The Future of Law Libraries: Twelve Tables or 7-11?
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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]

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]

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.

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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.

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]

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 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]

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.

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]

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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.

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]

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 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]

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.

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.

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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.

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.

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]

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.

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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 evidence of Greek influence in the Twelve Tables. See Watson, p. 112.

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]

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]

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 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

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13. Harriet I. Flower, Roman Republics, Princeton University Press (Princeton: 2010), p. 48.
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.

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]

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]

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.

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

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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 Apiciana. (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 Josephy Dommers Vehling, Walter M. Hill (Chicago: 1936).

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.

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.

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.

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

One of the goals of Law.Gov 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.

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.

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.

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

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."[20]

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.

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.

20. Crook, pp. 33-34, quoting Horace, Epistles I, XVI. 40.