AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES

by

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Second Edition

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PREFACE

This book had its genesis in a series of lectures on American law that I delivered to the class in comparative law at the University of Istanbul more than two decades ago. It occurred to me then that there was a real need for a brief introductory text on the legal system of the United States. This thought was confirmed when, with translations, the first edition appeared in nine languages. The second edition is intended to serve the same purpose as the first, for both American and foreign readers.

This book does not pretend to explain the political or economic system within which our law has developed, nor does it purport to compare our law with that of any other country. Its object is to set forth those fundamentals of our legal system that are most important as background in the event of further inquiry and most likely to be novel or troublesome to one not trained in it.

In order to present this complex subject in small compass, I have taken liberties that would not be fitting in a more detailed exposition. It is only fair to warn the reader of the obvious fact that what follows is general rather than specific and illustrative rather than exhaustive. Prevailing or conventional views on controversial points may be presented without notation of conflicting or dissenting opinion, and significant matters may be omitted entirely. The reader who would be on firmer ground may find guidance in the list of reading suggested in each chapter.

I owe more than the usual author's debt of gratitude to my colleagues, who have read the manuscript and given criticism, suggestion, and encouragement. For help in editing I thank Donald Guiney, a third year student at the School of Law. Responsibility for remaining vices rests upon my own shoulders.

E. Allan Farnsworth

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NOTE ON TERMINOLOGY

It will be helpful, at the outset, to clear up the considerable ambiguity that surrounds the terms "law" and "common law." The word "law" in the English language is used to refer to both the sum of all legal rules *(ius, droit, diritto, derecho, Recht)* and the express rule laid down by legislative authority *(lex, loi, legge, ley, Gesetz)*. Originally the term "common law" described that part of the law of England which was non-statutory and common to the whole land rather than local. It may still be used in much the same sense, as in the phrase "at common law," to refer to the law, usually of England, during the early part of its development and before widespread legislation. The American lawyer may use it in at least three other senses. The first use is to refer to the law that is laid down by the courts rather than by the legislatures. In this book the term "case law" is used for this purpose; "decisional law" is used to include the law as laid down by other tribunals, such as administrative tribunals, in addition to courts. "Statute law" is used to refer to the enactments of legislatures; "legislation" is used in its broadest sense to include such similar forms of law as constitutions, treaties, administrative regulations, and the like, as well as statute law. The second use of the term "common law" is to refer to the body of rules applied by the common law courts as distinguished from the special courts of equity or admiralty. The term is not used in this sense in this book. The third use is to refer to this country as a "common law" country, whose law is based on English law, as opposed to a "civil law" country, whose law is derived from the Roman law tradition. This is the sense in which these terms are used in this book. The term "civil" is also sometimes used in the United States in opposition to "criminal." It is used in this book in this sense only in such terms as "civil case" and "civil procedure." The term "civil law" is not ordinarily used in the United States to refer to the subject matter of a civil code, in opposition, for example, to "commercial law."

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Chapter I

HISTORICAL BACKGROUND

American law has two distinctive ingredients: a singular variety of federalism and a common law tradition. How did federalism take shape during the establishment of the union? How did the common law win acceptance during the formative era?

ESTABLISHMENT OF THE UNION[1]

Rapid change has been the rule rather than the exception during the course of American history. Less than four centuries have passed since the start of the colonial period, which is commonly dated from the first English settlement at Jamestown, Virginia in 1607. In somewhat over two hundred years since they declared their independence in 1776, the thirteen colonies of under three million inhabitants clustered near the Atlantic seaboard have become fifty states of upwards of two hundred and fifty million inhabitants, spreading from ocean to ocean and beyond.

Along with change there has, from the outset, been diversity—of religions, of nationalities, and of economic groups. To the colonies came Anglicans, Baptists, Huguenots, Presbyterians, Puritans, Quakers, and Roman Catholics. Among the English majority were pockets of Dutch, French, Germans, Irish, Scots, and Swedes. They lived as merchants, artisans, plantation owners, small farmers, and pioneers. But most important, there was diversity in the political organization of the colonies, which were entirely separate units under the English crown. Some were royal provinces ruled directly by a royal governer appointed by the king. Others were proprietary provinces with political control vested by royal grant in a proprietor or group of proprietors. Still others were corporate colonies under royal charters which generally gave them more freedom from crown control than either of the other forms. Each of the colonies had its own independent evolution and its own largely separate existence until the events that led up to the Revolution put an end to their self-sufficiency. No adequate comprehension of the American legal system is possible without an

[1] Part of the material in this section is adapted from N. Dowling, *Cases on Constitutional Law* 50-69 (6th ed. 1959), with permission of the publisher, Foundation Press, Inc.

understanding of the way in which these individual colonies were welded together into a single nation under a Constitution which has, with relatively little amendment, withstood the stress of diversity and the strain of change from 1789 until today.

The events that provoked the American Revolution arose in large part out of the measures taken by Britain to solve three of her major problems of the mid-eighteenth century: first, the need for additional revenue, some of which, it was thought, the colonists should contribute; second, the demand for enforcement of commercial regulations by British merchants interested in preserving colonial markets and sources of supply; and third, the difficulty of control of new territories, involving administration, land organization, and protection against Indians. In reaction to these measures, which the colonists found oppressive of their liberties, the First Continental Congress met in Philadelphia in 1774. Composed of some fifty-five delegates from almost all the colonies, it was a harbinger of union among the colonies and of war with England. The colonists were anxious to assure their enjoyment of rights that the English had under case law and under the English Bill of Rights of 1689 and other great enactments of which they felt they had been deprived. This assembly, unauthorized by the Crown, represented a great advance toward united colonial action. From this moment forward there was always in being a public body devoted to the common cause of the colonies. The forceful Declaration and Resolves issued by this First Congress set out the arguments of the colonists and demanded that Parliament cease its interference in matters of taxation and internal polity. But the Congress rejected a proposed plan of colonial union.

By 1775, when the Second Continental Congress convened, fighting between the colonists and the British had already begun. Despite its dubious status, this body assumed authority over the colonies as a whole and instigated preparations for war. In spite of the hostilities, there was reluctance to break with England, and only after long delay were all of the colonies brought into line and independence declared in July, 1776. The Declaration of Independence detailed the colonists' grievances and epitomized much of the revolutionary theory. The preamble, which calls attention to the "station to which the Laws of Nature and of Nature's God entitle" the colonists and to the rights with which "all men. . .are endowed by their Creator," reflects the influence of theories of natural law under which the Revolution was justified. The language is, however, not that of union but only that of "free and independent states." It

did not unite the colonies among themselves, but only severed their ties with England.

By 1777 a committee of the Second Continental Congress, at work on the problem of colonial union, had drafted Articles of Confederation, but these were not finally ratified until 1781. This was the first serious attempt at federal union. However, each state was jealous of its newly acquired sovereignty, conscious of its own special interests, and hopeful of its own distinctive kind of reform. The Continental Congress created under the Articles resembled an association of diplomatic representatives of the various states in which each state had an equal vote. There was no provision for a separate national executive or judiciary. The most conspicuous reason for the ultimate failure of the Confederation was the lack of powers granted to Congress. It had no authority to levy taxes, to regulate interstate or foreign commerce, or to ensure state compliance with treaties. It was against this background that many of the best minds in America came to the Constitutional Convention in Philadelphia in May, 1787, to try to preserve the union.

They approached their task equipped not only with the governmental theories of their day, but also with an impressive degree of realism. Beginning in 1776 state constitutions had been adopted, occasionally amid bitter political rivalries. A number of the delegates had participated in the drafting of these documents and had been members of the Continental Congress. It was in large measure experience on which they relied—experience under colonial rule, under state constitutions, and under the Articles of Confederation. The chief problem before them was to form a strong union without obliterating the states as constituent, in some respects autonomous, parts of the system; it was through the states that experience gained in the colonial period was to be preserved. Widely differing points of view were ably represented among the delegates and the result was inevitably a compromise. As the Convention progressed, the movement away from a loose league of sovereign states, as the Confederation had been, grew more pronounced. Instead of adding coercive and other powers to patch up the old league, the delegates ultimately arrived at the crucial decision of the Convention, to have a central government with widened powers designed to operate on individuals rather than states.

In September, 1787, the Constitution was signed and submitted to Congress, to become effective upon its acceptance by two thirds of the states. This occurred in July, 1788, and the first President, George Washington, was inaugurated in April, 1789. The final text

of the Constitution shows the influence of principles developed in the course of history. The notions that the people are sovereign and that their government is based on a social compact may be found in the preamble, in the provisions for state conventions to ratify the completed Constitution, and in the idea that powers are "granted" to the central government. The theory that the federal government is one of limited powers is evidenced by their enumeration, including the power to tax, to wage war, to regulate interstate and foreign commerce, and to make treaties; as to the residue each of the states has the capacity to make law. The concept of the separation of the federal legislative, executive, and judicial powers is implied by the form of the Constitution, with three separate major articles each of which delineates one of these three major, and presumably distinct, powers. And the belief that constitutional rights should be embodied in a written instrument is evident from the document itself. The Constitution contained no guarantees of basic human rights. But in 1789 Congress promptly proposed the first ten amendments to the Constitution, which are popularly known as the Bill of Rights because many of them are concerned with the rights of the individual against the federal government. Their ratification was completed in 1791.

One of the tenets of the framers of the Constitution was that the interpretation of constitutional rights should be entrusted to specialists. The judiciary article provides for an independent judicial power operating, like the legislative and executive, upon both states and individuals, and vests this power in a Supreme Court and in such inferior courts as Congress "may from time to time ordain and establish." Their jurisdiction expressly includes cases arising under the Constitution. Coupled with this is a statement that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." But there is no specific provision giving the federal courts the power of judicial review[2] over either federal or state legislation, though many of the delegates must have assumed it would have that power.

In 1789 Congress passed the First Judiciary Act which, on its face, contemplated federal judicial review of state court decisions in certain cases. The Act implemented the judiciary article of the

[2] Judicial review, as that term is used in American constitutional law, refers to the power of a court to pass upon the constitutionality of legislation and to refuse to give effect to legislation that it decides to be invalid on constitutional grounds.

Constitution by creating lower federal courts and by defining their jurisdiction along with that of the Supreme Court. The state courts had already exercised judicial review over state legislation under state constitutions and continued to do so, and the newly created lower federal courts began to strike down state legislation as contrary to the federal Constitution itself. Judicial review was natural because of colonial experience with review of legislation and because federal and state constitutions had come to embody notions of limitations on government. Since the federal government was a government of limited powers only, those granted to it by the Constitution, it could be inferred that the federal judiciary was also to determine whether Congress had exceeded these powers. This inference was borne out by the opinion of Chief Justice John Marshall[3] in the landmark case of *Marbury v. Madison*,[4] decided in 1803. In that case the Supreme Court refused to give effect to a section of a federal statute, on the ground that Congress in enacting it had exceeded the powers granted it by the Constitution, and thereby firmly established that federal legislation was subject to judicial review in the federal courts. A few years later it affirmed its authority under the federal Constitution to pass upon the validity of state statutes,[5] an authority which has been one of the great unifying forces in the United States. Justice Holmes[6] of the Supreme Court of the United States observed, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."[7] A state court, too, may refuse to enforce a state or federal statute on the ground that it violates the federal Constitution, but this determination is subject to review by the Supreme Court of the United States.[8] The subject of judicial review is discussed in more

[3] John Marshall (1755-1835) was the fourth Chief Justice of the United States, from 1801 until 1835. He had previously served in a number of public offices, including that of Secretary of State. His only formal education consisted of two months of law lectures at the College of William and Mary. He was the author of many of the most significant opinions of that court during this crucial period and is generally regarded as its greatest Chief Justice.

[4] 5 U.S. (1 Cranch) 137 (1803).

[5] *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

[6] Oliver Wendell Holmes (1841-1935), a graduate of Harvard College and the Harvard Law School, practiced law in Boston, served briefly as professor of law at Harvard, and then for twenty years as justice and later chief justice of the Supreme Judicial Court of Massachusetts. In 1902 he was appointed an associate justice of the United States Supreme Court, where the quality of his dissenting opinions won him the title of the "Great Dissenter." He resigned because of ill health in 1932. His most famous work is *The Common Law* (1881), based on a series of lectures.

[7] Holmes, *Collected Legal Papers* 295-96 (1920). In Corwin (ed.), *The Constitution of the United States: Analysis and Interpretation* 1241 (1953) there is a list of only seventy-three acts of Congress held unconstitutional in whole or in part by the Supreme Court from its inception to June 30, 1952.

[8] See p. 38 *infra*.

detail in later chapters, as is the hierarchy of such authorities as constitutions, treaties, statutes, and judicial decisions, among the various sources of law in the newly formed union. For present purposes it is sufficient to note that in spite of the surrender by the states of some of their sovereignty when they joined the union, each state was left to work out its own law as best it might, subject only to the restraints imposed under the Constitution.

ORIGINS OF AMERICAN LAW

Just as there was no uniform evolution of political organization in the colonies, there was no uniform growth of colonial law. The same diversity as to extent of crown control, date of settlement, and conditions of development resulted in thirteen separate legal systems, each with its distinct historical background. Furthermore, as the boundaries of the United States were extended, large areas were added which had been subject to Spanish, Mexican, or French sovereignty for substantial periods of time. A few states, most notably Louisiana, still show the imprint of such origins, and the civil law institution of community property can be found in eight states today. Nevertheless, the similarities among state law far outweigh the differences and there is on the whole an unmistakable family resemblance to the law of England. That the influence should have been English is hardly surprising in view of the language and nationality of most of the colonists; that this influence should have met with the resistance that it did calls for some explanation.

There were at least three impediments to the immediate acceptance of English law in the early colonial period. The first was the dissatisfaction with some aspects of English justice on the part of many of the colonists, who had migrated to the New World in order to escape from what they regarded as intolerable conditions in the mother country. This was particularly true for those who had come in search of religious, political, or economic freedom. A second and more significant impediment was the lack of trained lawyers, which continued to retard the development of American law throughout the seventeenth century. The rigorous life in the colonies had little attraction for English lawyers. English law books were not readily available, and few among the early settlers had any legal training. The third impediment was the disparity of the conditions in the two lands. Particularly in the beginning, life was more primitive in the colonies and familiar English institutions that were copied often produced rough copies at best. The early settlers did not carry English law in its entirety with them when they came, and the

process by which it was absorbed in the face of these impediments was not a simple one.

The extent to which English case law, as distinguished from statute law, was in effect, either in theory or in practice, during the early history of the colonies is not free from dispute. It is clear that though the British Parliament had legislative power over the colonies, it was not fully exercised. Although acts passed prior to the initial settlement of a colony, if adapted to the circumstances, were generally regarded as being in force in that colony as well as in England, acts passed after initial settlement did not extend to the colonies unless expressly provided. Power to legislate had been conferred upon the colonies themselves, and each had its own legislature with at least one elective branch and with considerable control over internal affairs. Codification was common in the early stages of some of the colonies partly because of the absence of law books and the lack of a trained bar, and partly because of colonial notions of law reform. Colonial legislation was reviewed by administrative authorities in the mother country and might be set aside if it was "contrary" or "repugnant" to the laws or commercial policy of England. Colonial legislation was also subject to judicial review and might be held to be void when appeals from judgments of colonial courts were taken to England. But no systematic control was exercised until the end of the seventeenth century.

During the seventeenth century the justice that was administered was often lacking in technicalities and was sometimes based on a general sense of right as derived from the Bible and the law of nature. Court procedure, at least outside of the superior courts, was tailored to suit American needs and was marked by an informality of proceedings and a simplicity of pleadings befitting a less technical system in which the judges were, for the most part, untutored in the law. The model may have been the local courts in England which would have been familiar to many of the colonists. Substantive law, as well as procedure, began to respond to colonial needs. In England the feudal policy in favor of keeping estates in land intact had resulted in the rule of primogeniture, the exclusive right of the eldest son to inherit the land of the father.[9] In America, however, this rule was rejected in favor of equal distribution among all children, subject to varying rights of a surviving spouse. This practice began in the northern colonies, was confirmed there by statute, and had spread southward by legislation to all of the states by the end of the eighteenth century.

[9] The rule of primogeniture was not changed in England until the Administration of Estates Act in 1926.

The beginning of the eighteenth century saw considerable refinement of colonial law and a concurrent increase in the influence of English case law. Review of colonial legislation had become more thorough. With the growth of trade and the increase in population—to some three hundred thousand in 1700—the ranks of trained lawyers were swelled and the courts of review began to be manned by professionals. Some were English lawyers who had immigrated, while others were native lawyers who had studied in London or as apprentices in law offices in the colonies. English law books had become increasingly available and it has been said that by the time of the Revolution Williams Blackstone's[10] widely read *Commentaries on the Laws of England*, which first appeared between 1765 and 1769, had sold nearly as many copies in America as in England. Interest in English law was stimulated by the necessity of dealing in commercial matters with English merchants trained in its ways and by the desirability of reliance upon its principles to support the colonists' grievances against the Crown. By the time of the Revolution English law had come to be generally well regarded and each colony had a bar of trained, able, and respected professionals, capable of working with a refined and technical system. The colonial legal profession, especially in the cities, had achieved both social standing and economic success. It was also politically active: twenty-five of the fifty-six signers of the Declaration of Independence were lawyers.

It is therefore not surprising that most of the thirteen original states formally "received," that is adopted, by constitution or statute, some part of the law of England along with their own colonial enactments. The formulas varied, but a typical reception provision might include that part of English law that "together did form the law of said colony" prior to such a specific date as 1607 or 1776. In other states the reception of English law was achieved by judicial decision alone. As additional states were carved out of the western territories, similar procedures were followed with regard to reception. While the details of the reception of English law differ considerably from state to state, it is clear that the changes and developments in English law after the date of reception for a particular state have no binding force at all in that state.

The Revolution resulted in a setback to the influence of English law in some of the new states because of political antipathy. In a few, anti-British sentiment was implemented by statutes

[10] William Blackstone (1723-1780), an English barrister, began the first university lectures on the common law in England at Oxford in 1753. In 1758 he was appointed to the first professorship of English law at that university. He is remembered chiefly for his *Commentaries*, which went through eight editions in his lifetime.

prohibiting the citation of English decisions handed down after independence.[11] At the same time the quality of the practicing bar as a whole declined. Some lawyers, who had been loyalists, had left the country before the end of the war; others, seizing the opportunity for leadership, accepted political or judicial posts under the new government. The standards and repute of the remainder deteriorated in many communities. The era of the lay judge was not entirely over and during the early nineteenth century the state of Rhode Island had a farmer as chief justice and a blacksmith as a member of its highest court. There was not even an adequate body of American case law that could be used by those judges who had the ability and inclination to do so. Although reports of cases began to be published at the end of the eighteenth century, they were few in number. The opportunity for broadening the base of American law was considerable. There was some inclination to look to French and Roman law, and European writers were cited, particularly in the fields of commercial law and conflict of laws where English treatises were inadequate. But few judges were versed in modern foreign languages and, while English treatises and reports were available, the *Code Napoléon* did not appear until after the beginning of the nineteenth century. Blackstone's *Commentaries,* which had been published in an American edition in 1803, were particularly influential.

During the first part of the nineteenth century, agriculture and trade dominated the economy as energies went into the westward expansion and the production of staples for European markets. Judges labored to shape English legal materials to fit the conditions of their particular jurisdictions. They examined the pre-Revolutionary English law to determine its applicability to American conditions and laid the foundations of such fields as contracts, torts, sale of goods, real property, and conflict of laws. There was constant legislative intervention in such areas as procedure, criminal law, marriage and divorce, descent and distribution, wills and administration. Sometimes the law grew out of local usages or needs. The customs of western farmers and gold miners formed the basis for water and mining law in some of the western states. Some of the prairie states where cattle-raising was the means of livelihood and wood for fences was scarce, changed the English rule that the owner of cattle is liable without fault for damage that they may

[11] New Jersey and Kentucky enacted statutes forbidding the citation of common law authorities, and a common toast of the time is said to have been: "The Common Law of England: may wholesome statues soon root out this engine of oppression from America." E. Haynes, *The Selection and Tenure of Judges* 96 (1944). See also Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 Va. L. Rev. 403 (1966).

cause to a neighboring crop-owner. But it was also an era of great "national" treatises such as James Kent's[12] *Commentaries on American Law,* published from 1826 to 1830, and nine works by Joseph Story[13] published from 1832 to 1845. These treatises, which went through many revisions, played an important role in promoting uniformity by helping to counter the forces which contributed to diversity.

Out of the first half of the century came institutions and procedures that still survive. But the functions they now perform and the issues they now deal with often differ from those of the earlier formative period. The years of the Civil War, 1861 to 1865, mark a rough but convenient division between this period and the later development of American law. The years after the war saw a rapid increase in population and its concentration in the cities. They witnessed the growth of large scale industry, transportation, and communication, with attendant complexities in the corporate form of organization. From 1850 to 1860 the population of the state of Minnesota increased from 6,000 to 172,000. In 1790 only about three percent of the people in the United States lived in the six cities which had 8,000 or more inhabitants; by 1890 about one out of three Americans lived in a city of 4,000 or more. From 1869 to 1900 railway mileage grew from 30,000 to 166,000 miles. In 1876 the first telephone message was sent and in 1882 Edison's electric power plant began operation in New York City.

In this rapidly expanding industrial society the creation of a stable system of law took on increased importance. Development continued in such field as corporations, public service companies, railroads, and insurance. But during the final quarter of the century much of the law of the formative era began to crystallize and the role of the judge became one of systematizing rather than of creating. As the volume of case law increased, the uncertainty that had been inevitable in earlier years became unpopular and efforts turned toward a search for predictability. The principal achievements of the courts were the ordering of the system and the logical development of details. It is significant that the treatises of this period were more specialized than those of the first half of the

[12] James Kent (1763-1847) became the first professor of law at Columbia College in 1793. He resigned in 1798 to go on the New York Supreme Court and was appointed Chancellor of the state in 1814. Upon his retirement in 1823 he returned to Columbia, and during this period he published his *Commentaries on American Law*, a collection of his lectures dealing with nearly all phases of contemporary substantive law.

[13] Joseph Story (1779-1845) was appointed to the United States Supreme Court in 1811. In 1829, while retaining his seat on the Court, he became a professor of law at the Harvard Law School, where he reorganized the curriculum and revitalized the school. His nine commentaries developed from his lectures on subjects ranging from the Constitution to conflict of laws.