

ASPEN COURSEBOOK SERIES

# THE AMERICAN LEGAL SYSTEM FOR FOREIGN LAWYERS

Eldon H. Reiley • Connie de la Vega



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ASPEN COURSEBOOK SERIES

*THE AMERICAN SYSTEM  
FOR FOREIGN*



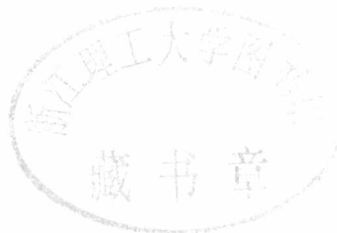
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*The authors appreciatively dedicate this book to the foreign lawyers from 79 nations in the LL.M. classes of 1997-2011 at the University of San Francisco School of Law. They encountered earlier versions of this book in their LL.M. studies. Their contributions to the finished product are reflected throughout these pages.*

# PREFACE

There may be some disagreement about what is meant by “The American Legal System.” This book is not an overview or survey of American Law, although much constitutional law and some contract law will be found between its covers. This book is about structure: the structure of the federal government, the unique relationships of the 50 separate states to the federal government and the respective legislative competences of the states and the federal government (which we call “American Federalism”); the structure of America’s dual judicial system, the relationship of judges to juries and also the relationship of judges to litigants, lawyers, legislators, and the executive branch (which we call “Separation of Powers”). This book is very much about the unique combination of functions exercised by both federal and state judges in the United States. It also has something to say about legal education and the practice of law in America.

Why are we writing “for foreign lawyers”? Because an increasing number of foreign law graduates have been coming to the United States to learn about America and its legal system. Some come to participate in one-year LL.M. programs or full-length JD programs. These young people bring a level of legal sophistication, a comparative perspective and an inquiring energy that sets them apart from American students entering JD programs. For them, we have included frequent discussions of historical background, biographical sketches of significant American judges, comparative law discussions and special attention to legal terminology (which we call “Legal English”). To them, we express the hope that such time as they spend in the United States will be not only productive, but also enjoyable, and that when they conclude their study of American law, they will have a better understanding not only of America’s legal system, but also of America’s peoples and their aspirations and concerns.

The book is structured to support a one- or two-term substantive law course. It is assumed that such a course would be accompanied by a separate program of instruction in legal research and writing. The first 12 chapters include the basic materials for an introductory course. Beginning with Chapter 13, the chapters provide opportunities for more in-depth consideration of identified issues. Many of these chapters are self-contained so the instructor or reader may pick and choose among the areas of interest.

The book is divided into four parts:

- I. Courts, Common Law, Cases, Citations, and Legal Education
- II. The Constitution: Structure and Interpretation
- III. Individual Rights: Current Constitutional Issues
- IV. Contract Common Law, UCC Article 2, and the CISG

Part I begins with a discussion of American federalism and an overview of our dual judicial system. It moves on to the history of common law and equity, the development of common law in the United States, the sources of American law and the doctrines of judicial precedent and *stare decisis*. The balance of this part is designed to get readers up to speed for participating in other law classes and for reading the rest of this book. It discusses reading and briefing cases, including citations, legal education and the practice of law in the United States. The authors generally try to cover Part I during an orientation week before other classes start.

Part II looks at the structure and interpretation of the Constitution. It identifies five major subdivisions of constitutional law: separation of powers, federalism, individual rights (and substantive due process), classifications (and equal protection), and criminal procedure. Examples of current issues are pointed out in each area. The Electoral College and the amendment process are given special attention. Judicial review from *Marbury v. Madison* to Supreme Court consideration of international authorities is the subject of a long chapter that should have more than one week for class consideration. A short chapter follows that contrasts judicial interpretation of legislation with judicial review of constitutionality. Doctrines that limit access to federal courts (ripeness, standing, political questions, etc.) and “jurisdiction stripping” legislation are considered in Chapter 10. Two major chapters discuss constitutional limitations on federal and state legislative powers and the respective legislative competencies of federal and state governments. *M’Culloch v. Maryland* and *Brown v. Board of Education* are included in these chapters. The final chapter in Part II, Chapter 13, takes an in depth look at the dormant commerce clause and the Twenty-first Amendment in the context of the direct wine shipment cases.

Part III consists of three self-contained chapters, which the reader or instructor may select for an in-depth consideration of selected issues: modern takings jurisprudence (*Kelo v. New London*), current status of the right of privacy (*Lawrence v. Texas*), and use of international authority to support domestic affirmative action.

Part IV considers the modern development of contract common law in the United States by examining several threads of common law development from early English cases through the Restatement, Article 2 of the UCC, the UN Convention on Contracts for the International Sale of Goods (CISG), and the UNIDROIT Contract Principles. The “threads” examined include: revocation of offers, mirror image rule and the “battle of the forms,” impossibility excuse/exemption, foreseeability limitation on damages, and specific performance. Civil law and common law compromises in the CISG drafting process are identified and discussed.

Chapter 22 contains suggestions for drafting basic contracts. Appendix B discusses writing law exam answers.

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FOR FOREIGN LAWYERS*

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