

SIXTH EDITION

Introduction to the Law and Legal System of the United States

William Burnham

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INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES

Sixth Edition



William Burnham

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 **WEST**
ACADEMIC
PUBLISHING

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To Marcia —
without whom
all this would have been
done much sooner.

PREFACE

This book is intended primarily for people interested in the U.S. legal system who do not have a U.S. legal education. The first group—and the principal inspiration for the book—are law students, lawyers and legal scholars from foreign countries. The second group comprises U.S. undergraduate college students, whether “pre-law” or not, who wish to gain an overview of the law, either for their own edification or in preparation for future study in law school. The third audience are members of the general reading public in the United States and professionals in non-law fields.

A fourth category of readers has emerged in recent years—*law* students in the *U.S.* They find that the book fills them in on subjects they do not have time to study in law school, gives them a “big picture” perspective on the law as a whole, and provides them with a helpful review of “what you would have learned in law school had you been paying attention.” In addition, many law students come to law school with an educational, family or personal background devoid of law and lawyers—nurses, engineers, artists, musicians and others. They find that the book gives them background knowledge that their education and work circumstances before law school did not supply.

The original idea for this book grew out of two frustrations. The first was my effort to find a text for a course, “Introduction to American Law,” that I was called upon to teach while on a faculty exchange in Western Europe in the early 1990s. Books for U.S. lawyers and law students are clearly unsuitable because they are too detailed. Books written for undergraduate college students, primarily business law and constitutional law books, are useful only for teaching those two areas of the law. And, in any event, they are often overly simplistic and “un-lawyerlike” in their presentation. There did not seem to be anything in between. This was confirmed when I spoke with foreign lawyers studying for advanced law degrees at U.S. law schools who felt that the big problem with their one year of law study in the U.S. was that they did not get any kind of overview of U.S. law.

The second frustration that led me to attempt this project came from the opposite perspective—my difficulties as a comparativist trying to learn about foreign legal systems. Books on other countries’ systems written for foreign audiences tend to deal in generalities that make it hard to picture how the system actually operates and what the principal legal concepts and doctrines are. At the same time, many such books are quick to give the author’s impressions of the differences between systems without giving sufficient detail to allow me, as the reader, to decide for myself how that system fits into my own frame of reference. I found this was true as well of the few books on the U.S. legal system written by U.S. comparative law scholars.

Accordingly, my approach in this book has been to provide a summary of the law and the operation of the legal system in the United States that is sufficiently detailed to allow readers to make their own judgments, and that does not burden the reader with my own comparative observations. When U.S. institutions or laws have been the subject of criticisms, I have sought to set out the arguments from all sides of the question. To aid readers interested in more detail, I have put in many citations to original materials, particularly cases and statutes, and to books and articles that are particularly suited to the non-specialist. The Reader’s Guide and Bibliographic Introduction that follows this Preface generally explains the books and cases cited and makes some general comments on the organization of the book. It should help in reading and using the book.

The book is now in its sixth edition and it has evolved over time, though the basic

approach remains the same. While no new chapters have been added for the sixth edition, this is the most thorough edit and revision of the book since its first edition. The more substantial revisions and improvements have been made possible by my taking emeritus status in 2014.

I have also made stylistic changes and editing for clarity throughout, with substantial rewriting of some portions of the text. More headings have been added where it seemed that the text went on too long without a break or where more specific topical organization aided comprehension. There is also more comprehensive cross-referencing to other places in the book where the topic is treated in more detail. Many new “defined” entries for legal terms appear in the index, allowing it to be better used as a glossary. Finally, more cases cited in footnotes are followed by parenthetical summaries of their holdings unless what the case stands for is obvious from the text.

This edition has been thoroughly updated and is current through U.S. Supreme Court decisions issued in the first week of May, 2016. Several sections of the book have been revised and expanded, sometimes in light of recent developments and sometimes simply because, on reflection, they seemed to be in need of more detail or reorganization. In roughly the order that they appear in the book, revisions and expansions concern the following: judicial narrowing of Congress’s commerce clause power; statutory interpretation; *stare decisis* and overruling precedents; the judge-jury division of labor in trials; judicial elections, particularly conduct limitations on judicial candidates and the advent of “Big Money” in state judicial elections; judicial review of and deference to agency interpretations under *Chevron*; recess appointments of federal officials; Article I tribunals and the disputes they can adjudicate; preclusion effects of administrative agency decisions; the new pleading regime in federal courts; the duty to preserve electronic evidence for discovery, and spoliation; equitable defenses; confidentiality of settlement agreements; joinder and complex litigation, particularly class actions and multi-district litigation; personal jurisdiction, particularly over foreign defendants; punitive damages and tort reform; arbitration clauses; recent confrontation clause cases; plea bargaining, particularly the role of defense counsel and enforcement of plea deals; standing to raise constitutional issues; federalism limits on federal power; 1st Amendment and press freedom; various consumer rights, including the holder-in-due-course prohibition and state consumer protection laws; intellectual property, particularly the AIA and protection of business method patents; non-traditional marriages in light of the new constitutional protection of same-sex marriage; vehicular manslaughter and murder; death penalty developments; crack vs. powdered cocaine sentencing discrepancies; corporate veil-piercing in greater depth; securities fraud and insider trading; employment discrimination proof and defenses; environmental law, particularly air, water pollution, toxic waste cleanups and environmental impact statements; extraterritorial application of U.S. law and judicial process; the Alien Tort Statute and Torture Victims Compensation Act; proof of foreign law; *forum non conveniens*; and foreign State sovereign immunity.

The breadth of this book has required that I write in several areas of law in which I am not a specialist. This is often the fate of comparative law scholars. But I accept all the dangers that go with that fate if readers find this book helpful.

May 2016
Ann Arbor, Michigan

William Burnham

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Several lawyers and law students from other countries have provided useful comments and helpful suggestions over the years. Among them have been my students at the University of Utrecht and the University of Maastricht in the Netherlands, the University of Trento (Italy), the Moscow Institute of International Relations, Mari State University Law Faculty (Mari Republic, Russia), and Kwansai Gakuin Law Department (Nishinomiya, Japan). In the U.S., my LL.M. students at the University of Michigan Law School and the succession of foreign lawyers who have attended the summer programs of the American Institute for Legal Education have made helpful suggestions.

I also owe a special thanks to Tom Berreman, now retired from West Publishing, who maintained his and my interest in this project through several interruptions and difficulties.

READER'S GUIDE AND BIBLIOGRAPHIC INTRODUCTION

Organization of Chapters The chapters are arranged in an order that makes sense to me. But readers or teachers may wish to use them in a different order. In general, there is no great advantage to any particular order. In most situations, where knowledge from a different chapter is needed, there are cross-references to the appropriate pages elsewhere.

In general, the organization of the book is as follows. Chapters I through VI deal with matters of constitutional, administrative and judicial structure of the legal system and general legal methodology, including caselaw method, the adversary system of adjudication and legal education and the legal profession. Chapters VII and VIII deal with procedural law in civil and criminal cases. Chapter IX, on constitutional law, starts the remainder of the book's focus on substantive law topics. Chapters X through XVII cover most of the major substantive subject-matter areas of the law.

Within chapters, organization varies. But I have tried to place the more difficult material toward the end of each chapter. A teacher who wishes to spare students some of these complexities can have them stop at the appropriate point and go on to the next chapter.

Citations to Cases and Other Authorities There are many citations to original sources in this book. These citations should facilitate the use of this book as a reference. However, readers who plan to use it in this way should make sure that they consult the original sources cited. A table of case citations is provided in Appendix C.¹

In most instances where a case is cited in this book, the facts of the case will either be apparent from the text or will be set out in a parenthetical summary following the citation in the footnote. Part of the reason for citing cases is because caselaw is an important source of law in a common law system. But even aside from their value as sources of law, the fact situations of cases serve as concrete illustrations of how the legal concepts, doctrines or laws discussed in the text are applied in practice. In addition, judicial opinions are often helpful for reference purposes because they tend to be encyclopedic, informing the reader generally about the subject matter involved beyond the specific issue being decided. Opinions also contain useful citations to more general caselaw, law review articles and treatises.

Looking Up and Reading Cases It is essential that foreign law students or lawyers planning to study in the United States look up and read a few of the principal cases cited here, since much of their time studying in U.S. law schools will be taken up by reading and analyzing appellate opinions in preparation for class. Moreover, cases give one a real sense of what kinds of legal disputes arise in the United States and how they arise. I would strongly urge even the casual reader to look up a case that seems interesting from the description in the text and read it.

Teachers using this book should consider handing out one or two cases in each subject-matter areas for students to read after they have had an overview from the narrative description of the law in the book. Especially useful would be recent cases that have come out since the book's publication date, especially cases that appear to take

¹ Omitted from citations in both the book and the table of cases is any denial of review of the case by a higher court, including denials of *certiorari* by the U.S. Supreme Court.

the law in a new direction. Another way to work cases in is to give single students or groups of students the task of finding and reading a particular case in the library and then reporting their impressions and analysis of it to the entire class.

A suggested structure for class discussion of a case would consider the following: (1) whether the case makes any changes in the basic doctrine and what those changes are; (2) whether prior relevant caselaw or statutory provisions were properly applied to reach the decision; and (3) which opinion is more persuasive, the majority or the dissent.

Case Citation Form Information on citation form and legal research is set out in the last section of Chapter II.² However, some preliminary comments should be made here to facilitate reading.

The basic citation form for a case decision is the following: (1) case name, (2) volume number, (3) abbreviated case reporter series name, (4) page number where the case begins, and (5) the court and year of the decision in parentheses. For example, the case set out in the Appendix on page A1 would be cited as *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973). This indicates that it is found in volume 280 of West's Southern Reporter, 2d Series, starting on page 431, and that it is a 1973 decision of the Florida Supreme Court. Had the case been from the Florida Court of Appeals, the intermediate appellate court in that state, the abbreviation "Fla.App." would have appeared in the parentheses with the year. States often publish official state reporters. However, the official citations are not included because official reporters are often not carried by libraries outside the state that publishes them.

In the federal courts, United States Supreme Court cases are reported in United States Reports (U.S.), its official reporter, so any case with U.S. as the reporter citation is the U.S. Supreme Court. Only the official reporter citation is used in the text of the book. However, since general public libraries in the U.S. and foreign law libraries often have only the unofficial commercial reporters of United States Supreme Court cases—West's Supreme Court Reporter (S.Ct.) and Michie's Lawyer's Edition (L.Ed. or L.Ed.2d)—parallel citations to them are set out in the table of cases in Appendix C. Lower federal court cases are published in the West's Federal Reporter (F.2d or F.3d) and Federal Supplement (F.Supp., F.Supp.2d or F.Supp.3d). As with state court citations, right after the citation the court rendering the decision is indicated by an abbreviation in parentheses with the date. For example, (6th Cir. 2006) indicates the Court of Appeals for the Sixth Circuit (Michigan, Ohio, Tennessee and Kentucky) and (W.D.N.Y. 2006) indicates the U.S. District Court for the Western District of New York.

Appendix A reproduces a sample common law case decision and the U.S. Constitution. Appendix B has a list of sources of legal information and publications and contact information on major legal publishers. Appendix C sets out diagrams of the structure of the federal government, the court system and the floor plan of a jury trial courtroom. Following Appendix C is a comprehensive index.

Books Cited The first footnote or so in each chapter or major section of this book will contain references to more specialized books on that particular topic. Most of these books are from the "Big Four" in the educational legal publishing business: West Academic Press, Foundation Press (owned by West), Wolters Kluwer Publishing, and the LexisNexis Law Publishing. When a book published by any of these four is cited in

2 See *infra* pp. 79-84.

the text, only the name of the publisher appears. For other books cited, if they are in print or likely to be available in general libraries, I have included the full name of the publisher as well.

I have limited my citations to books most likely to be useful to the foreign lawyer or non-law-trained U.S. reader. Extended multi-volume treatises exist in most of the subject-matter areas of law addressed in this book, but they are written for legal practitioners and will tell nonspecialist readers more than they ever wanted to know. "Casebooks" also exist. But they are designed to be used by law students taking a course on the subject. As the title implies, they are primarily full of cases. The cases are then followed by a series of questions which, in the traditional style of such books, are largely unanswerable and designed primarily to stimulate classroom discussion. For the U.S. nonspecialist reader or lawyers from other countries, casebooks are an unnecessarily difficult and frustrating way to gain an overview of an area of law.³

For these reasons, I usually cite two classes of books: (1) one-volume treatises and (2) law student study aids. The one-volume treatises are written by prominent scholars and constitute their efforts in narrative form to summarize all the law of their specialty area in a single volume. Treatises of this type are used by law students to review for an examination in a course or for clarification while a course is being taught. They are also used by law teachers, judges and practicing lawyers as a departure point for research in an area of law with which they are not familiar. Typically treatises have extensive citations to cases and other authorities for further information and research. The paradigm treatise of this type is West Academic Press's "Hornbook Series" and "Concise Hornbook Series," though the other law publishers have some as well.⁴ Law student study aids take various forms: the "Nutshell Series," "Black Letter Law Series" and "Gilbert's" outlines published by West; the "Concepts and Insights" and "Turning Point" series published by Foundation Press; "Examples and Explanations" and the "Understanding the Law" series published by LexisNexis. Nutshells are intended to condense an entire law school course into a small pocket-sized paperback of around 300 pages. The Black Letter Series does much the same thing in a larger outline format. The "Examples and Explanations" book contain just that, with some introductory text. The "Understanding the Law" and "Concepts and Insights" series are somewhere between a Nutshell or Outline and a one-volume treatise.

There is great variation in the quality of writing and clarity of all the books mentioned, and in their suitability for the nonspecialist reader. Single-volume treatises and student aids are at least partly intended for review reading for a course the intended law-student reader has just finished, so they sometimes assume too much knowledge on the part of any other reader. Another shortcoming of some student aids, particularly outlines, is that they often do not provide regular citations to cases or statutes. This will frustrate the reader who wants to clarify generalizations about the law by looking at the appropriate caselaw or statute. The "examples and explanations" approach has the benefit of giving the reader both textual material and concrete problems to work through to learn basic concepts and variations on them. However, these books are often selective about what issues they cover within an area of law. They are also designed for supplemental reading in a course or for review and, like nutshells and outlines, may be too detailed and

3 Law school classes and the use of casebooks are explained in Chapter IV, pp. 139-140.

4 For the origin of the term "hornbook," see Chapter II, p. 82 note 223.

assume too much knowledge. “Understanding the Law” texts are written in narrative form. They are generally not as detailed and comprehensive as hornbooks, though they are more so than nutshells or outlines.

Legal encyclopedias include West’s *ENCYCLOPEDIA OF AMERICAN LAW* (13 volumes); *CORPUS JURIS SECUNDUM* (162 vols., updated annually with supplements); and *AMERICAN JURISPRUDENCE, 2D SERIES* (140 vols., updated with supplements). The first of the three is designed for the lay reader, while the second two are sometime used by lawyers and law students as a departure point for research.

Access to U.S. Legal Materials on the Internet Since the first edition of this book was published, there has been explosive growth in the amount of U.S. legal materials available free on the Internet. For this reason, Appendix B sets out some of the more prominent web sites where they can be found. However, since there are so many sites and they can be handily located by using general Internet search engines, no attempt at any kind of comprehensive list is attempted.

When doing legal research on the Internet one should keep in mind that not all the relevant sources of law are available, and finding aids do not yet assure that all the relevant authorities that bear on a given problem will be found. There is also no guarantee that the legal materials found are current. As a result, for any kind of comprehensive research, it is still necessary to gain access to a law library or to use the Westlaw or LexisNexis computerized legal databases.⁵

Unfamiliar Terminology There is no glossary of terms in this book as such. However, the index is designed in part to be used as one. In addition to the usual topical listing of subjects and terms discussed, the more important terms have a “defined” entry indicating the page where the term is explained. To assist in finding terms in the text, they are placed in quotation marks the first time they are used and explained.

An alternative solution is to keep handy one of the many excellent legal dictionaries that have been published over the years. The traditional comprehensive work is *BLACK’S LAW DICTIONARY*, 10TH ED. (Thomson-West 2009). More succinct dictionaries are West’s student edition of Black’s, *BLACK’S LAW DICTIONARY, ABRIDGED* 9TH ED. (West 2009), *HANDBOOK OF BASIC LAW TERMS* (Thomson-West 1999); *MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE* (Wipf & Stock 2009), *BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE*, 2D ED (Oxford U. Press 2001) and *ORAN’S DICTIONARY OF THE LAW*, 4TH ED. (Cengage Learning 2007). There are numerous free legal dictionaries available on the Internet.

5 Westlaw and LexisNexis are explained in Chapter II, *infra* p. 84.

**INTRODUCTION TO
THE LAW AND
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THE UNITED STATES**

Sixth Edition

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