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WHY IS THE "JEFFERSONIAN MOMENT" SO ENDURING?*

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In 1986, the American Agricultural Law Association and the Comite de Droit Rural held their first joint meeting.[1] As president of the former, I was asked to sum up my impressions of the proceedings. I was most impressed with one picture that continually emerged from the various cultures represented by delegates at the meeting: that the farmer is losing control over the economic and political systems developing both nationally and internationally.[2] I was aware how important the image of the independent farmer is to the American story, but I was surprised to learn how strong this sentiment is in so many European cultures as well.

This sentiment in America can be traced directly to Thomas Jefferson's ideas about a political economy in a nation composed of independent citizen-farmers. In 1776 and for a few years after, Jefferson and others introduced into the common law of Virginia a remarkable set of proposals designed to provide a sound foundation for a republican democracy. Some of these proposals were enacted, some were not. It was a time of cautious optimism, but Jefferson was most optimistic about his idea that the independence of farmers would nurture a virtuous citizenry, which in turn would become actively involved in the new experiment in self-governance. This experiment in civic republicanism, however, was short-lived; Alexander Hamilton and others "began to see human motivations, rather than an education in virtue, as the means by which to control politics and society."[3] This emerging

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1. *See Proceedings of the Euro-American Agricultural Law Symposium and Third Symposium of the C.E.D.R.*, 4A AGRIC. L. BULL. (George Spring ed., 1986).

2. *Id.* at 329.

3. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 557 (1986). *See generally* DANIEL A. FARBER AND SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 3-21 (1990).

liberalism eventually brought an end to what historian Stanley Katz called the "Jeffersonian moment" in American history.[4]

In this Article, I will explore why this Jeffersonian moment has become such an enduring notion in America's history of ideas. I begin by viewing this Jeffersonian legacy from the vantage point of the Anglo-American common law tradition.[5] Because this history is in a sense pre-constitutional, it may be worthwhile to focus on the impact it had on reform of the common law. In addition, and this is much more subtle and perhaps more tentative, it may be a useful way to examine the substantive ties between our common law traditions and our constitutional principles.

I. AGRICULTURE AND THE COMMON LAW

The common law is judge-made law, with an accretion of rules, doctrines, and decisions which, over time, mark the wisdom—or sometimes the folly—of an age. It is a localized system of decisionmaking, and piecemeal. It depends on the parties bringing a particular controversy before a court, which rarely has the opportunity to place the controversy within the grand scheme of things. But this, ironically, is part of its strength. It works at the edges of the law, completing a picture stroke by stroke. Closely viewed, the picture of society that the common law presents is impressionistic, but when viewed from a sufficient distance—in this case in terms of time—the picture begins to take on a clear, sharp focus. As this clearer image emerges, however, it changes shape again, as litigants work to accommodate the contours of the law to new and, perhaps, unimagined circumstances.

This particular mode of accommodation to change is the hallmark of the common law. It works from the past to anticipate the future. Judge Guido Calabresi put it this way: "In the common law, innovation must make its peace with history."[6] This obviously slows the pace of progress, but in doing so, allows for innovation in comfortable and acceptable degrees of transition. But the common law does move forward. Obsolete rules are discarded when they no longer serve "the science of human justice,"[7] and new principles are adopted.

This leads to some interesting paradoxes. One is the paradox of consistency. Justice Holmes remarked in his classic lectures on the common law:

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been

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4. Stanley Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 484 (1976).

5. I use the common law in its broadest sense, as "essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules . . ." ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 1 (1921).

6. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUES 189-190 n.31 (1982).

7. Arthur L. Corbin, *What is the Common Law?*, 3 AM. L. SCH. REV. 73, 75 (1915).

> absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.[8]

The other is the paradox of universality. To quote Professor Corbin:

> The common law is not a body of rules; it is a method. It is the creation of law by the inductive process. England and her colonies and all of our States have this method in common, though in using it they may all arrive at different results. From an increasingly large number of states of fact and individual decisions, we are constantly striving to arrive at a general doctrine, a universal rule. But we never arrive.[9]

A method of developing law that works for consistent, universal rules, but never reaches these goals, would seem to invite more criticism than praise. But that is one of the key aspects of the common law—it is not so much about doctrine as it is about process.[10] The work must be toward some legitimate goals, even if, by the nature of the process chosen, those goals are never completely satisfied.

The common law is law's attempt to develop a system of common sense knowledge. "Common sense is, of all kinds, the most uncommon. It implies good judgment, sound discretion and true and practical wisdom applied to common life."[11] Applying this precept to the development of law is no easy task. Judges must, after all, decide cases for one party or the other. Often, there are very good arguments to be made for either party. But a resolution is still necessary. This leads us to another paradox under the common law—the "antinomy of reason and fiat."[12] Lon Fuller theorized that judge-made law is "in part the discovery of an order and in part the imposition of an order."[13] The imposition of the order is the resolution of the case.[14] The reasons motivating the order must be "discovered" in the sense that the judge must identify the "external criteria, found in the conditions of successful group living, that furnish some standard for testing the rightness of his decisions."[15]

Thus, the common law provides both the method of judicial decisionmaking and at the same time the standards, or rules, for testing the "rightness" of these decisions.[16] Those who have reflected on the nature of

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8. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 36 (1881). *See generally* Frederic R. Kellogg, *Common Law and Constitutional Theory: The Common Law Origins of Holmes' Constitutional Restraint*, 7 GEO. MASON U. L. REV. 177 (1984); John C.H. Wu, *Justice Holmes and the Common-Law Tradition*, 14 VAND. L. REV. 221 (1960).

9. Corbin, *supra* note 7, at 75.

10. *Id.*

11. TRYON EDWARDS, THE DICTIONARY OF THOUGHTS 77 (Tryon Edwards ed., 1915).

12. LON L. FULLER, REASON AND FIAT IN CASE LAW 15 (1943).

13. *Id.* at 8.

14. *Id.* at 7-8.

15. *Id.* at 9.

16. *See* Catharine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L.J. 329, 344-45 (1994).

the common law have come to similar conclusions about its purposes. Professor Wells views the underlying purposes of the common law as "stability, justice and the promotion of human prosperity."[17] Professor Goodhart concluded that the principles of the public common law embody "an expression of the ideals of government to which all of us subscribe—government under law, evenhanded justice, and a due recognition of the rights of our fellow-men."[18] These notions of fairness, pragmatically applied to the particular circumstances of individual controversies, form the essential standard of common law decisionmaking.[19]

Much of the early common law focused on property, and in particular, on agricultural land.[20] In a recent article, Professor Fred Bosselman identifies the land ethic of medieval England as one in which estates in land symbolized order.[21] Land was meted out to warriors in return for military service in times of need.[22] In an era when many stories became myths, the Normans tried to make theirs one of benevolent monarchs with "gallant knights who subdued anarchy by dominating the land from their castles."[23] In reality, the feudal system that developed provided security through mutual support, although at a cost of deliberate subordination by many to the few overlords who could promise protection.[24]

The intricate system of estates which developed from these feudal beginnings became the chief organizing element of English society.[25] This land-based social system provided for most essential services.[26] The result was that many individuals could be linked together through interests in land. In actuality, the ones who worked the land were those imbued with the least status.[27] These farmers found themselves "locked into their role in society,"[28] by medieval legal institutions such as entailed estates and the doctrine of primogeniture.[29] And their lot in life was harsh.[30] We should not

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17. *Id.* at 344.

18. A.L. Goodhart, *What is the Common Law, in* THE MIGRATION OF THE COMMON LAW 10 (A.L. Goodhart ed., 1960).

19. *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 7-13 (1986). For a discussion of Bentham's critique of classical common law theory, *see id.* at 263-301.

20. "Medieval land law is not to be understood apart from medieval agriculture . . . ." Frederic William Maitland, *Tenures in Roussillon and Namar, in* 2 COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 251, 252 (H.A.L. Fisher ed., 1911).

21. Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439, 1441 (1994).

22. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 252 (2d ed. 1899) ("Soon after the conquest a process begins whereby the duty of service in the army becomes rooted in the tenure of land.").

23. Bosselman, *supra* note 21, at 1446.

24. G.C. CHESHIRE & E.H. BURN, THE MODERN LAW OF REAL PROPERTY 9 (11th ed. 1972).

25. For a good overview, see CORNELIUS I. MOYNIHAN, AN INTRODUCTION TO THE LAW OF REAL PROPERTY (2d ed. 1988).

26. CHESHIRE & BURN, *supra* note 24, at 16.

27. *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 109-12 (1966).

28. Bosselman, *supra* note 21, at 1456.

29. *Id.* at 1451-57. The rule of primogeniture limited descent of land to the eldest son

romanticize about feudal society—it was extremely hierarchical, and those who worked the land were at the bottom of the pyramid.[31]

This feudal system eventually dissolved, much of it giving way under its own weight.[32] Feudal society became incompatible with emerging notions of freedom.[33] The Industrial Revolution further stirred the winds of change, and a reform of the land ethic developed as a class of entrepreneurs waged a political war of sorts against the landed gentry.[34] According to Professor Bosselman, one of the architects for this changing land ethic was David Ricardo.[35]

Ricardo was a political economist who, in the early 1800s, argued in favor of the new class of entrepreneurs in England and against the landed gentry and their system of land ownership.[36] Ricardo's theory of rents was that "as the proportion of land to population and capital fell, and as increasingly marginal land was placed into production, a higher percentage of the price of commodities would go for monopoly profits for landlords, and wages would decline to subsistence levels."[37] From these assumptions about agricultural land, Ricardo made arguments that put the landed gentry on the defensive.[38] Bosselman explains:

> To Ricardo, land was not just territory in the feudal sense, it was habitat, a scarce natural resource, the quality of which differed greatly from parcel to parcel. By providing the public with a simple formula that appeared to correlate the increase in economic rent with the amount of marginal land put into cultivation, he put a spin on the issue that could be translated into sound bites at the local ale house.
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> This idea of "economic rent" was designed to put the landed magnates in a less deserving posture than the entrepreneurs; the magnates' fortunes varied with the fortuitous attributes of their land holdings rather than with the skill of their investment. In this manner, Ricardo made a theoretical

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to the exclusion of others; the estate in fee tail limited descent of land to the lineal descendants of the recipient of such a gift of land. *See* MOYNIHAN, *supra* note 25, at 34-39. These rules tended to keep ancestral lands within the family in large estates to assure social and political power. *Id.* at 37.

30. HOGUE, *supra* note 27, at 123. *See generally* ALAN HARDING, ENGLAND IN THE 13TH CENTURY, CHAPTER 2 (1993).

31. *See* Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual Through the Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739, 1743 (1992).

32. *Id.* at 1748-53.

33. *See* Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 708-13 (1938); John E. Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245, 247-51 (1965).

34. Bosselman, *supra* note 21, at 1459.

35. *Id.* at 1459-67.

36. *Id.* at 1458-59.

37. Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 424 (1988).

38. Bosselman, *supra* note 21, at 1466.

> basis for a distinction between land and capital that served as the linchpin for land reform.[39]

Ricardo's arguments were in opposition to the high tariffs on grain imposed through the Corn Laws. Ricardo asserted that these high tariffs unfairly increased the income of the landed gentry at the expense of other classes in English society.[40]

Professor Bosselman uses the words "order" and "reform" to represent two distinct land ethics in Anglo-American law. He also uses ideal "types" for the purpose of setting out a taxonomy of land ethics.[41] But the history of land law has been more in fits and starts than in direct, linear change, and thus is more complex. Changes in the concept of property continued throughout the growth of the common law, although clearly the later centuries witnessed the greatest degree of reform.[42] By the same token, land law in England even after the time of Ricardo's remonstrances against the Corn Laws was concerned with preserving the status quo. In a recent article on the metamorphosis of the equity of redemption, the authors conclude that legal institutions continued to support landed power through the nineteenth century and beyond,[43] and they emphasize the duality of change and stability that came to characterize the law of property.[44]

Perhaps we can say with certainty this much: By the eighteenth century, those who were trained in the common law tradition regarded the law as an institution which would promote both order and reform.[45] Professor J.G.A. Pocock reveals that English lawyers worked on yet another paradox—the notion that the common law, which is based on custom from time immemorial, could nevertheless adapt itself to changing conditions of the

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39. *Id.* at 1464-65. (footnotes omitted).

40. *Id.* at 1465.

41. Bosselman uses King Arthur to represent the land ethic of "order" and David Ricardo to represent "reform." *Id.* at 1441. On the American scene, John Muir is used to represent the land ethic of "preservation," and Justice Scalia represents the land ethic of "opportunity." *Id.*

42. *See* W.S. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 6-7 (1927). Holdsworth considers the years 1660-1833 as the period in which modern law developed, and the nineteenth and early twentieth centuries as the "era of reform." *Id.* at 8-9.

43. David Sugarman & Ronnie Warrington, *Land Law, Citizenship, and the Invention of "Englishness", in* EARLY MODERN CONCEPTIONS OF PROPERTY 111 (John Brewer & Susan Staves eds., 1995).

44. Within the dynamic field of political struggle, significant tracks of the law of property and, therefore, the core of the common law helped to generate 'knowledges' that tended to render aristocratic rule natural and essential. Other branches of property law, however, were more openly supportive of 'commerce.' It is, perhaps, this contradictory juxtaposition that helps to explain England's distinctive route toward modernity.

Id. at 135.

45. *See generally* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991) (describing the tension between stability and dynamism in the concept of property in eighteenth century legal discourse).

time.[46] This makes the common law appear "at once constantly adapting yet essentially unchanging, indeed, timeless."[47] The notion so affected the deep structures of the common law lawyer's thinking that it became an ideology, "a *mentalité*, rooted in the habits of mind bred by education and practice."[48] This ideology became an important part of the broader political discourse; if the law were immemorial, there could be no legislator, and the law would be immune even from the king's prerogative.[49] This "common-law interpretation of English History"[50] also supported the notion of an ancient constitution which survived the Norman invasion:

> To admit a conquest was to admit an indelible stain of sovereignty upon the English constitution. A conquest was therefore not admitted in the age of Blackstone any more than in the age of Coke. William was no conqueror, said the lawyers and the antiquaries and the parliamentarians in chorus; he was a claimant to the crown under ancient law who had vindicated his claim by trial of battle with Harold, a victory which brought him no title whatever to change the laws of England. If he had done so, it was a lawless act without validity, put right within a few generations of his death by the coronation charters of his successors and by Magna Carta, which had restored and confirmed the immemorial law of the Confessor's time.[51]

Pocock's analysis explains how the paradoxes of this common law tradition evolved into a broader concept of "fundamental law" designed to protect individual rights.[52]

The changing concepts of the ancient constitution and the fundamental law were "properly a colonial birthright" in America.[53] In 1774, Thomas Jefferson wrote *A Summary View of the Rights of British America*,[54] in which he argued, among other things, that Americans claimed their lands outright, with no feudal obligations, because America had never been conquered by William the Norman.[55] Thus, Jefferson argued, Americans can trace their rights back to "[o]ur Saxon ancestors," who held their lands in absolute

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46. J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY—A REISSUE WITH A RETROSPECT 30-41 (1987).

47. Stephen A. Conrad, *James Wilson's Assimilation of the Common Law Mind*, 84 NW. U. L. REV. 186, 192 (1989); *see also* POCOCK, *supra* note 46, at 274, 275-76 (arguing that the common law notion of custom was "ambiguous in that it implied both preservation and adaptation," and that "'the common law mind' was janus-faced, could always proceed in either of two directions, and could look in both at once without distraction or contradiction").

48. POCOCK, *supra* note 46, at 279.

49. *Id.* at 41, 46.

50. *Id.* at 46.

51. *Id.* at 53.

52. *Id.* at 47-50.

53. Stanley N. Katz, *The American Constitution: A Revolutionary Interpretation*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 23, 36-37 (Richard Beeman et al. eds., 1987). *See generally* Alexander, *supra* note 45, at 302-16.

54. THOMAS JEFFERSON, WRITINGS 103 (Merrill D. Peterson ed., 1984).

55. *Id.* at 119.

dominion.[56] Such rights were allodial in nature, and could be owned in fee simple.[57] It was an attempt to use the past, and past legal arguments,[58] for political ends.[59] But apparently any attempt to completely reinvent the common law proved too impractical, for Jefferson embarked on a project just two years later to reform Virginia's common law within the received tradition. He worked to develop not a land ethic, but a political ethic, which focused in large part on agricultural land.

II. THOMAS JEFFERSON AND THE AGRARIAN REPUBLIC

Common law emigrated to the American colonies along with its early English settlers.[60] Yet each American colony developed its own legal system.[61] The colonies were required by charter to follow the essence of English law, but some practices developed locally.[62] Only in the middle of the eighteenth century did customs evolve toward a general administration of justice along the lines of the English common law.[63] By the time of the American Revolution, ironically, Americans came to regard the common law based on English precedents as a defined body of legal doctrine.[64] Even after the Revolution, the attitude was ambivalent. "Naturally the public was very hostile to England and to all that was English," explained Roscoe Pound, "[b]ut the economic development which followed required law and no other

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56. *Id.* at 118-19.

57. *Id.* at 119-20.

58. *See* Mark DeWolfe Howe, *The United States of America, in* THE MIGRATION OF THE COMMON LAW 11-12 (A.L. Goodhart ed., 1960):

> In the end, of course, the Americans came to see that a lawyer's myth which had done political wonders in England could also do marvellous service overseas. Building upon legend which Coke had dignified with spurious annotation and English Puritans had sanctified with pious pedantry, the Americans discovered that the rights that really mattered to them had their roots in common law. Thomas Jefferson spoke as a disciple of Coke when he said that the "common law is that system of law which was introduced by the Saxons on their settlement of England" and which came to its end with Magna Carta. English legal history, in the eyes of Jefferson, was the grim narrative of the desecration of this law by Parliaments and Kings—a story which was less than tragic only because there had been times when learned and indignant Englishmen had redefined in Petitions and Bills of Rights the privileges and immunities of their Saxon ancestors. By these occasional restatements of the common law the rights of Englishmen—and therefore of Americans—had been kept alive.

Id. at 11-12.

59. MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 74 (1970).

60. Howe, *supra* note 58, at 11.

61. LAWRENCE M. FRIEDMAN, THE HISTORY OF AMERICAN LAW 35 (2d ed. 1985).

62. *Id.* at 35-39.

63. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 115 (1921).

64. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 4-9 (1977).

law was at hand."[65] The Virginia Convention of 1776 adopted the common law of England as "the rule of decision."[66]

In that same year, though, the Virginia House of Delegates set in motion a process for the general revision of the laws of the Commonwealth.[67] Thomas Jefferson led this process, calling immediately for the abolition of laws of entail and primogeniture, and later for freedom of religion and for a system of public education. Jefferson viewed these reforms collectively as forming:

> a system by which every fibre would be eradicated of ancient or future aristocracy; and a foundation laid for a government truly republican. The repeal of the laws of entail would prevent the accumulation and perpetuation of wealth, in select families, and preserve the soil of the country from being daily more and more absorbed in mortmain. The abolition of primogeniture, and equal partition of inheritances, removed the feudal and unnatural distinctions which made one member of every family rich, and all the rest poor, substituting equal partition, the best of all Agrarian laws. The restoration of the rights of conscience relieved the people from taxation for the support of a religion not theirs; for the establishment was truly of the religion of the rich, the dissenting sects being entirely composed of the less wealthy people; and these, by the bill for a general education, would be qualified to understand their rights, to maintain them, and to exercise with intelligence their parts in self-government; and all this would be effected, without the violation of a single natural right of any one individual citizen. To these, too, might be added, as a further security, the introduction of the trial by jury, into the Chancery courts, which have already ingulfed, and continue to ingulf, so great a proportion of the jurisdiction over our property.[68]

Here was Jefferson, "an aristocrat to his fingertips,"[69] striking out at these "knowledges" that tended to reinforce the aristocratic feudal order, to be replaced by a social system that would reinforce republican democracy.

This broader vision for a republican society was centered upon Jefferson's well-known views of agrarian democracy. Indeed, the lacquer of interpretations on this aspect of the Jeffersonian legacy has been layered so thick that the eye has to work especially hard to get the proper image in

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65. Roscoe Pound, *The Development of American Law and Its Deviation from English Law*, 67 L.Q. REV. 49, 56 (1951).

66. 9 HENNING'S STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 126-28 (W. Henning, ed. 1821); *see* HORWITZ, *supra* note 64, at 4-5. *See generally* W. Hamilton Bryson, *English Common Law in Virginia*, 6 J. LEGAL HIST. 249 (1985).

67. PETERSON, *supra* note 59, at 110.

68. THOMAS JEFFERSON, *Autobiography 1743-1790*, *in* 1 THE WRITINGS OF THOMAS JEFFERSON 73-74 (Andrew Lipscomb ed., 1903).

69. MERRILL D. PETERSON, THOMAS JEFFERSON AND THE DIMENSIONS OF LIBERTY, 1776-1976, at 3 (1975) (A Poynter Pamphlet, the Poynter Center, Indiana University, Bloomington, Indiana).

focus.[70] I want to focus on just two aspects of this subject suggested by the following quote from J.G.A. Pocock: "Deeply entrenched in eighteenth-century agrarian classicism was an image of the human personality, at once intensely autonomous and intensely participatory . . . ."[71] What does it mean for the "yeoman archetype"[72] to be at once both intensely autonomous and intensely participatory?

As to the latter concept, republicanism places a "high premium on citizenship and participation."[73] Meaningful self-government is, of course, dependent upon participation. Active participation in the political process has its own rewards—it fosters empathy, virtue, and the sense that one has a real stake in the community.[74] These aspects of republican theory resonate just as loudly today, perhaps in part because we feel them slipping away. In a recent television interview with Bill Moyers, political philosopher Michael Sandel talked about the loss of control that many Americans feel over the political decisions that affect them:

> MOYERS: What has happened to our public life? We've seen a trend for years now—declining voter turnout, eroding party loyalties, diminished confidence in government.
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> SANDEL: There's a widespread sense that power is located in distant places and, individually and collectively, we're less in control of the forces that govern our lives. This is happening despite the fact that individual rights and entitlements have actually expanded in recent years. People have a sense that something has gone wrong with the enterprise of self-government.
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> MOYERS: You've said that we're facing a world that we can neither summon or command.
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> SANDEL: Yes. The present generation was weaned on a confidence in America's unrivaled power in the world and a faith in unprecedented growth in the domestic economy. It comes as a source of great frustration that suddenly we no longer seem to be the masters of our collective life in the way that we had come to expect.

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70. *See* JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 253-62 (1992).

71. J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISC. HIST. 119, 134 (1972).

72. APPLEBY, *supra* note 70, at 256.

73. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555 (1988).

74. *Id.* at 1556 (citing CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970)).

> MOYERS: That old notion is weakened—that the individual matters, that I can signify, that I'm an autonomous individual in a self-governing political culture . . . .[75]

Jefferson's agrarian ideal served to represent a model, or a social construct of a political system in which voters feel as though they share a real sense of control, of participation in the political process.[76] This part of the Jeffersonian ideal, then, represents a desire to structure society in such a way as to promote the meaningful participation of citizens in that society.[77]

The notion of autonomy may be similarly focused. Let us go back again to Jefferson's original text, with another look at the frequently quoted passage on the virtues of agrarian life:

> In Europe the lands are either cultivated, or locked up against the cultivator. Manufacture must therefore be resorted to of necessity not of choice, to support the surplus of their people. But we have an immensity of land courting the industry of the husbandman. Is it best then that all our citizens should be employed in its improvement, or that one half should be called off from that to exercise manufactures and handicraft arts for the other? Those who labor in the earth are the chosen people of God, if ever He had a chosen people, whose breast He has made His peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth. Corruption of

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75. BILL MOYERS, A WORLD OF IDEAS II 150 (1990).

76. Under Jefferson's plan, those who did not own property would be given land—seventy-five acres to every freeborn Virginia native who marries and fifty acres to each immigrant—from Virginia's western lands. PETERSON, *supra* note 69, at 7. This part of the plan failed to be enacted, however, and "millions of acres that might have gone to independent farmers fell to monopolizing speculators." *Id.*

77. A devastating caveat is in order at this point. Civic republicanism included only white, male Virginians in this franchise.

> As to the persons who had little property, or who—like married women or slaves or children or madmen—were excluded from property ownership on principle because of their purported incapacities and "dependency": republican theory had few qualms about excluding such persons from the franchise. Republicanism had its own pyramid of hierarchy, although perhaps a more flattened one than monarchy or aristocracy. But the logic was everywhere the same: ruling authority entailed property, and vice versa. Republicanism too divided the populace into rulers and ruled, and the rulers were those citizens who had the property necessary to independence, and therewith the ability to participate in governance.

Carol M. Rose, *Property as Wealth, Property as Propriety, in* NOMOS 33: COMPENSATORY JUSTICE 223, 236 (John W. Chapman ed., 1991). This fact has led some commentators to question the appropriateness of using republican theory to guide modern theory. *See, e.g.*, Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988). *Cf.* Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 256-57 (1989) ("The attempt to realize an ideal of universal citizenship that finds the public embodying generality as opposed to particularity, commonness versus difference, will tend to exclude or to put at a disadvantage some groups even when they have formally equal citizenship status.").

> morals in the mass of cultivators is a phenomenon of which no age nor nation has furnished an example. It is the mark set on those, who, not looking up to heaven, to their own soil and industry, as does the husbandman, for their subsistence, depend for it on the casualties and caprice of customers. Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition. This, the natural progress in consequence of the arts, has sometimes perhaps been retarded by accidental circumstances; but, generally speaking, the proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandmen, is the proportion of its unsound to its healthy parts, and is a good enough barometer whereby to measure its degree of corruption. While we have land to labor then, let us never wish to see our citizens occupied at a workbench, or twirling a distaff.[78]

Jefferson wanted a society which would provide a strong foundation for his notions of republican democracy. He thought farming would be a means to this end. It provided for both a livelihood and an autonomous way of living. Commerce and manufacturing were suspect precisely because they encouraged interdependence.[79] For Jefferson, a happy republican would be in control of his own fate, his own destiny. To use a modern term, he would be in control of his environment. Here I do not mean just the land, but rather more broadly in control of his livelihood and the basic decisions concerning everyday life. If voters feel as though they have a real sense of control over their day-to-day lives, they are apt to assert themselves in a meaningful way in the political process as well. Very few lifestyles could fit these requirements the way farming did in the eighteenth century.

But as Professor Katz noted, the Jeffersonian moment in regard to republicanism was ephemeral.[80] The notion of public virtue, which rested mostly on the concept of private virtue, was considered too naive.[81] Professor Katz phrased the issue as essentially a clash of the Titans: "The most important tension in American intellectual life has been between the perhaps naive Jeffersonian faith in the capacity of the individual for self-development and self-restraint and the more generally accepted realism and consecration of self-interest which we associate with Alexander Hamilton."[82] Liberalism became the norm (although not exclusively so), based in large part on an assumption that individuals will work to promote their own self-interests, and government should recognize that fact.[83]

But for a brief moment in our history the intellectual forces that I have been talking about—the common law tradition with its capacity for accommodating both stability and change, and the agrarian philosophy of Thomas

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78. Thomas Jefferson, Notes on the State of Virginia, *in* II THE WRITINGS OF THOMAS JEFFERSON 228-29 (Andrew Lipscomb ed., 1903).

79. Rose, *supra* note 77, at 236.

80. Katz, *supra* note 4, at 484.

81. *Id.* at 483.

82. *Id.* at 487.

83. *See generally* ALEXANDER, *supra* note 45 (revealing that this transformation was more nuanced than is commonly described).

Jefferson and others—came together to form a remarkable experiment in self-government.[84] "This was not simply an ideal, such as philosophers and poets of other times and places had conjured with," proclaimed biographer Merrill Peterson. "It was rooted in the American environment. It grew from Jefferson's effort to define and interpret the values and the arts of a pioneering society with an immensity of land at its disposal."[85] Jefferson's scheme in a sense exemplified the common law duality of order and reform: some aspects of Jefferson's thinking were conservative or tradition-based; some of his ideas were novel and far-reaching.[86]

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84. I am not suggesting that Jefferson was necessarily enthusiastic about assimilating the common law into the new world order. He often criticized the common law tradition, particularly of the Blackstonian persuasion. *See* Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 U. ILL. L. REV. 629 (1933); *see also* Meyer Reinhold, *The Classical World, in* THOMAS JEFFERSON: A REFERENCE BIOGRAPHY 136-37 (Merrill D. Peterson ed., 1986) (discussing Jefferson's admiration for Roman law). But they had a new republic to form and the common law was, for all practical purposes, the only law around. At one point in the deliberations of Virginia's Committee of Revisors, the question arose whether the Committee should abolish the whole existing system of laws or just alter the common law. Edmund Pendleton and Ludwell Lee favored preparing a new system of laws; George Wythe, George Mason, and Jefferson favored revising the existing common law. The actual work of revising the legal code fell upon Jefferson, Wythe, and Pendleton. *See* GILBERT CHINARD, THOMAS JEFFERSON: THE APOSTLE OF AMERICANISM 90-93 (2d ed. 1948); MAX BELOFF, THOMAS JEFFERSON AND AMERICAN DEMOCRACY 76 (1949). Jefferson's motivation for voting for a revision of the law is itself a matter of debate, *see* RALPH LERNER, THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC 66-67 n.10 (1987), but as Professor Lerner asserts, the fact that it was an effort to revise the law gave the project some transcendent value:

> Jefferson through his revisal showed the character of an emerging republican society as it was and as it might yet be. The grandness of the goal must not, however, obscure the obvious. Although an entire society was indeed to be reformed and transformed, that great work was to take place within certain legal constraints. The three revisors, representing the best legal learning in Virginia, would approach the common law with caution; they would build on existing English and colonial legislation. Precisely because the chosen instrument of change was a work of *revisal*, within a legal tradition, it presupposed that the meaning and effect of many of its prescriptions would have to be worked out in a long course of interpretation. As a whole, then (it is argued here), the proposed bills testify—sometimes eloquently, sometimes mutely—to a world of high aspiration and intractable circumstance, to a sense of open possibilities and cherished constraints. Wishing to soar, but obliged as sober legislators always to touch Virginian soil, the revisors came forward with a singular project for their colleagues to enact and their successors to ponder. In acting or failing to act as they did, each group would reveal something of itself and thereby enable us to limn a world distinguished by extraordinary equality and inequality, by complex demarcations of public and private realms, and by elaborate efforts to form and sustain a people capable of governing itself.

Id. at 63.

85. PETERSON, *supra* note 59, at 117.

86. *See* Alexander, *supra* note 45, at 286-302.

In terms of political economy, the Jeffersonian moment was brief indeed. Historian Joyce Appleby notes that there was a period of about thirty years in which the demand for grains and livestock fueled an expanding agricultural economy for the new nation.[87] The dislocations of the revolutionary war were followed by a five-year depression, but beginning in 1788 an increase in demand, principally from overseas markets, brought on a period of real prosperity.[88] Appleby asserts that "for the mass of ordinary farmers the growing demand for foodstuffs abroad offered an inducement to increase surpluses without giving up the basic structure of the family farm."[89] That overseas demand diminished by 1820 in part because of increased production levels in England, Belgium, and the Netherlands.[90] But during the interim, the Jeffersonian image of a political economy based in large part on family farmers was in fact a reality. Appleby concludes:

> By isolating in time and space the golden era of grain growing in the early national period, one can see more clearly the material base upon which Jefferson built his vision of America, a vision that was both democratic and capitalistic, agrarian and commercial. It is especially the commercial component of Jefferson's program that sinks periodically from scholarly view, a submersion that can be traced to the failure to connect Jefferson's interpretation of economic developments to his political goals. Agriculture did not figure in his plans as a venerable form of production giving shelter to a traditional way of life; rather, he was responsive to every possible change in cultivation, processing, and marketing that would enhance its profitability. It was exactly the promise of progressive agricultural development that fueled his hopes that ordinary men might escape the tyranny of their social superiors both as employers and magistrates. More than most democratic reformers, he recognized that hierarchy rested on economic relations and a deference to the past as well as formal privilege and social custom.[91]

Of course, this economy would eventually change dramatically, but the fact that it existed for at least one generation should not be overlooked. And to the extent that this goal was indeed conservative or traditional, it worked to provide that stability that Jefferson realized must exist if real change is to occur.

The changes in the common law were more lasting.[92] Some of the changes may have been largely symbolic; for example, the abolition of

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87. APPLEBY, *supra* note 70, at 257-58.
88. *Id.* at 263.
89. *Id.* at 264.
90. *Id.* at 263.
91. *Id.* at 269.
92. I do not have the space to detail here the numerous changes proposed by the Committee of Revisors, but Professor Lerner's fine essay, *Jefferson's Pulse of Republican Reformation*, LERNER, *supra* note 84, Chapter 2, provides a summary of the major bills. Professor Lerner gives particular attention, and praise, to the preambles which accompany the following bills: for proportioning crimes and punishment, for the more general diffusion of

primogeniture and entailed estates was not as significant given the fact that such practices were, apparently, not common.[93] But these changes should not be underestimated. By relating the future of the young republic to the notion of allodial rights in land, Jefferson was making a clear break with the common law's tendency to place land ownership on some form of social hierarchy.[94]

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knowledge, for amending the charter of the College of William and Mary, and for establishing religious freedom. These preambles, he says:

> introduce those bills most critical to Jefferson's project and most characteristic of his legislating art. Inspiring and inspired, they could rouse a people to a sense of what that people might be. They could remind a people of the evils self-governance helps them avoid—and of the possibilities for good and ill it puts within their reach. Commercial opportunities and free consciences, public accountability and participation in public duties, the freeing of private life and the public utility of private excellence—here were the benefits to be cherished by all, both atop Monticello and in the valleys below. It took a rare, long perspective to make that evident and point out the way.

Id. at 90.

93. PETERSON, *supra* note 69, at 7 ("At the time of the Revolution, entail was falling out of fashion in Virginia and wills were becoming the rule among the great families. In all likelihood, then, Jefferson was assailing a dying institution."). *See generally* Stanley N. Katz, *Republicanism and the Law of Inheritance in the Revolutionary Era*, 76 MICH. L. REV. 1, 13-14 (1977) (relying on C. Ray Keim, *Primogeniture and Entail in Colonial Virginia*, 25 WM. & MARY Q. 545 (1968)).

But Professor Gordon S. Wood has challenged these assumptions. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 45-48, 183-84 (1992). Many families in the colonies wanted to emulate the English nobility, he argues, and they adopted these inheritance practices in order to amass large estates to pass on to their heirs. *Id.* at 45. When they deviated from these devices, it was not to adopt a modern commitment that all children should share equally in the estate, but rather to promote more traditional purposes. Professor Wood explains:

> In most of the colonies, at least before mid-century, land was sufficiently plentiful for fathers to be able to take care of more than the eldest son in passing on their estates. Indeed, given the abundance of land in America compared with England, what is remarkable is not that the colonists resorted to partible inheritance but that they tried to institute primogeniture and entail at all. The sole existing study we have of primogeniture and entail in Virginia is more ambiguous than we have been led to believe. Virginians held much land in fee simple and docked many of their entailed estates; yet even as they were struggling to free some of their entailed land for disposal, they were entailing other portions in their continuing efforts to establish their family estates.

Id. at 47.

94. Katz, *supra* note 93, at 14-16; WOOD, *supra* note 93, at 182-83:

> In their revolutionary state constitutions and laws revolutionaries struck out at the power of family and hereditary privilege. In the decades following the Revolution all the new states abolished the legal devices of primigeniture and entail where they existed, either by statute or by writing the abolition into their constitutions. These legal devices, as the North Carolina statute of 1784 stated, had tended "only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source

This was a powerful idea, and it became an important part of the political discourse.[95] These changes helped to define the new republic as a country in which the wide distribution of land would be an important part of the political ethos of the nation.

Ironically, though, one of the most enduring legacies of the Jeffersonian moment is that which was most ephemeral: the concept of civic virtue as the defining element of a political system. For the past several years, many writers in the law have attempted to weave some of the threads of civic republicanism into a modern political ideology.[96] The full import of this scholarship is too complex for an adequate summary here, but a few examples may serve to show the continued vitality of some of the Jeffersonian ideas. Suzanna Sherry, who has argued that feminist jurisprudence "instead of rejecting the communitarian and virtue-based framework of Jeffersonian republicanism, might embrace and adapt it for modern society,"[97] has recently defined the contours of a right to education for responsible republican citizenship.[98] Akhil Amar has argued that if the concept of property as a means of protecting and enhancing autonomy is such an important concept, then everyone ought to have some of it in the modern state.[99] And Daniel Farber and Philip Frickey have argued that the attributes

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> of greate contention and injustice." Their abolition would therefore "tend to promote that equality of property which is the spirit and principle of a genuine republic."

Cf. Gordon S. Wood, *Thomas Jefferson, Equality, and the Creation of a Civil Society*, 64 FORDHAM L. REV. 2133, 2139 (1996) ("What made Jefferson's revolution radical was his attempt to substitute merit and talent in place of the older social attributes of kin and blood.").

95. Katz, *supra* note 93, at 26-29. "The Americans rejected categorically the notion that political office is a private possession transmittable by the laws of succession." *Id.* at 27. *See also* Alexander, *supra* note 45, at 340:

> A dominant Jeffersonian dialectic was stability versus dynamism. The civic-republican texts depicted stability and dynamism as simultaneously necessary for, and in contradiction with, the value of autonomy. One aspect of individual autonomy, the dimension that saw liberty as realized through involvement in public life, required stability. The other aspect of autonomy, which connected personal liberty with social and, to some extent, economic equality, required dynamism. Connecting dynamism with virtue, civic republicans saw a dynamism of virtue as the force that would prevent the creation of aristocracy through unequal wealth. The metaphorical distinction between the allodial and the feudal was the rhetorical formulation of this dialectic most common in American legal texts throughout this period and the early nineteenth century.

96. For an introduction to the literature, as well as an excellent overview of both the proponents and critics of civic republicanism, see Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 133-56 (1995). A detailed exploration of the subject can be found in *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

97. Sherry, *supra* note 3, at 544.

98. *See* Sherry, *supra* note 96.

99. Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990). Professor Amar defines the "R/republican tradition" as being shaped by Abraham Lincoln's Republican Party in the

of civic republicanism can help us define the role of the courts as common law courts in the modern age of legislation.[100]

These modern writers recognize the nonegalitarian aspects of the classical civic republican tradition. They write with the hope of finding an "inclusionary solution"[101] that will preserve and even build upon those ideas which are still worthy of our consideration.[102] They do so with the optimism, not unlike Jefferson's, that we must continue to search for a political system which will raise the human spirit and which, in turn, will be raised itself.

III. CONCLUSION

The common law changed dramatically in the nineteenth century. For that matter, America changed dramatically. In the twentieth century, the New Deal brought on transformations that Jefferson could never have imagined.[103] As Professor Linda Malone states,

> Jefferson could not have visualized the present-day realities of America's single-crop, government subsidized, heavily regulated agricultural system. Only 124,000 people own nearly half of American farmland, and many owners do not operate their farms directly. The United States Department of Agriculture projects that by the year 2000, 2.7 million people will own 1.7 million farms, compared to 4.9 million owners of 5.7 million farms in 1900.[104]

1860s, Thomas Jefferson's democratic republicans, and the group of commonwealth writers, including James Harrington, in England in the seventeenth and eighteenth centuries. *Id.* at 38. Professor Amar rejects the "exclusionary side" of this R/republican vision, which he believes was dependent upon slavery. *See id.* at 38-39 (relying on EDMUND MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 295 (1975)). But he asserts that the republican tradition was modified radically by both the Civil War and the Thirteenth Amendment, and he relies on an interpretation of the Thirteenth Amendment to provide a right to minimum sustenance and shelter in modern society. *Id.* at 39.

100. Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 876-77 (1991).

101. Amar, *supra* note 99, at 39.

102. *See also* Sunstein, *supra* note 73, at 1581:

> Republican thought has traditionally been allied with exclusionary practices. It is thus odd to invoke republicanism as a basis for rejecting those same practices. But the premises of republican thought furnish an aspiration that turns out to provide the basis for criticism of republican traditions. There is nothing especially unusual in this phenomenon. Frequently cultural commitments are used to revise cultural practices; indeed those who attempt to revise existing practice inevitably draw on traditional commitments. The use of republican aspiration to counteract republican practice is simply an illustration of this general proposition.

103. *See* David A. Myers, *Agricultural Lawyers, Agricultural Lawmaking*, 38 ALA. L. REV. 625, 627-32 (1987) (describing the effects of the New Deal on the structure of American agriculture and agricultural lawmaking). For an excellent overview of governmental regulation of agriculture, see DONALD B. PEDERSEN & KEITH G. MEYER, AGRICULTURAL LAW IN A NUTSHELL, 1-50 (1995).

104. Linda A. Malone, *Reflections on the Jeffersonian Ideal of an Agrarian Democracy*

In modern times, Jefferson's notion of a nation built on an agricultural economy of independent farmers seems quixotic and strange. But the notions of virtue, community, autonomy and control over one's environment, and active participation in political decisions that affect our daily lives, seem strangely modern. If innovation in the law must indeed make its peace with history, then these are aspects of Jefferson's vision that are worthy of such respect.

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and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill, 12 STAN. ENVTL. L.J. 3, 3-4 (1993). Professor Malone aptly concludes "[a]s agriculture has distanced itself from the land—with corporate, absentee, non-organic farm management—the reverence for agriculture in American society has diminished. It is not the American public which has forgotten Jefferson's vision, but agriculture itself." *Id.* at 49.