
# Selected Readings 02

# LAW AND JURISPRUDENCE IN AMERICAN HISTORY

## CASES AND MATERIALS

Fourth Edition

Stephen B. Presser
Jamil S. Zainaldin

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*American Casebook Series®*

# LAW AND JURISPRUDENCE IN AMERICAN HISTORY

***CASES AND MATERIALS - SIXTH EDITION***

**Stephen Presser / Jamil Zainaldin**

## THE ENGLISH HERITAGE - INTRODUCTION:

### *The Development of Legal Institutions and Common Law to the Time of Sir Edward Coke*

Many of the dynamics of modern law, society, and political institutions are evident in the first 400 years following the Norman conquest of England in 1065. The Romans invaded England in 43 AD. By 300 A.D., we can speak of Britannia, as the Romans named it, as "Romanized."

With Italy and Rome threatened by the invasions of the Goths and Vandals, in 407 A.D. Constantine III called Britain's military legions home. Without Roman protection, the Britons were soon overwhelmed by invading bands of Angles and Saxons from Germany, and later Vikings and Danes. These new occupiers set up their own kingdoms, though in time the Danes and English emerged as the dominant elements. (The word "law" is derived from Danish.)

Edward "the Confessor" (1042 66), an Englishman, was the first to unite the country under a single ruler, though his hold was tenuous. The Christian Church was by now an established institution, through the influence of the Romans and the later efforts of missionaries. Its clergy were among the few who were literate. Customs, laws or "dooms" of particular kings, "oaths," and grants of land ("bocs," which is the origin of the word "hook" because it contained the written record of land grants) made up the legal infrastructure of this essentially primitive society.

In Anglo Saxon England, most village conflicts were settled informally among warring clans, and the king's law was more a guide than a mandate. Still, what was later to become English criminal law originated in this Anglo Saxon era with the concept of a superior right of the king to impose his own brand of law on anyone violating his "peace," which extended to his habitations and eventually to markets and roads.

Not less important is the Anglo Saxon concept of "right" which was an extension of the sphere of the King's Peace. A right was understood as the space to which the King's Peace extended, and this space, which might include a physical or geographic area, also could include persons. The Anglo Saxon term "folc riht" embodied this notion of a personal right.

Edward the Confessor's death in 1066 left an already unstable country vulnerable. That same year Duke William II of Normandy crossed the channel and defeated Harold, Edward's successor, and his Anglo Saxons at the Battle of Hastings. William the Conqueror, as he became known, embarked on an ambitious resettlement of the English lands by Norman nobles, and he imposed a new regime of central administration. The Anglo Saxon shires (or counties, supervised by the shire-reeve, or "sheriff") were kept intact, as were local units of the shire, known as "hundreds."

These ancient administrative forms each had local courts run by laymen, and continued to be useful. The inspired contribution of the Normans was to create, in steps, a bureaucracy on top of these local customary institutions that in time established the king and his courts as the basis of a new law "common" to the realm.

This administrative structure carved out royal jurisdiction for felonies, certain civil disputes, and taxation; introduced a process in writing, known as royal "writs", for initiating action; and formed centralized royal "courts" to adjudicate civil complaints and criminal actions. The name "court" was taken from the noun describing the royal household that included advisors and administrators. The Normans also introduced juries, a Norman practice, and "justiciars" or judges to whom the king delegated his authority as his representative in the courts.

French, the language of the Norman king and his barons, also became the language of the royal courts. "Law French" was an amalgamation of Anglo French that gave us words such as plaintiff defendant and brief. Latin, the language of the church and the educated, found its way into law through the writ system; writs were issued on parchment in Latin, and bore a royal seal. The writ initiated civil action in a royal court by asserting a right or complaining of a wrong. Among the better known writs are habeas corpus, mandamus, and certiorari. Until 1731 Latin was the language of record in common law courts.

The Magna Carta (1215) or Great Charter grew from the disgruntlement of Norman barons who believed their customary rights were being abused by King John. These abuses included arbitrary arrests and imprisonment, the imposition of fines, and other grievances. At Runnyinede Meadow, on the banks of the Thames River, nobles extracted from John his written approval of a list of specific rights. The Great Charter was something of a housekeeping document, the sorting out of rights that were presumed to exist and in need of affirmation. The real importance of this document comes from the meaning later attributed to it. For the first time, it set forth a concept of a supreme law that no person was above, not even a king

The Great Charter also contained phrases and concepts later generations on both sides of the Atlantic would reinterpret in light of contemporary events, such as "No scuttage [taxation] or aid shall be imposed in our kingdom except by the common council of the kingdom..." Chapter 39 of the Charter reads: "No free man shall be taken or imprisoned or disposed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."

***The Development of Legal Institutions and Common Law to the Time of Sir Edward Coke - Continued***

While the Charter was revised, reissued, and confirmed many times, Chapter 39 clearly points to what we now know as due process of law, and to law as a potential bulwark against arbitrary power an extraordinary and early contribution to constitutional jam.

In 1397-1399 the enlargement of the great Westminster Hall was completed. Here the royal central courts finally came to rest, assuming the trappings of a permanent and authoritative judicial system. They included the Court of Common Pleas (civil and appellate jurisdiction), the Court of Kings Bench (criminal and appellate jurisdiction), and the Court of Exchequer (jurisdiction over taxation, finances, and accounting involving the king). The existence of circuit courts, or "assizes," in the countryside allowed the central courts to stay put and to function primarily as courts of appeal. It was from this early royal adjudicatory system that the main elements of the future Anglo American legal system sprung: the development of substantive common law; a highly formalized process for initiating, hearing and trying cases; a class of professionals who represented clients before these courts; a system of record keeping, and a judicial establishment known for its competence and expertise. The Normans and Angevins (the Normans' French successors to the crown) introduced system, process, and rules, backed by the royal authority and the emergence of a professional class prepared to encourage allegiance to law.

The distinction between common law and legislation in post-Conquest England was murky. The courts were formed, by officials from the King's household. These included his political advisors (the Curia Regis) and the justiciars, his personal representatives. Similarly, legislation was the product of the king in his council and tended to take on the character of ad hoc lawmaking and adjudication in response to complaints, a process not unlike judging. In any event, this lawmaking was seen as a complement to rather than a departure from custom and common law.

The authority of the king to participate in lawmaking was unquestioned, though his presence in the legal process being carried out in his courts came to be more a fiction than a fact, creating the opportunity for the tension between the King and his judges which you will soon observe.

Not until after the reign of King Edward III (1327 1377) did Parliament begin to form as a distinctive body composed of Lords and Commons, each of whose consent (with the king's) was eventually necessary for the enactment of laws. During the later Tudor period, and especially during the reign of Henry VIII (1491 1547), legislation took on the form of a distinct departmental activity based on careful drafting of bills, Parliamentary debate, and policy making.

As Parliament evolved into a formal institution with specific powers, it eventually began to assert a self-conscious power to change law, including common law, or to enact new law, its only limit being its capacity to bind a future Parliament, although this development was not completed until well into the Seventeenth Century. At the same time that the "High Court of Parliament" as it was then called, began to evolve into an institution to make rather than interpret the law, adjudication was evolving as the task of a distinct non-legislative department a judiciary though there is little doubt that judges enjoyed latitude in interpreting the language of legislation. The precise nature and authority of the legislative and judicial jurisdictions, however, were based on custom and practice. The possibility for conflicting interpretations of authority and law was always present among king, Parliament, and the courts; the tricky part was how to determine the rules to play by when fundamental questions of authority and jurisdiction were involved, as occurred in the reign of King James I.

Medieval law (1066 to approximately 1500) was complex, entwined in "feudal" custom and practice. Under feudalism, the social system of the Normans, the king owned the land and granted rights to others, his "tenants," to its use. In return they made payment, rendered services, or may have owed other obligations. A tier of rights might descend from king and through nobles, to farmers, to craftsmen, and finally to the lowest order who were "serfs," usually the Anglo-.Saxons in Norman England. For all practical purposes, a serf lacked any rights at all. In theory, only the king owned lands outright. Feudalism was not a Norman invention; it was a pattern of rule and service common in Europe at the time of the Conquest, and one that the Normans brought with them. The expectations that formed around feudal rights of tenure and obligations were evident in the complex law (to modern eyes) that took form through disputes in courts. Long after feudalism receded as a social system, its vestiges could still be found in English law.

Norman land law, because it was rooted in a variety of tenures, called upon conceptual powers that arrayed minute detail with overarching ideas Not surprising, a final Norman contribution to Anglo-American legal history was the treatise writer, the unofficial clarifier who drew law together by explaining the significance of leading cases. The first great treatise writer in English history was known as "Bracton," (c. 1210 1268). The man (or men) who wrote Bracton's work was probably a judge, and Bracton's treatise on The Laws and Customs of England was not only a guide for the judges who followed: it was the first work to present early Norman law as a "system" (the common law) that contained basic "rules" discovered through logical analysis of precedent. Using both Canon and Roman law for comparison, Bracton was the first to use concepts and theories to explain an unwritten law. To use F.W. Maitland's words, he was the "crown and flower of English jurisprudence." He gave intellectual credibility to English common law and to the profession of lawyers.

The importance of the relationship between the crown and the church cannot be overestimated as a matter of English history, and had far-reaching effects in law. The relationship was often problematic, as the murder of Archbishop Thomas a Becket at the instigation of King Henry II showed (1170). Difficulties could flare up around any number of areas, from jurisdiction, to the ownership of church lands, to the binding force of papal decrees.

***The Development of Legal Institutions and Common Law to the Time of Sir Edward Coke - Continued***

Because the common law developed apart from Canon law with its Roman law roots, Church and common law courts at times clashed in politically tinged contests of the kind that you will soon see occupying James I and Sir Edward Coke. These clashes were not only about the authority to decide cases, but also involved fundamental differences in legal procedure and the sources of law, and pitted emerging desires for English nationalism against the continental Roman heritage.

Centralized kingship, the rise of central courts, the emergence of a class of learned legal professionals, the formation of a common law that encompassed substance and process, a distinction between precedent-based adjudication and legislation, the idea of a supreme law, and the presence of an intellectual and conceptual approach to law are among the elements of the new legal system the early Norman and Angevin kings and their successors called into being.

The elements exerted a profound shaping influence not only on the constitutional development of English law spanning almost 900 years, but on the English colonies of the seventeenth and eighteenth centuries who viewed themselves as beneficiaries of the rights and privileges of the English constitutional system.

Note: Early English legal history is normally divided chronologically by kingships. The reign of French Norman kings includes the Normans, Angevins, and Plantagenets (1066 1485). The Tudors of Welsh origin succeeded to the throne in 1485 and ruled through 1603. In 1603 King James VI of Scotland, a Stuart, acceded to the throne as King James I of England. The Stuart line ended with Queen Anne (1714).

## SECTION A. THE KING AND THE CHIEF JUSTICE: JAMES I AND SIR EDWARD COKE

### The Common Law, the Civil Law Tradition, the Church, and the King

There are two great strands of legal thought in the West. One is the Anglo American "Common Law" tradition originating with the England of the Middle Ages. The other is the Civil Law tradition originating in Continental Europe. Through the historical processes of colonization, innovation, and adoption, the two systems have become the dominant traditions in the world today.

The "civilian" tradition has its origins in classical Roman law. In the sixth century, Roman Emperor Justinian promulgated a new summary and update of the law in the *Corpus Juris Civilis*. During the Middle Ages, approximately 500 to 1450, legal scholars developed and spread Roman law through the Byzantine Empire. The defining characteristic of the civilian tradition is the written law, or code, founded on broad principles and doctrines. Legislative in nature, Civil Law was interpreted and applied by courts on the basis of deduction from first principles. Because the Roman-based legal tradition is founded on scholarship and official statements of what the law is, it is sometimes referred to as "the learned laws." The legislator is the most powerful actor in this tradition. For civilians, the lawyer and judge function more as trained technicians of law, for their task is not to discover the law, or even interpret it, but to apply it.

In contrast, the developing English common law was founded on local customs, traditions, and precedent. Its method of proceeding was the case, and its manner of proceeding was adversarial, with each party represented by attorneys. The rules of the common law were derived from prior cases, and therefore are "unwritten" (to distinguish them from officially-promulgated and drafted legislation). Moving from the specifics of the case to general principles, the common law mode of reasoning was inductive. The centrality of tradition, custom, the law case, the attorney, the judge, and the inductive method of reasoning is what most distinguishes common law from Roman law. The judge and the lawyer are the most important actors in this tradition, and their job is to "discover" the law.

The "leaned laws" exerted an impact in England through the Church's Latin culture and Canon law, which borrowed from classical Roman law. Though the Romans introduced Christianity in the British Isles, it was Augustine's mission in Canterbury around the time of 600 that is dated as the English Church's beginning. The Synod of Whitby in 644 consolidated the Church in the medieval era, insuring that the Roman branch of Christianity prevailed over the Celtic branch. William the Conqueror, a Christian, strengthened the Church and among his first acts was the appointment of Norman prelates with close ties to the Holy See. William also created a system of courts through which the bishops' spiritual authority was exercised. These courts were called "ecclesiastical" because they pertained to matters of the Church, the Greek word for which is ekklesia. They were made distinct from the "temporal" or regular courts at the levels of the county shire and local hundreds, and also from the king's court (Curia Regis).

Jurisdiction of the ecclesiastical courts was based on the law of the Church, or Canon law. The influence of the Church ranged widely in English society, and so therefore did its law. The Church exercised jurisdiction over marriage, other familial issues, inheritance of personal property, sexual offenses, and breaches of faith. Church law was administered by bishops' chancellors Appeals lay to the archbishop and ultimately to papal delegates or to the Papal Curia in Rome Because church law was administered by clergy learned in Canon law, the jurisprudence of the English Church developed separately from common law. At times, Church law seemed to be a rival system to common law because it was continental in origin and not beholden to English traditions or customs.

**The Common Law, the Civil Law Tradition, the Church, and the King - *Continued***

Conflicts between the Church and the crown in early English history were inevitable, and they tended to flare around issues of taxation and revenues (the king controlled most of the Church's land), the appointment of bishops, and discipline by the Church of royal officials and representatives. As we will see in the dispute between Coke and James I, there was also the question of what was, or was not, temporal or spiritual. Much of this conflict was worked out not through contests between pope and king, but through private litigation. By means of the "writ of prohibition," a judge who believed the common law's jurisdiction was being sidestepped could pluck a case out of the ecclesiastical court.

The relationship between Church and Crown changed fundamentally in 1534, when Parliament enacted the Supremacy Act and officially broke all ties with the Church in Rome. Henry VIII originally instigated what became the English Reformation because the pope denied his request for an annulment of his marriage to Catherine of Aragon, which would have freed him to marry Anne Boleyn. Even if Henry had not forced the issue, the Reformation probably would have occurred in England at some point, for its appeal was present before Henry wed Anne. On the continent, the Protestant Reformation was begun by Martin Luther when he nailed his Ninety Five Theses to the door of the Wittenherg Church in 1517.

While Henry disapproved of the study of Canon law at Oxford and Cambridge, he did create the Regius Chair of Civil Law at Cambridge. Also during his reign the Society of Doctors of Civil Law was founded. The judges and advocates in the ecclesiastical courts, which were continued under the Reformed English Church, were doctors of Civil Law, and this body of scholars furnished the legal and clerical professionals for Courts outside the common law. On the continent and in England 1ng the Renaissance, there was a revival of interest in classical Roman literature and law, as well as classical Greek philosophy. There were some English royal advisors who favored a "reception" of the Civil law as a replacement for the common law, seeing the continental system as more rational, consistent, and based on time-proven principles. Civil law was also well suited to a system of centralized administration and control, making it an ideal tool for European monarchial absolutism.

The English Reformation led to a number of royal administrative developments that shifted more power to the crown. One was the creation of the Ecclesiasticai Court of High Commission by the King, which replaced the pope in criminal matters and became the legal mechanism for enforcing conformity to the new Church of England. As we will see, this court used the oath ex officio to force a person to testify against himself in opposition of the common law privilege against self-incrimination.

Another encroachment on common law was the Court of Chancery. The Court of Chancery grew out of petitions to the king for special justice because the civil complainant, for one reason or another, could not gain satisfaction through the royal central courts. Initially created from the king's court in the late fourteenth century, Chancery, because it was not a common law court, was bound by less formality of procedure and was not hindered by precedent or rules. By 1460 its jurisdiction (and business) enlarged, making it as important as the common law courts. The Court of Chancery dispensed "justice" in accordance with the dictates of "conscience." This was an Aristotelian concept popular during the Renaissance that held great appeal, and when operating in unison with common law, offered an important corrective to England's relatively rigid legal system.

Under the Tudors, however, and especially Henry VIII, Chancery showed a certain disdain for common law as it adopted an aggressive stance in relation to the central courts. Tudor Chancellors tended to be Church men who served the king; their background was in Canon and Civil law and they were inclined toward continental systems and the idea of centralized power.

As we will see, the widening gulf between courts of common law and equity reached a highpoint during the reign of the Stuart King James I, with the face off between the king, Coke, and behind the scenes, Lord Ellesmere, who served as James' Chancellor (1596 1617).

Courts like Chancery that grew from the king's council took the name of "conciliar" or "prerogative" courts because they were created by means of the king's prerogative to satisfy claims of justice made to him personally. The Court of Star Chamber, taking its name from the gilded stars on the roof of the chamber it met in, was one such court founded in 1487; it functioned as the king's tool for the prosecution of crimes and offences that could not be tried at common law or could not be entrusted to a jury. These were usually cases of a political nature, and included offenses like riot, libel, forgery, perjury, and conspiracies. Because Star Chamber acted outside of the common law, it enjoyed streamlined procedures that made action speedy: The Attorney General prosecuted cases, and trials were by affidavit and interrogation rather than by jury. Torture, or its threat, was the usual tool for obtaining confessions, and punishments included fines, imprisonment, the pillory, branding, and cutting off of ears but not death. Star chamber rulings could not be appealed.

For a portion of its history, like the Court of Chancery, Star Chamber was accepted as a supplement to common law courts, and it may well have corrected deficiencies in the central royal courts that frustrated notions of justice and fairness. The potential for abuse of executive power was always present, however, and under Henry VIII, traditionally regarded as one of the most absolute and ruthless of English kings, Star Chamber became a useful tool for persecuting dissidents and non-conformists.

Under the Scots Stuarts, who never enjoyed the popularity of the Welsh Tudor monarchs Henry and Elizabeth, the Star Chamber prerogatives began to chafe, especially when, Charles I, the son of James, used it in place of convening Parliament. Eventually Parliament abolished Star Chamber as one of the reforms of the English Revolution.

**The Common Law, the Civil Law Tradition, the Church, and the King - *Continued***

In all, the centralization of authority under Henry VII and the Tudors, and his elevation as the head of the Reformed Church of England was an extraordinary augmentation of royal power. The common law, with its origin in custom and archaic feudal traditions, was certainly open to criticism. Its procedures had become dilatory, and its use of Law French highly archaic. The common law was also the exclusive domain of a learned profession, lawyers and judges, jealous of their position as the sole interpreters and transmitters of an unwritten law.

To legal scholars trained in Canon and Roman law, the common law was a throwback to a more primitive time. Yet, as you will soon note, it was this law, according to Coke, that was and ought to be supreme in the land because it was source of English liberties and rights, protector of both ruler and ruled, as he put it. Henry's (and later the Stuarts') reach for power was part of a modern European trend toward centralizing national authority and lawmaking. The existence of Chancery and Star Chamber, and the prerogative courts that borrowed their procedure from Civil law, offered an impressive set of legal tools that any modern monarch would want to have. They also became symbols in a power struggle between Parliament and the king that would lead to the violent events of the English Civil War and the interregnum of 1640 1660, but not be finally settled until the "Glorious Revolution" of 1688.

For colonial Americans, the significance of these events was not fully felt until almost a century later. Then, the Americans rediscovered the political theory and argumentation of the radical Whigs who had struck at monarchial power in the name of English liberty, and employed these arguments against the British. As the colonials moved toward Revolution, the target was Parliament instead of the king, and the goal was creation of a republic, instead of the constitutional monarchy England had become.

# AMERICAN LEGAL HISTORY

## *Cases and Materials*

KERMIT L. HALL
•
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third edition

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***CASES AND MATERIALS - THIRD EDITION***

**Kermit Hall / Paul Finkelman / James Ely, Jr.**

## LAW IN THE MORNING OF AMERICA - THE BEGINNINGS OF AMERICAN LAW, TO 1760

In his famous book The Common Law (1881), Oliver Wendell Holmes, Jr. (who later became a U.S. Supreme Court justice) concluded that "the life of the law has not been logic; it had been experience." He observed that “the felt necessities of the times, the prevalent moral and political theories," and "intuitions of public policy, avowed or unconscious" have been central to the development of American law.

The development of law in early America illustrates the wisdom of Holmes's observation. The English who came to America brought a well-developed legal culture with them. Their cultural "baggage" included English statutes, case law, and common law, as well as local rules, customs, and usages. They came from a legalistic society, and some of the early leaders, like John Winthrop of the Massachusetts Bay Colony, had legal training and experience. But new conditions and changed social circumstances led, almost immediately, to both subtle and dramatic legal changes. Colonial law was a dynamic as it blended the inherited English legal culture with new rules that were necessary for a new environment. In addition, some colonists brought with them ideas about law that were quite distinct from what existed in England. Quakers in Pennsylvania, for example, firmly believed that law should be merciful, and thus they consciously rejected the huge number of English laws that provided for capital punishment.

English inhabitants of the mainland colonies, even those who were born in the New World, did not think of themselves as "Americans" until the last third of the eighteenth century. Rather, they considered themselves English people who happened to be living outside of Great Britain but within the Empire. They therefore regarded themselves as heirs of the English constitutional tradition, especially those parts of it that guaranteed individual liberty. Yet, even as they stressed their "rights as Englishmen," these settlers discovered that New World conditions both required and allowed for an alteration of English ways.

Some English Protestant thought emphasized both the individual and the community. It thus laid a foundation for the prominent place of individualism in American law, giving American legal institutions, both public and private, a strong bent toward protecting the rights of the individual. At the same time, the communitarian element of Protestant theology - especially among the Puritans and Quakers - suggested a role for law in protecting the community. American law has never been exclusively individualistic in its emphasis. Community needs, rather than those of the individual, were particularly important in the early period when English Americans felt themselves beset on all sides by hostile peoples: Catholic Spaniards to the south, Catholic French to the north, Indians everywhere, and enslaved Africans in their midst. This feeling produced a fortress mentality that used law to fortify the community.

Although Americans thought of themselves as English people, the very act of creating new societies provided both the opportunity and the necessity for inventing or adapting legal institutions appropriate to the New World environment. For example, legal institutions that supported the established church in England, such as canon law and its ecclesiastical courts, were unsuited to the new colonies. The religious dissenters in New England and Pennsylvania rejected all church hierarchy, and the Anglican Church never became the established church in these places. Even where Anglicans predominated, like Virginia and Georgia, the lack of an educated clergy or sometimes any clergy at all made it impossible for church courts to successfully cross the Atlantic. In the religiously heterogeneous colonies, like Rhode Island, New York. New Jersey, and South Carolina, adoption of canon law was both impractical and irrelevant. Instead, these colonies, along with Pennsylvania, pioneered in creating governments that tolerated religious diversity. The emergence of religious toleration in the colonies was an adaptation to conditions unique to the New World.

Americans ultimately created a legal order based on older traditions and ideas, but which in the end was significantly different. They accomplished this without having to crawl out from underneath centuries of legal tradition and custom found in Europe. Americans often selected out of the English heritage only those legal elements that met their needs. Rhode Island's 1663 charter, for example, limited conformity to those English laws suited to the "nature and constitution of the place and people”. In 1833 Justice Joseph Story summed up this tradition in his book Commentaries on the Constitution. noting that the colonists "did not carry over with them all the laws of England when they migrated hither, for many of them must, from the nature of the case, be wholly inapplicable to their situation, and inconsistent with their comfort and property. "Rather they brought "with them all the laws applicable to their situation, and not repugnant to the local and political circumstances, in which they are placed." Americans created their legal order in a spirit of eclectic opportunism, drawing from various sources of law and devising new rules of law when they found nothing suitable in existing systems.

While never fully free to reject all English laws they did not like, or adopt all new rules they wanted, Americans were less constrained than their English cousins in molding laws to fit their society's needs. Consequently, American law was easier to reform and more instrumentalist in its development than British law.

Americans did not develop their laws unthinkingly or reflexively. On the contrary, they displayed a remarkable sophistication in thinking about the governance of their societies. In addition to English common law and statutes, they drew freely from a variety of legal sources, including Roman law, local English law and customs, contemporary justice-of-the-peace manuals, and some biblical law (especially in the early seventeenth century). Similarly, they turned to various sources for political theory including the writings of Montesquieu, James Harrington, and John Locke.

**The Beginnings of American Law, to 1760 - *Continued***

Thus, by the eve of the Revolution, Americans had developed a political philosophy to support the choices they made about the directions of their legal development. Eventually, they reaffirmed their commitment to the English common law as the foundation of their legal order, but it was the common law stripped of unsuitable doctrines. Americans regarded the common law as a guarantor of personal liberty after the American Revolution.

Early American law contained within itself the basis of the legal and constitutional order of the post-Revolutionary states and nation. During the colonial period, American law incorporated some essentials of what we today call the rule of law, including concepts of higher law, limited government, separation of powers, an independent judiciary, due process of law, and consent as the basis of legal obligation. Legal development in the colonial period anticipated much of what later became American constitutionalism. Law, as historian Arthur Bestor has observed, both molds people and the way they think as much as it is molded by them. So it was with law in America's morning. We have become the people that we are today in part because of the laws that we adopted, borrowed, and created in the early English settlements.

## THE ENGLISH HERITAGE AND MAGNA CHARTA

American law traces its beginning to the landmarks of English constitutional development. The earliest and most revered of these was Magna Charta. The "great charter" began as an agreement between King John I and the leading barons of England. On June 15, 1215, the barons surrounded the king on Runnymede Island and forced him to sign the document. Much of the document's sixty-three chapters dealt with property, inheritance, and feudal obligations. But a number of significant provisions were directed at the fair administration of law, fundamental justice, and basic rights.

## Magna Charta
## 1215

*Magna Charta was ostensibly designed to protect the barons and their property from the king. However, the language of the document was more open-ended and ultimately became available to "all free men of our realm."*

*More than half a millennium later, many of its provisions had evolved into important constitutional provisions and legal principles in the United States.*

*For example, Chapter 17, requiring that lawsuits "not follow the royal court around," evolved into the provision in Article III, Section 2, of the United States Constitution, requiring that Congress fix the places where couns would meet.*

*Similarly, Chapter 18 can be seen as the ancestor of the grand jury.*

*Chapters 20 and 21 of the Magna Chana, providing that fines be "in proportion to the degree of' the offense, led to the ban on excessive fines found in the Eighth Amendment to the Constitution.*

*Chapter 35 is the ancestor of the provision in Article I, Section 8 of the Constitution that authorizes Congress to "fix the Standard of Weights and Measures."*

*Chapter 39 is the source of modem procedural and substantive due process.*

*Magna Charta's law-of-the-land phrasing appears in many of the early American state constitutions and, together with the concept of due process, is at the core of modern concepts of the fair administration of justice and the protection of fundamental liberties. Magna Carta contains many key concepts of American law, such as the idea that the government cannot take private property without compensation, the notion that no one can "sell" justice, and the commitment to maintain a legal system based upon "the law of the land".*

**John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, and count of Anjou, to the archbishop, bishops, abbots, earls, barons, justiciaries, foresters, sheriffs, stewards, servants, and to all his bailiffs and liege subjects, greetings.**

***1. In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; . . . We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.***

* * *

**The Magna Carta -** ***Continued***

***17. Common pleas [trial courts] shall not follow our court [that is the "Royal Court"], but shall be held in some fixed place.***

* * *

***18. Inquests of novel disseisin, of mort d'ancestor, and of darrein presentment shall not be held elsewhere than in their own county courts, and that in manner following; We, or, if we should be out of the realm, our chief justiciar, will send two justiciaries through every county four times a year, who shall alone with four knights of the county chosen by the county, hold the said assizes in the county court, on the day and in the place of meeting of that court.***

* * *

***20. A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contentment"; and a mercljant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage" if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood.***

* * *

***21. Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offense.***

* * *

***28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.***

* * *

***30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.***

* * *

***31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.***

* * *

***35. Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, "the London quarter"; and one width of cloth (whether dyed, or russet, or "halberget"), to wit, two ells within the selvedges; of weights also let it be as of measures.***

* * *

***38. No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law," without credible witnesses brought for this purposes.***

* * *

***39. No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.***

* * *

***40. To no one will we sell, to no one will we refuse or delay, right or justice.***

* * *

***45. We will appoint as justices, constables, or bailiffs only such as know the law of the realm and mean to observe it well.***

* * *

***63. Wherefore we will and firmly order as is aforesaid. that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places forever, as is aforesaid.***

**The Beginnings of American Law, to 1760 - *Continued***

**Note: Due Process and the Law of the Land**

Two parliamentary enactments of the late Middle Ages explicitly extended some of the benefits of Magna Charta beyond the nobility to all subjects of the realm. An act of 1346 provided that "every Man may be free to sue for and defend his Right in our Courts and elsewhere, according to the Law" (20 Edw. III, c. 4).

A law passed in 1354 introduced the phrase "due process of law" for the first time into English law and declared that "no Man, of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor put to Death, without being brought in answer by due Process of Law" (28 Edw. III, c. 3).

American courts in the nineteenth and twentieth centuries were to hold that the phrases "law of the land" and "due process of law" were equivalent. The notion of "due process" would eventually emerge as a driving force in the expansion of legal rights for all Americans.

**Note: The Reformation and Tudor England**

Until 1531 Roman Catholicism was the official, or "established," church for England. As the Protestant Reformation swept northern and parts of central Europe, King Henry VIII of England remained a staunch Catholic. In 1521 the pope declared Henry to be a "Defender of the Faith" after the English king wrote a small book attacking Martin Luther's writings.

However, in 1527 the pope rejected Henry's request for an annulment of his marriage to Catherine of Aragon, his Spanish wife. Henry responded by initiating what is known as the English Reformation. He broke away from the Catholic faith and in 1531 became head of the newly created Church of England (also known as the Anglican Church), which became the official religion of his nation.

The king of England was now the head of the church, which increased its popularity within the realm no longer would England be subject to the nilings and decisions of n foreign potentate. In addition, Henry distributed or sold vast amounts of church lands, thus giving many of England's elite a financial stake in the religion. The new church abolished priestly celibacy, which gained Henry support among many of the clergy, and most English clerics easily made the transition to the new faith.

While most Englishmen and women were happy to abandon Catholicism, some thought the English Reformation had not gone far enough. English followers of the Swiss theologian John Calvin wanted to further reform, or "purify," the Church and were thus called Puritans. These dissenters argued for the abolition of the church hierarchy, including bishops and archbishops, and demanded a less elaborate form of worship.

Henry generally tolerated these dissenters but never supported their goals. His successor, King Edward VI, was far more sympathetic to the Puritans, but his short reign (1547 1553) prevented any fundamental changes in the new church.

Edward's early death put his oldest sister, Mary, on the throne. Queen Mary (r. 1553 1558) was the daughter of Henry's first wife, Catherine of Aragon; like her mother, Mary was a practicing Catholic and as such wanted to bring England back under the authority of the pope. Queen Mary brutally persecuted Protestant leaders, especially Puritans, ordering many to be burned at the stake. The reign of "Bloody Mary," as she was known, was mercifully brief. But its impact on subsequent constitutional developments was profound.

The deaths of the Marian martyrs, burned at the stake at Smithfield, were alive in the historical memory of many eighteenth-century Americans. This left them with a profound fear of tyranny and for many Americans an equally strong fear of the Catholic Church.

Mary's death led to the reign of her younger sister Elizabeth "Good Queen Bess" as she would be known. Under Queen Elizabeth I (r. 1558 1603), the people of England enjoyed growing prosperity and, by the standards of the era, remarkable freedom. Elizabeth did not tolerate open dissent political or religious but she also claimed that she did not seek "windows into men's souls" and thus did nothing to persecute Puritans and other Protestant dissenters as long as they quietly practiced their faith and did not challenge her reign.

Under Elizabeth, England experienced a cultural golden age, exemplified by the writing of William Shakespeare and Christopher Marlowe. In 1585 the first English settlement in the New World was attempted at Roanoke Island, off the coast of present-day North Carolina. Meanwhile, the defeat of the Spanish Armada in 1588 made England a world power and set the stage for successful English settlements two decades later.

At the death of Elizabeth in 1603, England turned to her cousin, King James VI of Scotland. who moved south to become King James I of England. James was far more autocratic than Elizabeth, and his harassment of religious dissenters led some to move to Holland and later to America, where in 1620 they created the Plymouth Colony. Even before this, in 1607, England established its first successful New World settlement, Jamestown, which was the first town of the Virginia Colony.

**The Beginnings of American Law, to 1760 - *Continued***

## THE VIRGINIA COLONY

The Virginia Colony was organized as a joint stock company, but unlike a modem corporation, the charter for the corporation came directly from the king. The goals of the Crown were partially idealistic and religious, as the king hoped the colony would lead to the conversion of the "heathen" Indians. The investors (known as "adventurers of the company") bought stock in hopes of making a profit.

None of these goals and hopes were ever realized. Relations with the Indians were more murderous than religious, and the colony constantly lost money and was initially an economic and political failure. It was also a great human fiasco, with a huge death rate for the colonists and violent, often murderous relations with the local Indians.

In 1611 the stockholders in London sent Sir Thomas Dale to Virginia with men, supplies, and orders to impose a legal order based on the notion that as deputy governor he should "proceed rather as Chauncelor then a judge, rather uppon the naturall right and equity then upon the nicenes and letter of the lawe."

Instead he imposed a set of laws that were more military than civilian. While it may be unfair to blame Dale for these rules, since others in the Virginia Company were involved in their drafting and implementation, they are remembered as "Dale's Laws."

The attempts to impose this harsh rule through Dale's Laws succeeded only in alienating settlers. The charter was revoked in 1624 and a royal governor was appointed. By this time, however, three developments within the colony would have a long-term impact on American legal history.

In 1617 Virginians began to plant tobacco as a cash crop. This would set the stage for the development of a plantation economy and bring great wealth to Virginia's planter elite. In 1619 Virginia's landowners established the House of Burgesses - the first representative legislature in the New World. The experience in lawmaking over the next 150 years would prepare Virginians and other Americans for self-government after the Revolution.

Ironically, in the same year that an elected legislature arrived in Virginia, the first Africans also arrived. These blacks were treated as indentured servants, but within a generation Virginia would become committed to a slave-based economy in which race would become a marker of servitude and legal inferiority.

## THE BEGINNINGS OF CONSTITUTIONALISM IN AMERICA

Throughout the American experience, the polestar of public law has been the concept of "constitutionalism," a vague and comprehensive catchword embracing the ideals of limited government, the rule of law, and the various structural devices that achieve the substantive content of republican government in America. The origins of constitutionalism long predated the Revolution and the creation of the American Republic. They derived partly from the way that we think about the sources of law, and partly from the way that Americans structured the governments of their societies.

The concepts first developed most clearly in two religiously based colonies: Plymouth and Massachusetts Bay. Both were settled by Calvinist Protestants who believed that the English Reformation of Henry VIII had not gone far enough. As one Puritan minister put it, in breaking with the Roman church, King Henry had lopped off the "head" of Catholicism (the pope), but left the "body" intact by maintaining bishops, elaborate ritual, and a top-down practice in which the people were more the recipients of religion than participants in it.

The Puritans and the Separatists differed in one fundamental way. The Puritans believed that the Church of England could be reformed—purified—and so they were willing to worship in the Anglican Church while in England. in addition to holding their own meetings and services; the Separatists considered the English church to be beyond redemption, and thus had separated themselves from it. On other matters, these groups were similar. Most important, they believed that churches, and the larger society, should be organized on the basis of a compact between the members. Compact theory and practice, as exemplified in the Mayflower Compact of 1620, was a basic element of constitutionalism. So was representative government, a logical derivative of social covenants.

Another central constitutional principle of American culture has been the conflict between governmental power and individual liberty. Americans confronted this dualism from the outset, especially in Massachusetts. Neither the Puritans nor the Separatists believed in religious freedom; they wanted to be free to worship as they wished hut did not have any interest in extending such liberties or rights to others. They stressed the need for conformity within their community

John Winthrop, a founder and longtime leader of the Massachusetts Bay Colony, addressed the issue in his lay sermon aboard the ship *Arhella* in 1629 just before the Puritans landed in Massachusetts. Here Winthrop coined the endlessly captivating image of America as a "city upon a hill." Winthrop emphasized the primacy of community over individual interests.

## THE BEGINNINGS OF CONSTITUTIONALISM IN AMERICA - CONTINUED

Roger Williams, a learned and enormously well-liked Puritan minister who arrived in Massachusetts Bay just a short time after Winthrop, quickly rejected Puritan and Separatist orthodoxy. He ultimately espoused an altogether different approach to governance, condemning government efforts to coerce religious belief and practice. Ultimately he became the founder of the Rhode Island Colony, which allowed virtually unlimited religious free exercise and did not have an established church. Between them, Winthrop and Williams defined the polar opposites of power and liberty that have remained in tension throughout our political history.

The Laws and Liberties of Massachusetts (1648) provided a sophisticated official affirmation of the sources of governmental authority and underscored the growing belief in America that law should be published and accessible to the people. They also illustrate the variety of ways in which the Puritans attempted to merge a “Bible commonwealth” with the everyday needs of their society.

Constitutionalism also derived from the structuring of colonial government, which took different forms. The covenants of Plymouth embodied compact theory in its purest form. A variant was the liberal and democratic order established in Rhode Island under the influence of Roger Williams.

Emigration to the New World languished during the English Civil War and Protectorate but resumed vigorously after the restoration of the monarchy in 1661. The charters and compacts of the Restoration period embody many innovations in the forms and principles of government, such as the bizarre and abortive experiments in John Locke’s Fundamental Constitutions of Carolina, the liberal and democratizing approaches of William Penn in his Frames of Government for Pennsylvania, and the do-it-yourself innovations in guarantees for personal liberty in New York’s Charter of Libertyes (1683). All attest to the robust experimentation in a constitutional form of government that characterized America’s first century.

## THE SOURCES OF LAW IN AMERICA

American lawyers have sometimes claimed that the common law was the only body of English law that Americans drew on for their own law, that it was adopted early in the period of English settlement, and that its reception was both inevitable and noncontroversial. Some judges still make such assertions. Yet, each of these assumptions is wrong.

More than half a century ago, the legal historian Julius Goebel speculated that it would have been unlikely that the settlers of New England would have replicated the common law "as absurd as to expect that they would establish a religious system on the principles of the Anglican Church." Rather, he suggested, in creating their new legal order they would have drawn on the body of law most familiar to them:

English local and customary law of the sort found in the borough customals and in the practice of the manorial and county courts. Subsequent scholarship has confinned Goebel's conjecture. The result was a heterogeneous body of law, "a layman's version of English legal institutions," as Daniel Boorstin called it.

In New York during the proprietary period (1664 1684), at least five separate bodies of law and judicial systems prevailed: Dutch civil law, which was based on Roman law; the "Bible codes" of the Connecticut immigrants in Westchester County and on Long Island, reaffirmed in the Duke's Laws of 1665; the laws enforced in the manoria! courts on Long Island and up the Hudson River valley; the new statutes enacted by the colonial legislature; and the common law, which was fully applied to New York in the legal reforms of 1691. But until it did, the common law met vigorous competition from its rivals.

A Dutch resident of Dutchess County expressed his contempt for the new system, declaring that he "valued no English law no more than a Turd." American law was composed in unequal parts of vaguely and inaccurately remembered fragments of common law, local law, Mosaic law (in most of New England and in parts of Long Island), and Roman law.

Colonial law was also constantly changing to adapt to the circumstances and physical geography of the New World. To further complicate the picture, the colonies borrowed from one another's laws extensively yet with great selectivity, choosing only those elements of law suited to their local conditions.

The English common law was a part of American law, of course, however imperfectly it may have been understood and received before 1700. So were parliamentary statutes enacted before the settlement of a particular colony. Subsequent statutes were not part of a colony's laws unless explicitly made applicable to it.

New England presents a special case, however.

Although the common law was eventually received there after the American Revolution, Massachusetts resisted the extension of English law before the 1690s.

## THE SOURCES OF LAW IN AMERICA - CONTINUED

John Winthrop insolently proclaimed that "our allegiance binds us not to the laws of England any longer than while we live in England, for the laws of the Parliament of England reach no further, nor do the king's writs under the great seal go any further."

Moreover, in 1678, the General Court of Massachusetts Bay objected to the Navigation Acts, insisting that "the lawes of England are bounded within the fower [four] seas, and doe not reach America." John Adams, writing in 1776 as "Novanglus," also reiterated this viewpoint: "Our ancestors were entitled to the common law of England when they emigrated; that is, to just so much of it as they pleased to adopt, and no more. They were not bound or obliged to submit to it, unless they chose."

### Note: Reception of the Common Law

The common law was eventually received in all American jurisdictions, including refractory New England, by the nineteenth century. The beginnings of reception may be found in the charters to companies and proprietors granted by the Stuart monarchs in the early seventeenth century. Most of these charters insisted that any laws enacted by the colonists for their own governance must conform to the legal culture of the mother country. The Massachusetts Charter of 1629 declared that the leaders of the colony "from tyme to tyme" were empowered "to make Lawes and Ordinances for the Good and Welfare of the saide Company, and the Government and ordering of the saide Lande and Plantation, and the People inhabiting and to inhabite the same" as long as "such Lawes and Ordinances be not contrarire or repugnanat to the Lawes and Statuts of this our Realme of England." A subsequent clause in the charter empowered the magistrates of the colony to "ordeine, and establishe all Manner of wholesome and reasonable Orders, Lawes, Statutes, and Ordinances, Directions, and Instructions, not contrairie to the Lawes of this our Realme of England."

Similarly, the charter of New Plymouth authorized legislation, "provided that the said lawes and orders be not repugnante to the lawes of Englande." The Maryland Charter granted lawmaking powers to the new government, provided that "the said Ordinances be consonant to Reason and be not repugnant nor contrary, but (so far as conveniently may be done) agreeable to the Laws, Statutes, or Rights of our Kingdom of England: And so that the same Ordinances do not, in any Sort, extend to oblige, bind, charge, or take away the Right or Interest of any Person or Persons, of, or in Member, Life, Freehold, Goods or Chattels."

Such provisions were the first step on the road to the reception of the common law in America, as well as to the transference of English libertarian traditions, such as the principles derived from Magna Charta. Viewed by the Crown at the time as a means of controlling distant settlements, the conformity clauses came to be seen by Americans in the next century as an assurance that the settlers enjoyed the same rights and liberties as English people who had never left the realm. At the same time, these provisions allowed for vast experimentation in lawmaking, and indeed through these powers the colonies developed their own laws on a variety of topics, including inheritance, water rights, land usage and personal rights, including the development of slavery.

## BLACKSTONE

Long before Americans began to think seriously about the transit of English law, English judges and lawyers had begun to work out the basis for a theory of reception of their legal systems. This was not surprising, since the English had become active colonizers in the sixteenth century and had had to confront the practical problems of legal administration for places like Ireland even earlier.

After a century of development, the English theory of reception was summed up by William Blacksione, the magisterial commentator on English laws, in his four-volume treatise. Commentaries on the Laws of England (1765)

Sir William Blackstone was born on July 10, 1723, the son of Mary Blackstone and Charles Blackstone, of London. Blackstone's father, a silk merchant, died before Blackstone was born; his mother died while he was a young boy. Raised by an older brother and tutored by an uncle, Blackstone attended Charterhouse and Pembroke College, at Oxford University, where his education included a thorough exposure to mathematics and logic. Blackstone entered All Souls College, Oxford, in 1743, and became a fellow in 1744.

In preparation for a law practice, Blackstone received a Civil Law degree in 1745, and became a barrister in 1746. In 1750, he became a doctor of civil law. One year later, he was selected as an assessor (judge) of Chancellor's Court.

In 1755, after three years of a lusterless law practice, Blackstone decided to devote all of his time to teaching law at Oxford. His first book, published in 1757, was titled ***"An Analysis of the Laws of England".*** In 1758, Blackstone was named Oxford's Vinerian Professor of English Law, receiving the first chair of common law ever established at the university. Blackstone's lectures were well received, providing students with a comprehensive introduction to the laws of England.

**The Beginnings of American Law, to 1760 - *Continued***

**BLACKSTONE - CONTINUED**

The success of his lectures enhanced Blackstone's career. In 1761 he became a bencher (supervisor and lecturer) at Oxford's Middle Temple. That same year, he was elected to Parliament, where he served for seven years although, according to most historians, he was not an especially ambitious or effective politician. Also in 1761, Blackstone married Sarah Clitherow, with whom he had nine children.

In 1765, Blackstone published the first of his four volumes of Commentaries. The treatise discussed the cases, rules, and legal principles outlined in his popular Oxford lectures. Each volume concentrated on a particular area of law personal rights, property rights, torts, or criminal law.

Blackstone's commentaries would prove the groundwork for U.S. jurisprudence. Entitled, ***"Blackstone's Commentaries on the Laws of England"***, they provided a systematic analysis of English Common Law between 1765 and 1769. It was an exhaustive compilation of Blackstone's Oxford University lectures on law. These commentaries was unprecedented in scope and purpose, and profoundly influenced the development of common law and legal education in England and the United States.

As Blackstone analyzed the laws, he also revealed their relationship to a higher power. Throughout his Commentaries, Blackstone wove the concept of "natural law,"or God's laws imposed on humankind.

Although some contend that Blackstone's work presented a more uniform and simplified system of law then actually existed in England at the time he wrote, even his harshest critics concede that Blackstone's effort to synthesize English law was indeed impressive, an had an enormous impact in his country and beyond.

Blackstone's Commentaries was particularly influential in the United States as the new nation sought to establish its own laws and legal system. Although Blackstone is seldom now cited by practicing attorneys, his importance and work remains revered in U.S. law. Over thirty editions of his commentaries have been printed in the United States and England.

In 1770, Blackstone became judge of the Court of Common Pleas and was knighted. He died on February 14, 1780, at age fifty-seven.

# A HISTORY OF AMERICAN LAW

LAWRENCE M. FRIEDMAN

"THE BEST SINGLE, COHERENT HISTORY OF AMERICAN LAW THAT NOW EXISTS . . . THE BOOK TOUCHES EVERY CONCEIVABLE ASPECT OF LAW. . . . IT IS A STUPENDOUS ACHIEVEMENT."

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THIRD EDITION

# A HISTORY OF AMERICAN LAW

***THIRD EDITION***

**Lawrence Friedman**

## PROLOGUE

Modern communications and technology have made the world smaller. They have leveled many variations in world culture. Yet, people still speak different languages, wear different clothes, follow different religions, and hold different values dear. They are also subject to very different laws. How different is not easy to sum up. Clearly, legal systems are not as different as different languages.

The new world, the world we live in urban, industrial, technological creates a certain kind of society; and this kind of society depends on and welcomes certain kinds of laws. An income tax, for example, is a common feature among developed countries. But the exact form that a tax law takes depends on the general legal culture. Americans are naturally used to American laws. Law is an integral part of American culture. Americans could adjust to very alien laws and procedures about as easily as they could adjust to a diet of roasted ants or a costume of togas. Judge and jury, wills and deeds, the familiar drama of a criminal trial, an elected assembly or council at work making laws, licenses to get married, to keep dogs, to hunt deer these are all part of a common experience, peculiar to the United States. No other legal culture is quite like it. Presumably, no other culture fits the American system quite so aptly.

Many people think that history and tradition are very strong in American law. There is some basis for this belief. Some parts of the law can be traced back very far the jury system, the mortgage, the trust, and some aspects of land law. But other parts of the law are quite new. The living law, the law we use every day, the law that affects us every day, including tax law, traffic codes, and social- welfare laws, is comparatively recent, on the whole.

While one Lawyer is advising his client how to react to a ruling from Washington, issued that very day, another may be telling his client that some plausible course of action is blocked by a statute well known to the lawyers of Henry VIII or by a decision of some older judges whose names, language, and habits would be unfathomable mysteries to both attorney and client. But the first situation is much more likely than the second.

Some parts of the law are like the layers of geological formations. The new presses down on the old, displacing, changing, altering, but not necessarily wiping out everything that has gone before. Law, by and large, evolves; it changes in piecemeal fashion. Revolutions in essential structure are few and far between. That, at least, is the Anglo-American experience. Most of the legal system is new, or fairly new; but some bits of the old get preserved among the mass of the new.

What is kept of the old is highly selective. Society may be fast or slow as it changes; but in either case, it is ruthless. Neither evolution nor revolution is sentimental. Old rules of law and old legal institutions stay alive only when they still have a purpose. They have to have survival value. The trust, the mortgage, the jury are legal institutions that can be traced back centuries. But they still have the vigor of youth. They have come down from medieval times, but the needs they now serve are twenty-first-century needs. They have survived because they found a place in the vigorous, pushy society of today a society that does not hesitate to pour old wine into new bottles and new wine into old bottles, or throw both bottles and wine away. At any rate, the theory of this book is that law moves with its times and is eternally new. From time to time, the theory may not fit the facts. But more light can be shed on legal history if one asks why does this survive than if one assumes that law, unlike the rest of social life, is a museum of accidents and the mummified past.

In an important sense, law is always up-to-date. The legal system always "works"; it always functions. Every society governs itself and settles disputes. Every society has a working system of law. If the courts, for example, are hide-bound and ineffective, that merely means some other agency has taken over what courts might otherwise do. The system is like a blind, insensate machine. It does the bidding of those whose hands are on the controls.

The laws of China, the United States, Saudi Arabia, France, of North and South Korea reflect the goals and policies of those who call the tune in those societies. Often, when we call law "archaic,' we mean that the power system of its society is morally out of tune. But change the power system, and the law too will change.

The basic premise of this book is this: Despite a strong dash of history and idiosyncrasy, the strongest ingredient in American law, at any given time, is the present current emotions, real economic interests, and concrete political groups. It may seem a curious beginning to a book of history to downgrade the historical element of law. But this is not really a paradox. The history of law has meaning only if we assume that at any given time the vital portion is new and changing, form following function, not function following form.

History of law is not or should not be a search for fossils, but a study of social development, unfolding through time. Law and society both have a long and elaborate history in the United States. Compared to some, the United States is a new country but Boston and New York are more than three hundred years old, and the Constitution may be the world's oldest living organic law. In short, enough time has elapsed for American law to be essentially American, the product of American experience.

But American law is not an isolate. It has, and has had, close affinities to other legal cultures. The most important immediate ancestor is easy to identify. The basic substratum of American law, as of American speech, is English.

**Prologue-** ***Continued***

Before the Europeans came, the country belonged to the native Americans. Europeans came late, but they came in force. They settled first along the coast. The Spanish settled Florida; the French built New Orleans. Swedes settled briefly on the Delaware; the Dutch pushed them out. Then the Dutch were overwhelmed by the English. The Hudson and Delaware settlements were added to a chain of tiny colonies, all English-speaking, along the Atlantic coast. Their populations grew. More Englishmen came. And English speakers, as Englishmen or Americans, ultimately pushed out the native peoples, took over their lands; and the lands of the French and the Spanish; and a big chunk of Mexico. They established an empire that stretched from sea to sea. And then they pushed out across the ocean to Hawaii, Puerto Rico, and the Philippines.

Each culture group lived by its own legal norms. Of many of the native laws, it is fair to say, not a trace remains. Others retained more vitality. There are native American communities today with their own court systems, and some bits and pieces of their tradition still live on. Some scholars have claimed to find a speck or two surviving from the Dutch legal tradition. The office of district attorney may be Dutch in origin. French law gained a more or less lasting foothold in Louisiana, and there (in translation) it stays. Spanish law sent down wider if not deeper roots; no state can call its law Spanish, but some aspects of Spanish or Mexican law (for example, the community-property system), persist in California and in other parts of the West. Everything else, if not strictly native, is English, or comes by way of England. or is built on an English base.

But English law was complex and bewildering. It is not easy to say which English law was the ancestor of American law. Colonial law the law of the colonies, up to Independence is, after all, an abstraction; there was no "colonial law" any more than there is an "American law," common to all fifty states. There were as many colonial systems as there were colonies. The original union was made up of thirteen states; but this thirteen represents, if anything, only a head count at one arbitrary time. Some colonies, such as Plymouth and New Haven, were swallowed up by larger ones. It was also the merger of two entities that produced New Jersey. Each of these entities had its own legal system.

Each colony, moreover, was founded at a different time. At least a century separates the beginnings of Massachusetts from the beginnings of Georgia. During this time, English law did not stand still. The colonies began their careers at different points in the process of legal development. During all this time, the law of the mother country was theoretically superior. But the colonial condition was not one of simple subordination, like the relationship of a ward to a city, or a county to a state. Even as a matter of theory, it was not clear which acts of Parliament and which court decisions were binding on the colonies. The colonies borrowed as much English law as they wanted to take or were forced to take. Their appetite was determined by requirements of the moment, by ignorance or knowledge of what was happening abroad, and by general obstinacy.

Mapping out how far colonial law fit English law is almost hopeless. Legal cultures differed in different colonies. New England deviated from standard English law more than the southern colonies did. The connection between the two sides of the Atlantic was always strong but never harmonious. They were also very far apart, in the literal sense. A big ocean separated them. It was hard for the mother country to control its unruly children. The colonies quarreled with the mother country over law as well as over politics and taxes.

Even after the Revolution, the legal connection was not totally severed. A complex legal relationship survived after 1776. English law continued to be imported, in some quantity, when and as needed. A thin, thin trickle remained even at the end of the nineteenth century.

English law, as we said, was complex and difficult. But what was English law? Two decades before the Revolution, Sir William Blackstone reduced to writing what he considered the core of the common law. His Commentaries on the Law of England, in four parts, can be printed out as one thick but manageable book.

This book, in its sluggishly elegant style, became a great bestseller, both in England and America. On the whole, Blackstone did a good job of putting the rank weeds of English law into some kind of order. But the picture he presented was partial and defective, like a dictionary that omitted all slang, all dialect, all colloquial and technical words. And even this imperfect guide was not available in the colonies before the 1750s. As such, they lacked a handy key to English law. Yet, a key was desperately needed. The English common law was one of the world's great legal systems; but it was incredibly hard to master or understand.

English law stood apart and still stands apart from most European systems of law. A modified, modernized form of Roman law swept over much of the Continent, starting in the middle ages. English law resisted the "reception," as the process is called. Modern continental law finds its highest expression in a code. "The law" in France and Germany is above all the law of the great codes statutes, in other words.

"Common law," on the other hand, was "unwritten law," as Blackstone called it. "Unwritten' was not meant literally; English and American laws are, if anything, overwritten. Blackstone meant, however, that the ultimate, highest source of law was not an enactment, not a statute of Parliament; but rather it was "general custom," as reflected in the decisions of the common-law judges. These judges were "the depositaries of the laws the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land," (1 El. Comm. 69).

**Prologue-** ***Continued***

Common law was judge-made law molded, refined, examined, and changed in the crucible of actual decision, and handed down from generation to generation in the form of reported cases. In theory, the judges drew their decisions from existing principles of law; ultimately these principles reflected the living values, attitudes, and ethical ideas of the English people. In practice, the judges relied on their own past actions, which they modified under the pressure of changing times and changing patterns of litigation.

As a general rule, common law adhered to precedent. Precedent is commonly considered one of the basic concepts of the common law. It was never quite a straitjacket, as some laymen (and lawyers) have tended to think, American judges have always assumed power to overrule an earlier case, if they considered the case seriously misguided. The power was not often exercised. Still, it was there, along with the more important power to "distinguish" an embarrassing precedent that is, to interpret it into oblivion, or twist its meaning. In any event, the common law was and is a system in which judges are kings. Whether they are following or distinguishing precedent, they create and expound principles of law.

In its prime, the decided case was one of the basic building blocks of law. For a long time, judges looked at statutes with great suspicion. Statutes were unwelcome intrusions on the law, and were treated accordingly. In continental law, all law (in theory) is contained in the codes. In common law, many basic rules of law are found nowhere but in the published opinions of the judges.

What Parliament can do in a month's intensive work, a court can do only over the years. And it can never do it quite so systematically, since the common law only handles actual disputes, actual cases. It cannot deal with hypothetical or future cases. If no one brings up a matter, it never gets into court. It is no answer to say that all important questions will turn into disputes; "disputes" are not litigation, and only litigation actually, only appellate litigation makes new law.

Nor is it easy for judges to lay down quantitative rules, or rules that can't be carried out without heavy public support (in the form of taxes), or rules that would have to he enforced by a new corps of civil servants. Judges are supposed to decide on the basis of legal principles. They decide specific cases; but they have only limited power to regulate. They are not equipped to decide what the speed limit ought to be, or what food additives are carcinogens, or what animals should go on the list of endangered species. An English (or American) court could not possibly "evolve" a Social Security law. The common law is therefore not only slow; it is also impotent to bring about certain important kinds of legal change.

Older English law was often as devious in making changes as it was (sometimes) slow. The culture of the common law shied away from formal, overt abolition of obsolete doctrines and institutions; English law preferred to supersede and ignore them. Trial by battle, a favorite of medieval romance and costume movies, was not done away with in England until 1819. For centuries, it slept in its sarcophagus; but a chance mistake in court, in 1818, reminded the legal profession that battle was still a legal possibility. An embarrassed Parliament quickly buried the corpse (59 Ceo. III, c. 46, 1819).

Legal evolution sometimes took the form of shortcuts called legal fictions. The rise of the action of ejectment is a famous example. Suppose two men we will call them Henry Black and Richard Brown are fighting over title to a piece of land. Brown is in possession, but Black has a claim to it. Each thinks he is the rightful owner. Medieval common law had a form of trial that could be used to resolve this dispute, but this form of action was torturous and heavy-handed. Ejectment developed as a way around it. In ejectrnent, the pleadings papers filed in court would tell a rather odd story. A man named John Doe, it seems, had leased the land from Henry Black. Another man, named William Styles, held a lease from Richard Brown. Styles (it was said) had "ejected"John Doe. In fact, Doe, Styles, and the two leases were pure figments of legal imagination. Black and Brown were the only real people in the case. This mummery (which everybody, the court included, knew to be false) served the purpose of bringing the issue of title before the court. Only now it was a case about a lease (well, an imaginary lease). Because it was a lease case, the ancient land actions (which did not apply to leases) could be avoided, and a more streamlined procedure used. In the' course of time, ejectment itself caine to be considered a complicated nuisance. But this action was not reformed in England until past the middle of the nineteenth century.

The strange history of ejectment is not an isolated example of high technicality and fiction. What is the nonlegal mind to make of a social institution that treats corporations as "persons," which at times classified slaves as real estate, and that allowed a plaintiff to state that the city of Paris was located in England, or that London (admittedly it rains a lot there) was located on the high seas; and in each of these cases, the defendant was not allowed to contradict these absurdities? One of these, the corporate fiction, is still alive (and useful); the others served their purpose and then died out. Enough high technicality survives to make Anglo-American law a difficult system for both lawyers and lay people. But the common law was involute, over-formalized, and fiction ridden not because it was changeless, but precisely because it was constantly changing.

Part of the problem lay in the traditional theories in which the common law was tightly swaddled. In theory, the common law was not man-made in the ordinary sense; the judges uncovered the law (or found" it); they did not make it, or tamper with it as it was found. The modern idea of law as essentially man-made, as essentially a tool or an instrument, was foreign to the classic common law. Change therefore had to be hidden, disguised. Blunt, overt reforms (by judges) were out of the question. Moreover, working doctrines of law, however quaint they may seem, must be acting as the servants of some economic or social interest. In a society with many rough, contentious holders of power, at war with each other, the court can effect power relations only slowly and subtly. Otherwise a delicate balance is upset.

**Prologue-** ***Continued***

Moreover, foolish traditions are tolerable as long as they are harmless. The abolition of trial by battle illustrates this point. If trial by battle had not been all but dead, it could not have survived to the nineteenth century. Powerful engines of change can and do exist inside the legal system but they may be, and often are, outside the courts. Some major changes take place in law by means of opening and shutting institutional valves. Subject matter moved from one legal agency to another. The courts gained work, lost work, then gained new work. Parliament's role got stronger; the king's power waxed and waned. In the course of these changes, some ancient, specialized, essentially marginal kinds of business stayed with the courts. Because they were colorful and old, these fossils attracted more attention than they deserved. They gave an impression of an archaic, hide-bound system; but this impression was in large part false.

Then, too, a good deal of the law is not addressed to the public directly. Lawyers stand between the laymen and the lawmaker. It is the business of the lawyer to tolerate and master artifice. After all, technical difficulty is one of the lawyer's excuses for existing: his power, his income, his monopoly; his stranglehold on court work, on the drafting of documents, and on the counseling of clients.

The English bar was, by the time our story opens, an important influence on the shape of English law. The evolution of the bar was a long and complicated process. But by 1600, English lawyers plainly were a profession a group of men trained and educated in law. They were not, however, trained at universities, at Oxford or Cambridge. Lawyers came out of the Inns of Court, in London.

The Inns had no connection with the universities. They had no connection with Roman law or with the general legal culture of Europe. Young men at the Inns, if they learned anything, learned English law, English pleading, English legal experience. Legal training was primarily practical, not theoretical. This peculiar bent in English legal education helped the common law to resist the seductions of a rejuvenated Roman law, at a time when continental law fell under the spell of the “reception."

In England, too, the bench was recruited from the bar. Lawyers and judges made up a single legal community, with a shared background and common experiences, as they do to this day. They formed a cohesive group, a kind of clan, or guild.

For these reasons and others, then, the common law came down through the centuries with some of its past sticking to it, like a skin it never quite succeeded in molting. This skin was strongly colored by the feudal past. But it was only a skin. Medieval English practice left deep marks on the language and habits of common law lawyers; but as the economy, and society, and culture changed, so too did the common law its substance, its guts, its bones and body, even as form and language kept a certain amount of ancient attitude.

The classic common law was utterly obsessed by two central topics: formal legal process and the law relating to land. A second's thought tells one, however, that these two topics could not have been all of the living law of England, any more than the life of great lords could have been the life of everyone in England. Common law was, essentially, the law of the royal central courts. It was this law, basically, that the great English jurists, up to and including Blackstone, described. But the royal central courts, by and large, handled the legal problems of a tiny group of people. Leaf through the pages of Lord Coke's reports, compiled in the late sixteenth and early seventeenth centuries; and you will find a colorful set of litigants, all drawn from the very top of British society lords and ladies, landed gentry. high-ranking clergymen, and wealthy merchants. Common law was an aristocratic law, it was a law for and of the gentry and nobility. The masses were hardly touched by this system and only indirectly under its rule except for the bite of a rather savage system of criminal justice.

There was law on the manor, law that controlled the common people and bound them to their betters. This was local law, customary law; and it made very little impact on the treatises, on books like Blackstone's. Law books were written at the seat of power: they dealt with the king's kind of law. The day-to-day law of the lower orders was barely noticed in these circles.

Nor did common law, which was royal law, the law of the realm, in fact cover the whole kingdom. Authority was not so centralized and compact. There was no single focus, no single legal culture. English law was pluralistic; it took many forms, and it varied from place to place. It was a little bit like the law of England's later colonial empire, especially the African colonies, where official law, modeled on the mother country, was dominant in the capital, among expatriates and businessmen, while in the countryside. customary law was left largely to fend for itself. In England, too, in the Middle Ages, many local customs, like local dialects, lived on alongside the common law.

Primogeniture, for example inheritance of land by the eldest son was the common-law rule, but not the rule in the county of Kent. In Kent, under the system known as gavelkind tenure (abolished in 1925), land descended to all the sons equally. Local and customary law had important influence on the law of early America. Colonial practice derived in part from that law which the settlers knew best: the local laws and local customs of their communities back home.

Even for important affairs of important people, the reign of the common law was not undisputed; it had to contend with rival courts, institutions, and subsystems of law. In the end, the royal common law usually won out. But it won only by granting deep concessions. Language once more is a useful analogy. The Anglo-Saxon language held out against onslaughts of Norse and French, and two culture tongues, Latin and Greek. But the surviving language English was drenched with foreign words, and heavily overlaid with foreign syntax.

**Prologue-** ***Continued***

Modern common law is full of Roman-law words and ideas and is also heavily indebted to equity, admiralty, and the law merchant, branches of law that were basically indebted to continental law-ways.

Of the formal rivals of the common law, the most astounding was the peculiar system, administered by the chancellors, known as equity. Since early medieval times, the chancellor had been an important royal official. The chancellor's office the chancery was responsible for issuing writs to the common-law courts. Through a long and complex process, chancery itself became a court. But it was a court with a difference. Chancery did not follow strict common-law rules. Looser principles governed, principles in accord with prevailing ideas of "equity."

The chancellor was said to be "keeper of the king's conscience." As such, he had the power to dispense with unjust rules. The chancellor was a clergyman, originally; and he could read and write (no small achievement). He had a staff of scribes, too, who were in charge of the machinery" of writs, the documents that petitioners needed to set legal processes in motion. This power gave him a strategic position in the royal system of justice. Over the course of time, the chancellor, as the king's delegate, loosened the rule of the common law in a number of fields of law. The theory of "equity" developed to explain the chancellor's power, and reduce his work to some kind of logical order. The ad hoc character of equity rules gradually disappeared. One could speak of rules, principles, and doctrines of equity as well as of "law." Equity became. in short, almost a system of antilaw.

In England, in short, two contradictory systems of civil law coexisted and not always peacefully. Yet, in many ways law and equity complemented each other. The common law could proclaim duties and rights; it could award money damages. But it could not force anybody to act (other than to pay money). Equity, on the other hand, had a whole battery of supple remedies. The injunction was one of these. An injunction is an order commanding a person to do something (or sometimes to stop doing something). It is enforceable because, if a defendant disobeys, the chancellor can declare him in contempt of court, and put him in jail without further ado. Equity had power over persons, not over things. It could not renderjudgments that actually affected the title to the land, for example. It could only act on the parties. The chancellor could order B to give A's land back to him. If B refused, the chancellor could send him to jail until he obeyed. But the chancellor could not give A the land directly.

Procedurally, the two systems were very different. Equity was closer to continental law and to canon law. No jury ever sat in a chancery court. The jury was purely a common-law institution. On the other hand, many familiar doctrines, and some whole branches of law, such as the law of trusts, grew up out of equity rules and equity practices.

What was curious, perhaps unique, was the separation, within one legal system, and one country, of these two systems, law and equity. A person could have a claim that was good in equity and bad in law; or vice versa. For example. the common law judges tended to consider a deed of land valid so long as it was executed in the proper form. In equity, however, the deed had no effect if it was the product of fraud or deceit, no matter how good it was in form. Hence, a claim based on a deed might win or lose, depending on which courtroom door the plaintiff entered.

Courts of common law paid no attention to the norms of equity. For their part, an equity court would dismiss a case if the plaintiff had an "adequate remedy at law."

Relations between the two systems were different, of course, at different times. In Tudor-Stuart days, open and bitter conflict broke out between equity and law. The common law lawyers did not succeed in driving their rival out of business, much as they would have liked to. After a time, the two systems came to a rough and ready coexistence. In the nineteenth century, equity and law finally "merged' in most of the states. This meant, basically, that there would no longer be separate courts of equity and law; judges would handle both systems in a single court, and with a single procedure. Where rules of law and equity collided, equity usually won. Some states, Massachusetts for one, had never had a system of equity. Most of the states made their merger move in the nineteenth century, New York, for example. New Jersey, however, did not abolish its chancery courts until 1947. And in little Delaware, the separate chancery court has lasted into the twenty-first century.

Even though equity, almost everywhere, is gone as a separate entity, its historical memory lingers on, and makes a difference. The right to trial by jury often depends on whether the case would have been, in the past, an equity case or not. Chancery was not the only court that did not follow strict norms of common law.

The court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. The Star chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it a reminder that kings and queens could not safely entrust high state policy to feisty, independent courts.

The special commercial courts also outside the common law lasted longer than star chamber. The royal central courts, absorbed in the tangle of land titles, paid little attention to the Lombard merchants, and to the bankers and tradesmen, foreign and native, who bought and sold and trafficked and used the customs and habits of international business. The mercantile courts, however, Were sensitive to these customs and habits; and knowledgeable about them. In these courts, a separate body of law the law merrhant governed, rather than the ordinary law of England. There were various types of commercial courts, including the colorful courts of piepowder, a court of the fairs where merchants gathered.

**Prologue-** ***Continued***

Sir Edward Coke spoke of it as a court of "speedy justice . . . for advancement of trade, and traffic," as fast "as the dust can fall from the foot."

Through fair courts and merchant courts, English law and practice recognized the merchant's ways of doing business. From these sources, English law learned to handle the documents from which modern checks, notes, bills of exchange, and bills of lading are descended. Eventually, the ordinary courts absorbed the law merchant into the bloodstream of the common law; and the merchant courts decayed. By the seventeenth century, this process was well advanced.

A final key figure in this development was Lord Mansfield, who died in 1793. Mansfield, deeply versed in Roman and continental law, had a sure touch for commercial cases. His decisions were sensitive and responsive to the merchant's needs and ways.

Admiralty, the law of the high seas and maritime commerce, was another. "rival" of the common law. Admiralty too had an ancient international tradition, quite separate from the common law. As early as the sixteenth century, the English court of admiralty came into conflict with the common-law courts. The struggle for control over sea law was not finally resolved for many years. It was not the romance of the sea that was at stake, but power over naval policy and international transport.

Family law marriage and divorce was also largely outside the pale of common law. Marriage was a sacrament; church courts, even after the Reformation, maintained jurisdiction.

The law of succession to property (in modern law, wills and estates) was curiously divided; the common law controlled inheritance of land; church courts controlled inheritance of personal property. The two courts used quite different rules. If a man died intestate (without a will), his eldest son inherited his land. But the children shared equally any personal property (money and goods). The ecclesiastical courts, like, the courts of equity, did not use common-law procedures; a jury, therefore, had no role in its decisions.

This prologue has laid heavy stress on courts. But one must not assume that all English law was judge-made. A great deal of law came, directly or indirectly, from King and Parliament. In Renaissance England, there was nothing like the steady stream-of statutes that is usual today. But there were statutes; and they were important. Some of them fundamentally altered the structure and substance of the law. Some were carried over into the colonies.

English law was never static. The law of Charles II was not the law of Edward I, and it was light-years away from the law of King Alfred. Mostly, what has been described is what resulted from centuries of evolution and enactment, roughly at the time of the settlements. England, in 1600, stood on the brink of a period of the most profound changes, a period that has not yet ended.

As far as the legal order is concerned, probably the single most important aspect of this modern period has been a revolutionary shift in the attitude of society toward law. In traditional cultures, law was basically static: a divine or time-honored body of rules. It defined people's place in the order of society. In modern times, law is a tool, an instrument; the people in power use it to push or pull toward some definite goal. The idea of law as a rational tool or instrument underlies all modern systems, whether capitalist, socialist, fascist, whether democratic or authoritarian. And all modern societies govern by and through law through rules, regulations, statutes, decisions. And these norms are constantly growing, shrinking, changing. The period covered by this book is a period of restless and insatiable change.