

1 The Origin and Development of American Law and Government

1 Facts

Exercise 1 (page 20)

1. Common law private property rights developed originally in 16th and 17th century England as an important check on the arbitrary exercise of monarchical power. Private property rights were inviolable, even by the power of the state. This idea continued to develop in the liberal economic tradition, as part of the principle of non-intervention by the state in economic affairs.
2. The federal system of the United States enables the co-existence of separate and distinct legal jurisdictions within a single nation-state. Each of the 50 states of the union has its own legal system.
3. Lawyers in the United States are licensed to practice by the bar associations of their respective states. For example, a lawyer who is a member of the New York State Bar Association may not practice law in the adjacent state of New Jersey.
4. English common law was adopted in the United States on a state-by-state basis, either through a specific constitutional clause or ordinary statute (known as ‘reception statutes’). Subsequent case law further refined the terms of this adoption. (For example, see *Lux v. Haggin* in the “Focus on Case Law” section).
5. The primary motor of change in the history of American law has been the economy. As the industrial economy developed and society became more complex, the law evolved to meet new needs.
6. Modern contract law developed in the 19th century, in response to the growth of national and transnational markets, based on the consent of independent wills, without any notion of inherent fairness, as was the case in earlier moments of contract law.
7. Product liability represents a departure from traditional common law principles in that it introduces the possibility of liability for a third party, other than one of the contracting parties of the sale (i.e. the manufacturer). This runs counter to the traditional common law rule of ‘privity of contract’.
8. Tort litigation functions as an alternative to state regulation in that it imposes financial incentives on economic agents to behave in such a way as to minimize their liability. Economic actors are forced to consider the economic consequences of not acting in a responsible manner and make cost-benefit calculations accordingly. Thus, tort litigation has the same deterrent effect on potentially harmful behavior as state regulation, only without the direct intervention of the state.

Exercise 2 (page 20)

17th century – English common law comes to America with the immigration of early American settlers. At first, law is informal and irregular. As the colonies develop economically and grow in size, a formal legal profession is established. Common law is modified to meet conditions in America by local precedents.

1776 – American Revolution establishes new independent states, each with its own constitution and legal system based on common law.

1776-1784 – Most states adopt a measure to specify the nature and terms of their adoption of common law, either through constitutional provision or ‘reception statute’.

19th century – Modern contract law develops and codification debates begin.

1848 – Field Code written (first civil code in US), though not adopted in Field’s native state of New York. Versions of the Field code are, however, more successful in western states, including Missouri and California.

1881 – New York State adopts a systematic criminal code, abolishing common law crimes.

1887 – Interstate Commerce Commission (ICC), the first federal regulatory agency, is created to administer commerce between the states, largely in response to the growth of railroads.

20th century – With rapid economic growth and technological advancement, the rise of the modern corporation and the expansion of financial markets, new areas of the law are developed, and administrative agencies assume more and more rule-making responsibility.

1911 – Wisconsin inaugurates a system of workers’ compensation, which over the following three decades spreads to all other states, that takes the issue of compensation for on-the-job injuries out of the courts.

1916 – The New York high court decision of *MacPherson v. Buick* establishes the beginning of a new form of liability to respond to the development of modern industry: product liability.

1934-1938 – New Deal reforms, responding to the Great Depression, give the federal administrative state a big boost, creating an ‘alphabet soup’ of federal agencies: Security and Exchange Commission (SEC), Federal Communications Commission (FCC), National Labor Relations Board (NLRB), Food and Drug Administration (FDA).

1937 – Federal Rules of Civil Procedure are implemented, merging law and equity into a single form of action, called a ‘civil action’.

1946 – Administrative Procedures Act creates a legislative framework for the powers and operations of the federal agencies making way for an explosion in administrative regulation.

Exercise 3 (page 20)

1. Students can research the Blackstone-Bentham debates as they played out in the United States, and to some extent continue to do so to the present day. The debate turned on who should be trusted with making law, legislators or legal professionals. Bentham’s ideal was to have a system of codified law that was so transparent there would be no need for lawyers at all. Obviously, this posed a considerable threat to the legal profession. In the 19th century, major figures included David Dudley Field for codification, and Joseph Story for preserving common law. Students might also explore more recent incarnations of this debate, including the law and economics movement. Defenders of common law have seen it as a way of limiting the development of a central state with the power to intervene directly in the affairs of individual actors.

2. Students can research the legal and constitutional issues raised by the rise of administrative law in the United States, including for the separation of powers (since the administrative agencies, although created by Congress, operate within the executive branch, thus combining rule-making, adjudication and enforcement functions in a single branch of government) and judicial review (since federal court review of administrative rulings has been constrained; see *Chevron v. Natural Resources Defense Council* (1984)). In a more recent issue related to federalism, the right of states to make their own environmental regulation has been curtailed by the federal Environmental Protection Agency (EPA). The State of California has sued the EPA in the Ninth Circuit Federal Court of Appeals, to demand its right to issue regulations for its own state (in this case, on automobile CO₂ emissions).

2 Further Resources

Exercise 1 (page 25)

1763 – The end of the Seven Years War between England and France, which left England in control of North America but also heavily indebted.

1764-1765 – The Sugar and Stamp Acts: the first attempts by Parliament to impose taxes on the colonies, which were met with various forms of resistance including boycotts and jury activism.

1766 – The Declaratory Act, in which Parliament repeals the earlier taxes but refuses to back down on the constitutional issue, asserting its right to legislate over the colonies “in all cases whatsoever.”

1767 – The Townsend Act, in which Parliament again attempts to impose taxes on the colonies.

1773 – The Tea Act, which imposed a tax on tea imports, resulted in the Boston Tea Party, where colonists decided to destroy a shipment of tea arriving in Boston harbor in order to avoid the establishment of a precedent for taxation by Westminster.

1774 – The Intolerable Acts (known in England as the Punitive Acts) were passed to punish the Americans for the Boston Tea Party and served to heighten the Americans’ sense of constitutional violation.

1774 – The Declaration and Resolves of the First Continental Congress, in which the Americans petitioned the King to veto the various attempts by Westminster to exercise unconstitutional legislative authority over the colonies.

1775 – Open military conflict breaks out between British troops and colonial militias at Lexington and Concord, in Massachusetts.

1776 – After repeated petitions had failed, the colonists finally decide to make a revolutionary break with Britain, issuing the *Declaration of Independence*.

Exercise 2 (page 25)

1. The American Revolution resulted from a constitutional crisis that arose, in part, due to a divergence of constitutional interpretation. After the constitutional upheavals of the 17th century in England, culminating in the Glorious Revolution of 1689, the dominant interpretation of the English Constitution in England had evolved into one of Parliamentary supremacy. This led Westminster Parliament to believe that it had the

right to legislate “in all matters whatsoever”, unchecked by Royal veto. However, in the American colonies, an older interpretation of the English Constitution – as a mixed or balanced constitution, like that in Montesquieu’s famous characterization – still held sway.

An additional, related problematic involved the functioning of the customary constitution across the territory of the Empire, including the American colonies but also others like India. In particular, the constitutional status of the colonial legislatures and Westminster Parliament was in dispute.

2. The grievances of the American colonists were constitutional in nature. Although the nature and number of grievances multiplied as the constitutional crisis advanced (especially with the Intolerable Acts), the primary and original grievance was summed up by the rallying cry: “No taxation without representation.” However, this motto was not invented in 18th century America, and was heard in England during the constitutional struggles of the 17th century. The constitutional principle has its origins, of course, in *Magna Carta*.

3. The Americans made a wide range of constitutional arguments, based on their understanding of the English customary constitution. They made arguments based on customary right, original contract (Royal Charters), and precedent, in addition to *Magna Carta* (“no taxation without representation”).

4. Precedent was of central importance for the American founders because most of them were trained in English common law, in which precedent is a fundamental legal principle. Indeed, as the famous English political philosopher and parliamentarian Edmund Burke explained in a speech at Westminster, in 1775, the spirit of English law pervaded the culture of 18th century America:

The people of the colonies are descendants of Englishmen. England, Sir, is a nation, which still I hope respects, and formerly adored, her freedom. The colonists emigrated from you when this part of your character was most predominant; and they took this bias and direction the moment they parted from your hands. They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles... Permit me, Sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this intractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. The founders of the United States – although influenced by Enlightenment thinkers like Locke, Hume, Montesquieu, and Vattel, as well as classical figures like Cicero and Plutarch – primarily thought and acted as English common lawyers, and in terms of the English constitution of customary right in which they were trained.

5. Throughout the long constitutional crisis from 1764 to 1776, the American colonists understood their rights as deriving from the customary English constitution and as accruing to them as *Englishmen*. Note the fact that in the *Declaration and Resolves* of 1774, the colonists make their declarations as Englishmen as “their ancestors in like cases have usually done.” Also note the extended demonstration (Resolves 2-4) that the American colonists are indeed Englishmen and thus entitled to certain rights as such.

Exercise 1 (pages 26-27)

1. The *Declaration of Independence* marked the break with the English constitutional order, effecting the American Revolution. Whereas in the *Declaration and Resolves of the First Continental Congress*, of 1774 (see p. 23), the Americans were affirming their rights under the English Constitution, as Englishmen, and petitioning the King against what they considered to be the arbitrary and illegal acts of Parliament, in the 1776 *Declaration*, they are indicting the King and affirming their rights as citizens of the thirteen “free and independent” *united* States of America (though not yet the *United* States of America). This document founded thirteen new, sovereign political entities and enabled these new sovereign entities to enlist the support of other sovereign states, like France, in military alliances under the law of nations.
2. The charges against King George the III, as enumerated in the indictment section of the *Declaration*, are many and varied. They all amount to “the establishment of an absolute Tyranny over these States.” The most important ones refer to subjecting the colonists to “a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation.” This, of course, refers to Parliament at Westminster and, in “giving his Assent,” King George had effectively refused to exercise his veto power, which was the longstanding demand of the colonists. Some specific grievances include the abolition of local legislatures, Royal Charters, and the right to a jury trial, as well as the imposition of taxes without consent, and the deployment of a standing army (many of these were effected by the Intolerable Acts). All of these would have been considered constitutional rights guaranteed to all Englishmen since *Magna Carta*. Scholars have noted the repetitiveness and seemingly random ordering of the charges in the indictment.
3. As long as the Americans were directing their grievances against Parliament, and were petitioning the King for redress, they were acting entirely within the established English constitutional order. The moment they shifted their charges to the King, they broke with this order, declaring independence and engaging in revolution.
4. Therefore, signing the *Declaration* was a dangerous act in that it signaled one’s participation in revolution. An American could have signed any previous petition or declaration while remaining a loyal subject. Signing this document marked a point of no return.
5. Americans were slow to declare independence in large part because they considered themselves to be Englishmen (and often English *lawyers*) and considered that their cause was just under the English constitutional order. They saw no need to break with this order because they understood their position to be legally sound, and were formulating their arguments, precisely *in the terms of* this order.

Exercise 2 (page 26)

The Second Continental Congress gave responsibility for the drafting of the *Declaration* to the “Committee of Five,” consisting of Thomas Jefferson (Virginia), John Adams (Massachusetts), Benjamin Franklin (Pennsylvania), Robert Livingston (New York), Roger Sherman (Connecticut). Jefferson was the principal author of the text, although his draft underwent considerable redaction by the other members of the Committee and Congress as a whole. For example, Congress softened the language of

