and apply it.")

[528] *See*, Lawrence M. Friedman, *Introduction, in* COMMON LAW, COMMON VALUES, *supra* note 245, at 11, 15; CHRISTIAN WOLFE, THE RISE OF MODERN JUDICIAL REVIEW. FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986).

[529] FRED A. CAHILL, JR., JUDICIAL LEGISLATION. A STUDY IN AMERICAN LEGAL THEORY 20 (1952). Much as Bispham, having promoted written law was concerned about keeping unwritten law, Eugene Wambaugh, having promoted case law, worried about keeping written law. EUGENE WAMBAUGH, THE PRESENT SCOPE OF GOVERNMENT (1897).

[530] Robert M. Lafollette, *Introduction*, GILBERT EMSTEIN ROE, OUR JUDICIAL OLIGARCHY v (1912). Lafollette continued: "They have taken to themselves a power it was never intended they should exercise; a power greater than that entrusted to the courts of any other enlightened nation." *Id. See* Horace A. Lurton, *A Government of Law or a Government of Men?,* 193 N. AM. REV 3, 23 (1911) ("In this indisputable function of interpreting and construing applicable constitutional or statutory law to the case in hand there lurks, however, an immeasurable power, which is all the more dangerous to the public welfare because under its cover it is possible of a bad or ignorant judge to defeat the legislative purpose.") Lurton was then a sitting justice of the United States Supreme Court.

in professional interest.[531] At its founding the American Bar Association gave legislation and its uniformity as among its reasons for being.[532] That initial orientation of reform was soon challenged and changed.[533] In 1892 the President of the Mississippi Bar Association in his annual address, objected: "It has been said that lawyers should only deal with the administration of the laws, and that as a class we have no concern with making them. But to this doctrine I cannot subscribe."[534] By 1918, the transformation seems complete. Ernst Freund, then America's premier proponent of legislation, lamented the lack of interest in legislative problems: "The business of the legal profession is litigation and not legislation." [535]

4. The Academy: From Systematizing to Synthesizing

The triumph of Harvard Law School and its case method of instruction sealed the end of the ideal of government of written laws. The case method, introduced in 1870, but not widespread beyond Harvard until 1890, made excerpts of reported court cases the basis of classroom instruction. It was the antithesis of codifying. It had no place for legislation or systematizing statutes, but instructed students how to synthesize a legal rule out of a succession of legal opinions. It fostered prejudice against statutes and codes.[536] It focused on resolution of private law disputes to the exclusion of public law. It let professors teach a mythical national common law and allowed them to ignore the chaos of competing jurisdictions that was and is the reality of American law.

Harvard introduced a number of innovations in legal education that undermined lawmaking in America. Harvard created the modern law school that is neither scholarly nor practical, but is an incubator for common law

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[531] *See generally*, Simeon E. Baldwin, *The Founding of the American Bar Association*, 3 A.B.A.J. 658 (1917).

[532] Article I of its Constitution of 1878 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. The former was diluted in the new 1919 Constitution; the latter was dropped already in 1913.

[533] Adolph Augustus Berle, *Modern Legal Profession, Legal Profession and Legal Education*, 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 340, 344, 345 (1933).

[534] Hon. L. Brame, *President's Address*, *in* PROCEEDINGS OF THE MISSISSIPPI BAR ASSOCIATION AT ITS SEVENTH ANNUAL MEETING HELD JANUARY 7TH, 1892, 7, 9 (1892)

[535] Ernst Freund, *Prolegomena to a Science of Legislation*, 13 ILL. L. REV. 264, 272 (1918).

[536] *E.g.*, 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, at 1-2 (1915), *reprinted in* 63 U. PA. L. REV. 196(1915) ("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.) *See* Max Radin, *Modern Legal Education, Legal Profession and Legal Education*, 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 334, 338 (1933).

myth. In 1871 it published the first casebooks for instruction; these included only edited case reports. In 1873 it hired the first law professor who had no experience whatever in the active profession. In 1883 it physically took the law school out of the university when it became the first university law school to build its own building. In 1886 Field opponent Carter helped found and became the first president of the first law school alumni association. He endowed a chair as well. In 1887 Harvard founded the first student-edited law review. The *Harvard Law Review* attained and maintained the position of leading law review notwithstanding its insularity. It had little of the reformist verve and insight of such journals as the *American Jurist* of the 1830s or of contemporary magazines such as the *American Law Review* of the *Albany Law Journal*. Harvard graduate Oliver Wendell Holmes dismissed law school law reviews as the "work of boys",[537] and yet had a leading role in placing those "boys" as judicial clerks. Today their successors practically monopolize law teaching: they are former apprentices to judges and not to legislators or scholars.

5. Case Reports: from Commentary to Commodity[538]

At the Centennial moment case reporting was struggling to meet the needs of judges making law and the requirements of the bar to use judge-made law. Reporters had long abandoned the format of the first reports: books of commentary that reported cases selectively for their importance of developing law, that included arguments of counsel and that sometimes added extensive notes of the reporter's authorship. "Modern case law" demanded books of authority, not books of wisdom. Case reports should be current, inexpensive, and in coverage comprehensive. Books should exist for each jurisdiction. The cases that they reported should be textually accurate, easily found through indices and digests, and of determinable and current validity. An 1873 Report of the Association of the Bar of the City of New York found "radical changes" necessary.[539] Yet by century's end those changes had been made thanks mostly to West Publishing Company and a few others.

In October of the Centennial year West offered its first publication to the profession. In 1886, when the ABA met to debate statutes in Saratoga, its National Reporter system of reporting and organizing cases had gone live.

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[537] As cited by Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace,* 71 N.Y.U. L. REV. 615, 631 (1996).

[538] *Cf.,* James T. Mitchell, *Historical Address, in* ADDRESS DELIVERED MARCH 13, 1902 AND PAPERS PREPARED OR REPUBLISHED TO COMMEMORATE THE CENTENNIAL CELEBRATION OF THE LAW ASSOCIATION OF PHILADELPHIA, PENNSYLVANIA, 1802-1902, at 13, 15 (1906) (describing law books at century's end as "mere merchandise".).

[539] REPORT OF THE COMMITTEE ON LAW REPORTING OF THE ASSOCIATION OF THE CITY OF NEW YORK 5 (1873). For a contemporary account of similar issues in England, see W.T.S. DANIEL, THE HISTORY AND ORIGIN OF THE LAW REPORTS TOGETHER WITH A COMPILATION OF VARIOUS DOCUMENTS SHOWING THE PROGRESS AND RESULT OF PROCEEDINGS TAKEN FOR THEIR ESTABLISHMENT (1884).

By century's end, it and other publishers efficiently supplied the profession not only with the books of authority, but with the indices, digests and citators to make use of them.[540] West, in its own words, provided the profession with "Law Books by the Million."[541] Legal writing turned from systematizing analysis to collecting authorities.[542] Treatises swelled to incorporate a case from every jurisdiction. The table of cases in such books could be 25% or more of their length.

6. Legislation: from Codes to Collations

In the decade after the Centennial American jurists began to discuss improving methods of legislation. Looking to foreign models, they suggested introducing a permanent legislative institution that would be charged with maintaining the quality of legislation.[543] These discussions foreshadowed the development of the legislative research bureaus and the offices of legislative counsel. But before these bodies could be created, "codifying" was turned into reporting statutes the way reporters reported cases: an exercise in or-

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[540] Ironically, the "father of the American digest" was none other than Benjamin V. Abbott, the Centennial Writer for *The First Century of the Republic*. ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 119 (1990).

[541] WEST PUBLISHING COMPANY, LAW BOOKS BY THE MILLION: AN ACCOUNT OF THE LARGEST LAW-BOOK HOUSE IN THE WORLD—THE HOME ESTABLISHMENT OF THE NATIONAL REPORTER SYSTEM AND THE AMERICAN DIGEST SYSTEM 1901, *reprinted in* 14 GREEN BAG 2D 311, bound as an insert in Google Books to 24 N.J.L.J. (1901).

[542] *See generally*, SAMUEL FREEMAN MILLER, THE USE AND VALUE OF AUTHORITIES IN THE ARGUMENT OF CASES BEFORE THE COURTS AND IN THE DECISION OF CASES BY THE COURTS, AN INTRODUCTORY ADDRESS BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA, MONDAY, OCTOBER 1, 1888, 121 Pa. xix (1889), *reprinted* as *Appendix B*, CHARLES NOBLE GREGORY, SAMUEL FREEMAN MILLER: JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 123 (1907).

[543] *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON A PLAN FOR IMPROVING THE METHODS OF LEGISLATION OF THIS STATE, BY A COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1885). The committee consisted of Simon Sterne, Chairman, James M. Varnum, Theron G. Strong, and George H. Yeaman. Id. at 19. *See also* Simeon E. Baldwin, *Byrce on American Legislation*, 14 NEW ENGLANDER AND YALE REV. 39 (1889); CHARLES REEMELIN, TREATISE ON POLITICS AS A SCIENCE 55 (1875); HENRY WADE ROGERS, THE LAW-MAKING POWER. A PAPER READ BEFORE THE KANSAS BAR ASSOCIATION, JANUARY 24, 1894 (1894), *reprinted in* 3 NORTHWESTERN L. REV. 39 (1894); SIMON STERNE, OUR METHODS OF LEGISLATION AND THEIR DEFECTS. A PAPER READ BEFORE THE NEW YORK MUNICIPAL SOCIETY ON THE EVENING OF JANUARY 6, 1879 (1879); Simon Sterne, *The English Methods of Legislation Compared with the American, Read Before the Penn Monthly Association, March 13th, 1879*, 10 PENN MONTHLY 336 (May 1879); Simon Sterne, *The Prevention of Defective and Slipshod Legislation*, REPORTS OF THE 7TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 275 (1884); Simon Sterne, *Defective and Corrupt Legislation: The Cause and the Remedy* in the popular (*Questions of the Day*, volume no. XXII, 1885); FRANCIS WAYLAND, ON CERTAIN DEFECTS IN OUR METHODS OF MAKING LAWS, OPENING ADDRESS [OF THE PRESIDENT] BEFORE THE AMERICAN SOCIAL SCIENCE ASSOCIATION, AT ITS ANNUAL MEETING, SARATOGA SPRINGS, SEPT. 5TH, 1881 (1881).

ganization and not a scientific work of systematizing. No longer was codifying something for leading jurists. Codifying became collating and creating card catalogs.[544] It was not much of an advance on the first collation of rules in alphabetic order. Indeed, that is what "codifying" has become: the United States "Code" is "systematized" from A for Agriculture of Title 7 to W for War & National Defense of Title 50.

7. Legal Culture: From Cosmopolitanism to Nationalism

The ABA Convention, held September 26 to 28, 1904 was sandwiched between the International Congress of Arts and Science held the week of September 19, which included sections on Jurisprudence and on History and Law, and the Universal Congress of Lawyers and Jurists, held September 28 to 30 under the joint sponsorship of the Exposition and of the ABA.[545] Such cosmopolitanism in American law would soon disappear along with codifying.[546] When the ABA met in London in 1924, on the eve of the nation's sesquicentennial, the consensus 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."[547]

VII. CONCLUSION

Systematized written laws are the norm worldwide.[548] They are the world's best practices. Systematizing is not unusual: it is ordinary, albeit difficult. Professors of contemporary common law myth avert their eyes from

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[544] *See* REPORT OF THE SPECIAL COMMITTEE OF THE ASSEMBLY OF THE LEGISLATURE OF 1900 ON STATUTORY REVISION COMMISSION BILLS 1901 COMMITTEE (Adolph J. Rodenbeck, James T. Rogers and James E. Smith): PLAN FOR COLLATING THE STATUTES PREPARATORY TO THE WORK OF CONSOLIDATION AND REVISION: CONTAINING THE REPORT OF THE CHAIRMAN ON A GENERAL PLAN FOR THE CONSOLIDATION AND CLASSIFICATION OF THE STATUTES AND A DETAILED PLAN FOR MAKING A CARD RECORD OF THE HISTORY AND SUBSTANCE OF THE STATUTES OF THE STATE: PREPARED UNDER THE DIRECTION OF THE BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK : CREATED BY CHAPTER 664 OF THE LAWS OF 1904 : PASSED MAY 9, 1904. The report includes a color picture of such a card catalogue.

[545] OFFICIAL REPORT OF THE UNIVERSAL CONGRESS OF LAWYERS AND JURISTS HELD AT ST. LOUIS, MISSOURI, U.S.A. SEPTEMBER 28, 29, AND 30, 1904 (1905)

[546] *See* RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930 14 (1987) ("Given this background of minimal interaction between the American and English legal systems, the emphasis after 1870 on the similarity, if not identity, of the American legal system to its English predecessor, which blossomed into an article of faith on both sides of the Atlantic, becomes a remarkable phenomenon. The reasons for this unlikely transformation were rooted in the broader currents of historical change in addition to narrower legal concerns.")

[547] 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.

[548] *See, e.g.*, THE SCOPE AND STRUCTURE OF CIVIL CODES [Selected Papers from the 2nd International Academy of Comparative Law Thematic Conference] (J. César Rivera, ed.,

that inconvenient truth. They would have Americans believe that whatever may be the role of written laws abroad, in the United States unwritten judge-made law is and always has been the American way. Whatever advantages codes may bring to other countries' legal systems, somehow those advantages don't apply in the United States. Digitization challenges those claims. What was natural progress of law abroad was likewise progress that the Centennial Writers observed in their day and hoped for in the future. They expected that their country, that led in writing constitutions establishing government, would follow in writing laws for governing.

In the first century of the Republic and through to the end of the 19th century Americans were no less interested in systematizing their laws than were their counterparts abroad. Today, when Americans plead for understandable laws and judges that apply but do not make laws, they are begging for good laws and good legal methods which every believer in a rule of law should wish for.

Contemporary common law myths keep Americans stuck in a mythical past focused on dispute resolution. It denies them a modern government of laws. Digitization destroys the myths and exposes the failures to international comparisons. Codes have worked abroad for two centuries. Americans can look abroad and see how civil law methods avoid the chaos that their forefathers rejected but that they now accept as normal. It is time to change. Oliver Wendell Holmes said that it is revolting to have no better reason for a legal practice than blind imitation of the past.[549] How much more revolting it is to imitate a past that never existed.

IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE Vol. 32, 2014); CODIFICATION IN INTERNATIONAL PERSPECTIVE (Wen-Yeu Wang, ed., IUS COMPARATUM: GLOBAL STUDIES IN COMPARATIVE LAW, Vol. 1, 2014); CODIFICATION IN EAST ASIA (Wen-Yeu Wang, ed., IUS COMPARATUM: GLOBAL STUDIES IN COMPARATIVE LAW, Vol. 2, 2014).

[549] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).