

TWELVE TABLES OF AMERICAN LAW



CARL MALAMUD



The decrees of the Senate should be delivered to the aediles of the plebs at the temple of Ceres...whereas previously they had been suppressed or falsified by the consuls to suit their own convenience.

LIVY, HISTORY OF ROME

**TWELVE TABLES
OF AMERICAN LAW**

Address to the Future of Law Libraries Workshop
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Cover photo of "Roman Bridge over the Gard," circa 1890-1900
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1 I learned my Roman history from a retired shipyard
welder and gas-station attendant from West Virginia
named Robert Byrd.¹ In 1993, Byrd gave a series of 14
lectures on the Senate floor—delivered without notes—
tracing the rise and the fall of the Roman Republic.²

2 Byrd gave these lectures to make a point about a
recurring proposal in the Senate to give the President a
line-item veto. The line-item veto was to Byrd emblematic
of something much deeper, a failure to observe basic
principles of checks and balances, a failure which could
lead to the collapse of our great American Republic. Byrd
used Rome as his shining city on the hill that fell, relating
how when the Roman Senate lost its resolve, the Republic
began an inevitable decline. Byrd said “a weakened
Senate—once the resplendent and supreme pillar of
power and undergirding the rugged, yet graceful
architecture of the Roman republic—had lost its way, its
nerve, its vision, and its independence.”³

3 In those lectures, Byrd told the tale of the Twelve
Tables, and I think that story is relevant to us today as we
look at the future of law libraries.

4 In the year 509 B.C., it came to be that Tarquinius the
Proud became the last of the Roman kings and the word
rex became a term of insult. The aristocracy, to avoid
further tyrannies, vested the power to rule in two consuls,
to be shared equally and jointly, and that power would
shift every year to two new people.⁴

5 The limit on the power of the consuls was a limit by the
aristocratic patricians to protect themselves and their
estates, and the masses of the people, the plebeians, were

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not part of this franchise. And thus began a two-century struggle, the Conflict of the Orders, as the people pressed their grievances on matters such as the misallocation of public land won in wars and the arbitrary treatment of debtors.⁵

6 In 494 B.C., the conflict first came to a head. The patricians had a trump card in times of civil strife, they would draft all the plebeians into the army and declare martial law. But, they could only draft people within a mile of the city, and in 494 the people withdrew beyond that boundary in the first great secession and the patricians were left alone in the undefended city.

7 This led to a compromise, one in which, as Livy relates in his annals, “the plebeians were to have magistrates of their own, who should be inviolable, and in them should lie the right to aid the people against the consuls, nor should any senator be permitted to take this magistracy.”⁶

8 Many issues about the relative powers of the people and the Senate were left unresolved, but now the people had a tribune who could represent them and intervene when there were abuses of power. It was the beginning of the system of checks and balances that so influenced our own founding fathers.⁷

9 For the next 30 years, the annals tell of a continued struggle between the patricians and the plebeians to define their respective rights. Then, in 462 B.C., a particularly brave tribune named Gaius Terentilius Harsa stood up and gave a speech for the ages, and in that speech he “attacked the arrogance of patricians towards the plebeians and above all the powers of the consuls, and

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he proposed that five men be appointed to write down the law.”⁸ He said the consuls “should not make a law of their own whims and caprices.”⁹

10 There was a violent reaction to this call for codification. The Roman Senate was outraged. This radical proposal had been made while the consuls were off waging war, and the Senate accused the tribune of attacking the state while it was in time of strife. Then, a year later, Terentilius came back with his demand to codify the law, this time with all the tribunes supporting his call.

11 The Senate wanted to deflect the people, so they called in the experts, who consulted the Sybilline Books of the Oracles, and the readers of the book came back and said the omens were not good for codification that year as it would lead to war and internal strife.

12 The tribunes protested that the books were cooked, but the patricians made the story true when “new enemies were trumped up, and a loyal and neighboring colony was traduced. It was against the innocent Antiates that war was being declared,”¹⁰ as the consuls played Wag the Dog and the country moved into martial mode.

13 The calls would not go away, and the tribunes continued to press their case. Finally, in 454 B.C., the Senate knew they could no longer fail to face the issue, but to buy more time, they created a special fact-finding commission of 3 wise men and they were sent to Greece to investigate the written Code of Laws that Solon had promulgated 140 years prior, to see how that whole law thing was working out.¹¹ The mission was simply a

delaying tactic on the part of the Senate since they had no intention of adopting any Greek laws.¹²

14 Finally, the wise men returned from their junket and the plebeians would no longer be put off. The entire government was dissolved for a year, and instead of consuls a special board of 10 patricians—the *decimvirs*—were charged with administering the law as well as its codification. After a year, they came back with 10 tables of the law and those tables proved to wildly popular and were adopted by popular acclaim. Since commissions are loathe to decommission, the *decimvirs* got themselves reelected for a second year, and added two more tables of the law before being forcibly disbanded and the system of consuls reinstated. These tablets were the true beginning of the republic, the *res publica*, a “government with the participation of the governed.”¹³

15 As Byrd tells us, “The laws were promulgated, and inscribed, some say, on bronze tablets, others say wooden tablets, which, in turn, were displayed in the Roman forum. For a long time, these were the basic governing and civil laws. The Twelve Tables were destroyed by fire when Brennus and the Gauls captured Rome in 390 B.C. But the children of the Romans had been required to memorize the law of the Twelve Tables. The laws were reconstructed, therefore, largely through recollection.”¹⁴

16 The writing down of the law and its safekeeping became a function of the people. In 449 B.C., it was ordered that “the decrees of the Senate should be delivered to the aediles of the plebs at the temple of Ceres...whereas previously they had been suppressed or

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falsified by the consuls to suit their own convenience.”¹⁵ Later, these representatives of the people safeguarded the plebiscites, the Acts of the Plebeian Council,¹⁶ and then under Sulla and Julius Caesar, the tribunes took responsibility for creating the world’s first journal of government, the *acta diurna*, which was posted daily on the walls of the forums, and then copied and sent by messenger through all parts of Italy and the outlying provinces.”¹⁷

17 The Twelve Tables were private law. They did not limit the powers of the Senate, and they certainly did not govern the priests or religion. For example, there were no laws about blasphemy in Rome as the gods were “expected to handle matters personally.”¹⁸ However, the Twelve Tables did govern the things that mattered most to the people, like what to do when you got short-weighted at the *nundinae* when buying the ingredients for your favorite dish.¹⁹

18 The tales of the Twelve Tables and the history of the Republic were told by Robert Byrd because he was worried that the line-item veto was going to be no different from the story of how the Roman Senate shirked its duties over the centuries and started bowing to whims of the dictators.

19 As we examine the future of the law—and of law libraries—I put it to you we are faced with an equally momentous choice. Today, we have shirked our duties. The United States has given up equal protection under the law for the principle of pay to play, we have made access to justice conditional on access to money, our public laws

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have been subdivided into private parcels owned by designated concessionaires. We have sat by idly while this has happened.

20 This must change or there is no future for law libraries, only a future of managing vendor relations. Three foreign-owned multinationals have exclusive copies of key portions of our corpus. Even the American Bar Association and the Administrative Office of the U.S. Courts have succumbed to the lure of money: both of those organizations rank in the top 10 legal information retailers in total revenues.

21 This is where the law libraries should come in. You should be the keepers of the Twelve Tables, not the manager of a retail outlet. Today, law libraries risk becoming a 7-11, where one vendor comes in and fills up the donut case, another stocks the ATM, and your job is all about managing vendors and answering an occasional query from a customer. Do you prefer the jelly-filled or the sugar donut? Which is better, Lexis or West?

22 Our law schools and our law libraries are not active in maintaining the corpus of primary legal materials. We've outsourced this important function, and as a consequence, America is not being well served. We are not doing enough. We are not doing our jobs.

23 The Supreme Court of the United States is just one obvious example. Why have we not scanned the 25 million pages of briefs? Why is there no well-formatted and audited set of Supreme Court opinions? Why do we not have the trial court records of key cases that made it to the high court? There are many more examples from

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copyright over state statutes to an 8 cent-per-page
paywall on District Court dockets.

24 One of the goals of Law.Gov²⁰ was to establish why and
how access to primary legal materials is important. When
our principles were established, I went to the deans of law
schools to make the case that they should endorse these
principles, bring them to the attention of the Judicial
Conference, make access to the law truly reflect the
principles of equal protection under the law, of due
process under the law.

25 I went first to see the dean of a famous West Coast law
school. I asked him to endorse Law.Gov. He thought the
principles were obvious, but wasn't sure it was pertinent
to his job as a dean of a law school. But, he said he'd sign if
the dean of a famous East Coast law school would sign.

26 So, I went to see the dean of the famous East Coast law
school, and she said that she only signed documents
directly relevant to her duties as a law school dean.
Though I tried to make the case that access to primary
legal materials is a foundational issue for legal research
and education—with incidental spinoffs like justice and
democracy—I was unsuccessful there, and unsuccessful at
the famous Southern law school, and with those 3 strikes, I
knew we were out for the inning.

27 I can't help but think that if the law librarians were
jumping up and down and demanding that the Twelve
Tables of American Law be available, if there were a full-
throated roar from the AALL and the Academy, if access to
primary legal materials becomes an issue that we all
embrace, then I can't help but think we can get our point

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across, to those deans, the ABA, the Judicial Conference, and our lawmakers.

28 Horace, in his Epistles, asked “who is a good man?” and the answer was “the man who keeps the resolutions of the Senate, the statutes and the law, before whom many great suits are brought to judgment; when he is surety affairs are safe, when he is witness causes are upheld.”²¹

29 One can read Horace as saying that the definition of a good person is a law librarian, the collective keepers of the Twelve Tables. If our law libraries are to continue on their present road, content to become a retail outlet for vendors, I think there is no future, we might as well run a 7-11.

30 The law library should be much more, it should be the Tablirarium, the Temple of Ceres, the Citadel of Democracy. If law libraries keep and preserve the raw materials of our democracy instead of just renting them, if law librarians are the tribunes of the people who guard the records that make us an empire of laws not a nation of men, then there is a future for the law library, and that future is bright indeed. The choice is ours.

NOTES

1. See Robert C. Byrd, *Child of the Appalachian Coalfields*, West Virginia University Press (Morgantown: 2005).
2. Robert C. Byrd, *The Senate of the Roman Republic*, Senate Document 103-23, U.S. Government Printing Office (Washington, D.C.: 1995) (“Byrd on Rome”). Video from C-SPAN with closed captions generated from the Congressional Record is available at <http://www.youtube.com/user/LawResourceOrg#g/c/1E1633114E0E358F>
3. 9 Byrd on Rome, July 13, 1993, page 128.
4. Livy, *History of Rome*, Loeb Classical Library, Book II. I. 6-11. Ober dictum, Harvard could make a marvelous gift for the ages by open-sourcing the Loeb Library.
5. Andrew Lintott, *The Roman Republic*, Sutton Publishing (Phoenix Mill: 2000), pp. 13-15.
6. Livy, Book II. XXXII. 9.
7. Gordon S. Wood, *The Idea of America*, Penguin Press (New York: 2011), p. 57.
8. Alan Watson, *The Spirit of Roman Law*, University of Georgia Press (Athens: 1995), pp. 36-37.
9. Livy, Book III. VIII. II-IX. 6.
10. Livy, Book III. X. 6-12.
11. Hignett, *A History of the Athenian Constitution*, Oxford University Press (Oxford: 1952), p. 88.
12. Evidence that the blue-ribbon commission was simply a delaying tactic is the absence of any Greek influence in the Twelve Tables. See Watson, p. 112.
13. Harriet I. Flower, *Roman Republics*, Princeton University Press (Princeton: 2010), p. 48.

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14. 2 Byrd on Rome, May 11, 1993, p. 25.
15. Livy, Book III. LV. 8-15.
16. Wikipedia, Aedile, <http://en.wikipedia.org/wiki/Aedile>, retrieved June 10, 2011.
17. 11 Byrd on Rome, July 11, 1993, p. 133.
18. Philip Matyszak, *Ancient Rome on 5 Denarii A Day*, Thames & Hudson (London: 2007), p. 76.
19. See e.g., Apicius Book IV, 126: Apician Jelly, *Salacattabia Apicana*. (Put Picentian bread in a mould, interlined with pieces of lamb, cheese, pine nuts, pickles, shallots. Cover with jellified broth, bury in the snow. To serve, sprinkle with a dressing of mint, ginger, raisins, celery seed, coriander, honey, vinegar, oil, and wine.) Apicius, *Cooking and Dining in Imperial Rome*, Edited and translated by Joseph Dommers Vehling, Walter M. Hill (Chicago: 1936).
20. See <https://law.resource.org/>
21. J.A. Crook, *Law and Life of Rome*, Cornell University Press (Ithaca: 1967), pp. 33-34, quoting Horace, *Epistles I*, XVI. 40.

APPENDIX A

50 things law librarians can do as individuals, as institutions, as a profession, and as an association:

1. Get the AALL to enshrine the Law.Gov principles as a matter of formal policy.
2. Adopt a judicial jurisdiction and write a blog summarizing major opinions.
3. Adopt a judicial jurisdiction and form a reporter society with law students. Teach them to summarize opinions, categorize them, publish a blog with the results.
4. Audit an electronic case by comparing it to a known good paper copy, then digitally sign the electronic version and add a note explaining your methodology and who you are.
5. Work on the National Inventory of Legal Materials by entering data about your area in a spreadsheet. Publish your spreadsheet.
6. Get the AALL to institutionalize the National Inventory of Legal Materials and make it a professionally run, annually updated survey of the state of our law.
7. Give a talk about the Law.Gov principles to local governmental officials, such as a clerk of a court. Just call them up and ask for an appointment. They'd love to see you.
8. Help somebody install RECAP on their browser.
9. Monitor your local building standards commission and publish a list of which standards they incorporate by reference, any errata, and the status of upcoming draft standards.

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10. Use your rights under the Veeck decision and publish a copy of public safety standards and the incorporating legislation from your local building standards commission.
11. Start a \$10/quarter/person buying co-op for PACER access with RECAP. Any account gets a \$10/quarter waiver, so pool those exemptions together.
12. Create a DIY scanning cooperative for a specific set of serials, such as briefs submitted to a court or ordinances published by a municipal council.
13. Get a local law firm or foundation to pay the \$0.10/page fee and have the Internet Archive scan a series of primary legal documents. Tell them they'll get a prominent credit thanking them for their support.
14. Become a privacy ombudsman for a jurisdiction. Put up a web page and allow people to complain to you about privacy violations for that jurisdiction, then forward those complaints into the clerk or other relevant official and monitor whether or not they are taking corrective action.
15. Do a "how to find free law class" at a local community center or high school.
16. Get a lawyer to adopt a volume of the Federal Reporter for \$1200 at YesWeScan.Org. To entice the lawyer, promise you'll do an audit of the text against a known good paper copy.
17. Create a union of law libraries and go en masse and force West and LexisNexis to allow price disclosures. Threaten antitrust suits if they refuse.

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18. Go to the National Archives and find interesting old photos of local judges or lawyers. Publish them on Flickr, send a note to the local bar and let them know about it.
19. Find a bunch of interesting old video tapes, such as oral histories of a court, and get permission to digitize them and post them on the Internet Archive or YouTube.
20. Go to a prison and teach a legal research class.
21. Monitor a local code, such as a municipal code, and publish redlines as they update things so people know what changed. Publish a table of variances showing how the law varies among adjacent municipalities.
22. Send a letter from all the local law librarians to a chief judge and ask for permission to give a free law presentation to the next meeting of their Judicial Conference.
23. Big librarians: put together a common fund and a common front and get foundations to help you do something really big and important like scan all Supreme Court briefs or all back issues of the Congressional Record.
24. Start a declamation group: get together and read old speeches and opinions to each other as training in public speaking and an education in history. Videotape them and post them for others to watch.
25. Start writing plain-language summaries of Federal Register notices and publish them.

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26. If a local jurisdiction has such an awful web site that even web crawlers can't navigate, harvest everything they have and make it available. For example, some sites require that you search for documents and don't provide a listing. In that case, do periodic searches, grab all the docs, and throw them someplace easy.
27. Find an egregious example of outsourcing, like the California Supreme Court delegating all final opinions to LexisNexis which in turn explicitly states you may not "display, or transmit for commercial, non-profit or public purposes all or any portion of this Web Site." Organize several hundred students to all go in and copy opinions and repost them. Make sure you have safety in numbers because those Lexis lawyers can be really mean.
28. Create a podcast of breaking legal news for a specific interest group, such as realtors.
29. Create a web site that collects all the relevant legal information for a specific interest group, such as organic juice makers in California or plumbers in Georgia.
30. Jump a local pay wall and republish their materials. For example, the Fairfax County Court system in Virginia or the atrocious judicial.alabama.gov.
31. Summarize a 3-hour congressional hearing by posting a blog summary and some snippets of the high points of the video.
32. Add closed captions to an official hearing by mashing up the official transcript with the video using YouTube's beta closed caption service.

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33. Find a bunch of government forms and turn them into fill-in PDFs.
34. Don't like the AALL governmental policies or how they're developed? Recruit more dues-paying members of like mind and you can change those policies and procedures.
35. Rip a webcast using VLC and set it free by publishing it as an mp4 or mkv file.
36. Buy a copy of your local Bar Association's ethics manual and publish it. Make sure at least a dozen of you do it so you have safety in numbers.
37. Many governmental bodies sell DVDs of things like hearings. Start a kickstarter fund to buy them and load them on the Internet Archive or YouTube.
38. You a member of Hathi Trust? Download any public domain legal documents and upload them to the Internet Archive so anybody else can save them.
39. Ask your dean or managing partner to endorse the Law.Gov principles.
40. Use the Internet Archive to create a well-formatted XML file with metadata for a document including the provenance.
41. Find a 1,000 page compilation of opinions or briefs and set it free by documenting the individual items in the volume.
42. Raid the Federal Judicial Center and get some of their videotapes available to the public and the profession.
43. Reformat the U.S. Attorney Manual into decent HTML. What they have available now is a horror story.

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44. Partner with programmers and develop open source Code Management Software suitable for maintaining a municipal code.
45. Get a camera and go tape oral history interviews with famous lawyers and librarians.
46. Call your elected officials, find out who on their staff handles issues such as the judiciary and the law, and write the staffer a letter about issues important to you.
47. Poll local plaintiffs and defendants and ask them what they thought of the lawyers and judges in their case. Publish your results.
48. Assemble a casebook. Publish it.
49. Start an ABA revolution. Why is the ABA one of the top 10 legal retailers in the United States? Why hasn't the ABA done more about access to primary legal materials? Enquiring members want to know!
50. Ask to see your elected officials and talk to them about pay walls. Members of Congress are usually shocked to hear the Department of Justice has to spend millions of dollars to access PACER documents. State legislators are even more shocked when they understand their state has copyrighted the law.

The problem is all inside your head, she said to me

The answer is easy if you take it logically

I'd like to help you in your struggle to be free

There must be fifty ways to leave your lover [vendor]

Paul Simon