ONE

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

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 the roughly 240 years since they declared their independence in 1776, the thirteen colonies of under three million inhabitants clustered near the Atlantic Seaboard have become

50 states of over three hundred 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, Jews, Presbyterians, Puritans, Quakers, and Roman Catholics, as well as the native Indians with their own religion. Among the English majorities of settlers were pockets of Africans, Dutch, French, Germans, Irish, Scots, Spanish, Swedes, and Swiss. They lived as merchants, artisans, plantation owners and workers, 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 governor 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 that 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 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 that country’s major problems of the mid-eighteenth century: first, the need for additional revenue for the British treasury, some of which, it was thought, the colonists should contribute; second, the demand by British merchants for enforcement of commercial regulations to preserve 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 55 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 they felt they had been deprived though they believed they were assured them from English case law, the English Bill of Rights of 1689, and other great enactments reaching back to the Magna Carta in 1215. This 1774 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 policy. 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 Declaration, at least in its preamble, calls attention both to the “station to which the Laws of Nature and of Nature’s God entitle” the colonists and to the “unalienable rights” with which “all men . . . are endowed by their Creator” and 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 a federal union. However, each state was jealous of its newly asserted 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 one 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 of 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 amidst 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 constituents—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 of 1788, and the first president of the United States, George Washington, was inaugurated the following April. 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 of powers, 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 as ratified contained no guarantees of basic human rights. But in 1789, the first 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 the Supremacy Clause, 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 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 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

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1 The Bill of Rights initially had twelve amendments of which ten were ratified by the states by 1791. An additional amendment proposed in the same bill, limiting pay raises for members of Congress to benefit only those who serve after the subsequent election, was ratified as the Twenty-Seventh Amendment in 1992.

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 is invalid on constitutional grounds.
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\(^4\) in the landmark case of *Marbury v. Madison*,\(^5\) 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. The Court thereby firmly established that federal legislation was subject to judicial review in the federal courts.\(^6\) A few years later, it affirmed its authority under the federal Constitution to pass upon the validity of state statutes,\(^7\) an authority which has been one of the great unifying forces in the United States. Justice Oliver Wendell Holmes, Jr.,\(^8\) 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."\(^9\) 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.\(^10\)

The subject of judicial review is discussed in more detail in later chapters, as is the hierarchy of such authorities as constitutions, treaties, statutes, regulations, 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 the extent of crown control, date of settlement, and conditions of development resulted in 13 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, French, or Russian sovereignty for substantial periods of time. Many 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 and in their influence on the family law of rest of the nation. 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 earliest 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,

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\(^4\) 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 & Mary. He was the author of many of the most significant opinions of the Court during this crucial period and is generally regarded as its greatest Chief Justice.

\(^5\) *5 U.S. (1 Cranch) 137* (1803).

\(^6\) The Court's first declaration of the unconstitutionality of an executive act was *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), also called the *Flying Fish* case.

\(^7\) *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). This power was elaborated in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

\(^8\) Oliver Wendell Holmes, Jr. (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 book is *The Common Law* (1881), based on a series of lectures.

\(^9\) OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295–96 (1920). According to *The Constitution of the United States of America: Analysis and Interpretation* (Senate Doc. 99-16 1987), the Supreme Court from its inception through 1986 had held unconstitutional in whole or in part only 124 acts of Congress as opposed to roughly a thousand state acts.

\(^10\) See Chapter 4, infra.
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, and few among the earliest settlers had received 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.

During these early years, 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. The legislative power that the British Parliament had over the colonies had not been 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 scarcity of English 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 1600s, colonial justice often lacked English legal technicality 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, a simplicity of pleading, and judges 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. In America, however, this rule was rejected in favor of equal distribution among all of a father’s 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.

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 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, especially those of Sir Edward Coke, had become increasingly available. It has been said that, by the time of the Revolution, William Blackstone’s 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

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11 The rule of primogeniture was not changed in England until the Administration of Estates Act in 1925.
12 Sir Edward Coke (1552–1634), an English lawyer and judge, was personally involved in the establishment of some of the English colonies in America. His opinions and law books, especially his Reports and Institutes were the core of most colonial law libraries and remained influential long after independence.
13 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.
politically active: 25 of the 56 signers of the Declaration of Independence were lawyers.

It is therefore not surprising that most of the 13 original states formally "received"—that is, adopted, by constitution, judicial order, 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. 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 prohibiting the citation of English decisions handed down after independence. 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 treaties were inadequate. But few judges were versed in modern foreign languages and, while English treatises and reports were available, the Code Napoleon did not appear until after the beginning of the nineteenth century. Blackstone's Commentaries, which were available in numerous American editions throughout the nineteenth century, became particularly influential, not only to present the English law as received but also to describe local extensions and departures from it by American authors, courts, and legislatures.

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 of estates. 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 in which raising cattle 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 cause to a neighboring crop owner. But it was also an era of great "national" treatises such as James Kent's Commentaries on American Law, published from 1826 to 1830, and nine works by Joseph Story 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.

James Kent (1763–1847) became the first professor of law at Columbia College in 1793. He resigned in 1798 for the New York Supreme Court and was appointed chancellor of the state in 1814. Upon his retirement in 1823, he returned to Columbia and published his Commentaries on American Law, from his lectures dealing with nearly all phases of contemporary law, including one of the first American studies of international law.

Joseph Story (1779–1845) was appointed to the United States Supreme Court in 1811 at the age of 32. In 1829, while retaining his seat on the Court, he became the first Dane 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. For more on Justice Story, see Chapter 2, infra.

14 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 statutes soon root out this engine of oppression from America." 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).
Out of the first half of the nineteenth 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 this 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. For example, from 1850 to 1860, the population of the state of Minnesota increased from 6000 to 172,000. In 1790, only about 3 percent of the people in the United States lived in the six cities that had 8000 or more inhabitants; by 1890, about one out of three Americans lived in a city of 4000 or more. From 1869 to 1900, railway mileage grew from 30,000 to 166,000 miles, running from the Atlantic to the Pacific Oceans. 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 fields 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 more 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 legal treatises of this period were more specialized than those of the first half of the century. Some creative activity was to be found in the legislatures, which had been more active in reform than the judiciary until the Civil War, but popular esteem for the courts was at its height, and aggressive judges asserted their judicial authority in holding legislation to constitutional standards.

By the turn of the century, however, the methodical accretion of rules, case by case, had begun to lose some of its popular appeal. The watchword of the courts was still stability, but the courts had failed to keep pace with the demands of the rapidly changing political and economic order. The shape of things to come might have been foretold from the organization in 1886 of the American Federation of Labor, the first of the great national labor unions; from the creation in 1887 of the Interstate Commerce Commission, the first of the great national regulatory agencies; and from the enactment in 1890 of the Sherman Act, the first of the great federal antitrust statutes. And so the twentieth century ushered in a new era of change and creativity in law, marked by an increased pace of legislation, particularly legislation over social relationships, and by greater reliance upon administrative agencies instead of courts. During the second decade of the 1900s, most of the state workers’ compensation laws were enacted. At about the same time, modern administrative power began to take its present shape, both in the nation and in the states. Some of these more recent developments will be dealt with later.

The direct influence of contemporary English law in America, which was fading by the time of the Civil War, is negligible today. Only infrequently are the more recent English cases cited in contemporary American judicial opinions, and even more rarely will a question arise that turns on the reception of English law. Yet the fundamental approach, much of the vocabulary, and many of the principles and concepts of the common law are as familiar in the United States as in England. English cases, though in relatively small numbers, are still part of the “taught tradition” in American law schools. And while American lawyers and judges may commonly ignore English authorities, they are nevertheless conditioned by English ideas that were imported into American law two centuries ago. Foremost among these are first, the concept of supremacy of law, as exemplified in this country by the distinctive principle that even the state is subject to judicial review under constitutional standards; second, the tradition of precedent, according to which later decisions are based on earlier cases; and third, the notion of a trial as a contentious proceeding, a contest, often before a jury, in which the adversary parties take the initiative and in which the role of the judge is that of umpire rather than of inquisitor. These will be explored in later chapters.

Suggested Readings

L. Friedman, A History of American Law (3d ed. 2005) and K. Hall & P. Karsten, The Magic Mirror: Law in American History (2d ed. 2008) are comprehensive treatments that begin with colonial times. More controversial works are M. Horwitz,


For cases and notes on these topics see G. Fletcher & S. Sheppard, American Law in a Global Context: The Basics, Chapters 5 through 8 and 15.
A salient characteristic of the American judicial establishment is its deavage into parallel systems of state and federal courts. How are these systems organized and what are the limits of their jurisdiction?

A Dual System of Courts

For the most part, law in the United States can be conveniently classified, according to its sources, as decisional law or as legislation.\(^1\) The judicial system is the best starting point for an inquiry into the sources of law for, though decisional law stands below legislation in the hierarchy of authorities, and case law is subject to change by statute, the judiciary has been the traditional fountainhead of law in America as in other common-law countries.

\(^1\) Custom, a third possibility, is usually thought to be relatively insignificant as a source of law in the United States. It may be used, for example, in interpreting a contract or in determining whether a prescribed standard of conduct has been met, but rarely has it given rise to a new legal rule. But see Chapter 1, supra, for an example of the use of custom as a source of water and mining law.
One of the results of the particular form of federalism that has grown up in the United States is a judicial structure in which a nationwide system of federal courts functions alongside the state courts.

State Courts

The great bulk of all litigation comes before the state courts. Each state by constitution and statute has established its own system, and the lack of uniformity from state to state makes it impossible to give a detailed description to fit all states. Too often, the state courts bear the stamp of conditions and concepts belonging to the time of their origins, which are now changed or outmoded. In the late eighteenth century, when the first court systems were established, travel was difficult, and communication was slow. The response was to create a number of courts of general jurisdiction to bring justice close to the people, who soon came to regard the state court in their locality as their own particular possession. This policy of multiplication of courts and decentralization of the court system has persisted until modern times. In recent years, however, considerable progress has been made in the simplification of state court systems and in the improvement of judicial administration. This is perhaps best illustrated with the growth of electronic records of the courts, allowing litigants, lawyers, and others to observe the work of the state courts without travelling to each courthouse.

In each state, there are trial courts of general jurisdiction, which are called by such names as the superior courts, circuit courts, or courts of common pleas. A single judge presides, whether there is a jury or not, and is generally competent to hear all cases, civil and criminal, that are not restricted to special courts or divisions. Such special courts or divisions with limited jurisdiction may include criminal courts, domestic relations or family courts, juvenile or children’s courts, and probate or surrogates’ courts for decedents’ estates. In addition, there are courts of inferior jurisdiction that handle petty matters. These were traditionally the justice of the peace courts, which are now often called justice courts, but they have often been supplanted by county, municipal, small claims, police, and traffic courts. Neither at the state nor the federal level are there special commercial courts like those in some countries.

At the top of the state judicial system is the highest appellate court of that state. In most states, it is called the supreme court; in some it is known by another name, such as the New York Court of Appeals or the Massachusetts Superior Judicial Court. The number of judges ranges from five to nine, with seven the most common number, including a chief justice and associate justices. In most states, there are intermediate appellate courts, usually called courts of appeal or appellate courts, which are between the courts of general jurisdiction and the highest court and which are sometimes divided into specialized courts, such as a court specially tasked to hear criminal appeals.

Federal Courts

The decision of the framers of the Constitution to leave to Congress the power to create the lower federal courts, if it chooses to do so, has given flexibility and the opportunity for experiment within the federal judicial system. This system has three principal levels: the district courts, the courts of appeals, and the Supreme Court. There are also such special courts of limited jurisdiction as the U.S. Court of Federal Claims, the U.S. Court of International Trade, and the U.S. Tax Court. Although there is no special system of administrative courts, there are many federal administrative tribunals that have adjudicatory functions within the various departments and agencies but that are not properly courts.

The United States District Courts are the federal trial courts of general jurisdiction for both civil and criminal matters, including admiralty (or maritime) cases. They also review the decisions of some federal administrative agencies. There are some ninety-four district courts located throughout the country.
the fifty states, the District of Columbia, and some territories. Some states contain only one judicial district, while other states are divided into as many as four. Although a judicial district may have a number of judges, depending on the volume of cases, a single judge generally presides over any given case, whether it is heard with a jury or not. The work of the district court judges is eased by magistrate judges and bankruptcy judges.

Appeals from a district court are generally heard in the United States Court of Appeals for the circuit in which the district is located. In very rare instances, an appeal may be from a district court directly to the Supreme Court. There are thirteen such circuits, eleven comprising geographical divisions of the states and including a number of districts, a twelfth for the District of Columbia, and a thirteenth that reviews cases from specialized federal courts. These are the intermediary appellate courts in the federal system, but because of the limitations on review by the Supreme Court, they are, in practical matter, the courts of last resort for most federal cases. In addition to hearing appeals from the district courts, they also review decisions of certain federal administrative agencies such as the National Labor Relations Board. The number of judges in each circuit varies, but the judges ordinarily hear appeals in panels of three. In a few rare cases, all of the active judges of a court will reconsider a decision reached by a panel, in a proceeding en banc.

Appellate review of the decisions of the U.S. courts of appeals is in the hands of the U.S. Supreme Court, which since 1869 has consisted of nine members—one chief justice and eight associate justices—who sit as a body and not in panels. Their number has varied over time and is fixed by Congress. It is the only federal court created by the Constitution; all others are creatures of congressional enactment under a grant of power in the Constitution. As will be explained shortly, it not only holds the highest appellate authority in the federal system but also has a limited power of review over the state courts. However, the proportion of cases in which the Supreme Court reviews either federal or state courts is very small.

**Federal Jurisdiction**

The determination of the jurisdiction of the state and federal courts is a part of the more general problem of the distribution of state and federal power. Under the Constitution, the federal government has only those powers that are granted to it, and the residual powers are left to the states or to the people. Whatever judicial jurisdiction has not been given exclusively to the federal courts remains in the state courts, and so by determining what jurisdiction is given exclusively to the federal courts, what jurisdiction is given nonexclusively to the federal courts (which is concurrent jurisdiction), or that has not been given to the federal courts, the jurisdiction of both systems may be understood. It is therefore customary to discuss the division of judicial power in terms of federal, rather than state, jurisdiction.

Because the federal district courts were created by congressional enactment, their jurisdiction is defined not only by the constitutional grant of federal judicial power but also by the implementation of that power by federal legislation that began with the First Judiciary Act of 1789. Congress need not grant, and indeed has not granted, jurisdiction to the district courts to the full extent of the power given it by the Constitution.

The criminal jurisdiction of the district courts, which accounts for a substantial minority of all cases, includes all offenses against federal law. This includes federally recognized offenses against international law and state law.

Most of the civil business of these courts is of three kinds: first, cases in which the United States is a party; second, cases between private parties involving federal laws, under the so-called “federal question” jurisdiction; and third, cases between citizens of different states, under the so-called “diversity” jurisdiction.

The first category embraces not only criminal actions but also other actions brought "by the United States, or by an agency or officer thereof expressly authorized to sue by Act of Congress," as well as certain actions against the United States in which Congress has conferred jurisdiction upon the district courts. Its reason is evident: actions in which the

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6 A map of the districts and of the circuits is available at www.uscourts.gov/images/CircuitMap.pdf.
7 The most recent attempt to change the number of judges on the Supreme Court came in 1937, when President Franklin Delano Roosevelt proposed what came to be known as his "court-packing" bill, an attempt to increase the size of the Supreme Court in response to Court decisions holding parts of his legislative program unconstitutional. That proposal was abandoned after the Court altered its philosophy regarding his program.
United States is a party, whether as plaintiff or defendant, are heard not in state courts but federal courts.

The second category, cases under federal question jurisdiction, consists of controversies arising under the Constitution, laws, or treaties of the United States. The reasons for this category are also apparent. The federal courts are thus charged with the vindication of federally created rights and the settlement of federally recognized causes of action.

The third category, diversity jurisdiction, includes cases in which the dispute is between citizens of different states including foreign states and the amount in controversy exceeds $75,000. The reason for this category of jurisdiction is not entirely clear, but the conventional explanation is that the framers of the Constitution sought to avoid the partiality that might result if, for example, a New York creditor were obliged to try a claim against a Massachusetts debtor before a Massachusetts state court. In any event, some litigants prefer to be in federal courts today less from a fear of prejudice than from a belief that the court, the procedure, or the court calendar is more favorable to their interests. Diversity jurisdiction has been criticized from time to time and remains the most controversial ground of federal judicial power.

In some cases, Congress has made the jurisdiction of the federal courts exclusive. Thus, in cases under the federal criminal laws, in some admiralty (maritime) cases, in bankruptcy proceedings, and in cases under most patent doctrines and copyright laws, the matter cannot be brought before a state court. In most matters, Congress has not given the subject matter exclusively to the federal courts, and the jurisdiction of federal and state courts in these matters is concurrent, which means that the plaintiff can bring the action in either court. Cases of diversity jurisdiction and many cases of federal question jurisdiction are instances of concurrent jurisdiction. Thus, state-created rights may be enforced in the federal courts, and federally created rights may be enforced in the state courts. Where jurisdiction is concurrent and suit has been brought in the state court, however, the defendant usually has the right to have the case removed to the federal district court. In these cases of concurrent jurisdiction, either party may select the federal courts, the plaintiff by the original choice of forum and the defendant by removal.

Under the Constitution, the Supreme Court itself has original (or trial) jurisdiction over a few categories of cases, the most usual being disputes between states or between a state and the federal government. The trial is conducted by an officer of the court known as a special master, who is appointed for that case and who reports findings on the evidence to the Court for review and adjudication of the law. However, such cases are not common. The Court's jurisdiction is in the main appellate and is assigned, within constitutional limits, by Congress. The mechanism of review is designed to limit those cases that are to be decided on the merits with full consideration to a relatively small and manageable number, which are usually of some concern to the public at large as well as to the litigants.

One of the most important limitations on the work of the Supreme Court, as well as the lower federal courts, is that its jurisdiction extends only to "cases and controversies." It will decide lawsuits only between adversary litigants who have real interests at stake in a ripened controversy. Unlike some state courts, the U.S. Supreme Court will not give advisory opinions, even on constitutional questions, and even at the request of the president or Congress. Another restriction is that federal questions must be "substantial" in order to confer jurisdiction on the Supreme Court. And in no event will the Court review decisions of the state courts on questions of state law that do not affect a federal law or constitutional interest. The state courts are themselves the final arbiters of state law, and their decisions are conclusive on such matters.

The principal method of review by the Supreme Court that has been provided by Congress is by writ of certiorari, a command issued from

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8 This amount, which is a realistic assessment of the potential damages that might be paid to the plaintiff, is set by Congress and varies from time to time. See 28 U.S.C. § 1332 (2009). For the purpose of determining whether there is diversity, a corporation is regarded as a citizen not only of the state where it has been incorporated but also of the state where it has its principal place of business. Resident aliens are considered citizens of the state in which they are domiciled.

9 There are some exceptions. A resident defendant who is sued in a state court by a nonresident plaintiff cannot have the case removed to the federal court on the ground of diversity.

10 However, the Declaratory Judgment Act authorizes federal courts, in certain circumstances including the existence of an "actual controversy," to render a judgment declaring the rights of the parties in advance of any claim for damages or other relief. The highest courts of several of the states are empowered to give advisory opinions to the state legislature or the governor.
the Supreme Court to the lower federal court or to the state court of last
court,\textsuperscript{11} requiring it to certify and return the record of the proceedings in
the case.\textsuperscript{12} Even in a proper case, the issuance of such a writ is within the
discretion of the Court.\textsuperscript{13} It may be granted upon the petition of a party to
any case before a federal court of appeals. It may also be granted to review
a judgment of a state court of last resort where, for example, a state statute
has been held to be invalid under the Constitution or other federal law.
But certiorari will only be granted for "special and important reasons,"
and the fact that the decision below is erroneous is not such a reason.
Circumstances that may influence the Court to grant certiorari include
the existence of a conflict either between decisions among federal courts
of appeals for different circuits or between a decision by a state court on a
federal question and the decisions of the Supreme Court itself. While the
bulk of the cases disposed of annually by the Court consists of requests for
certiorari, it grants less than five percent of these and rejects the remainder
as unsuitable for review. Thus, while the Court may dispose of nearly seven
thousand cases a year, it decides very few on the merits and writes full
opinions in only about one hundred.\textsuperscript{14}

Law Applied in the Federal Courts

Because the federal government has only such powers as are conferred
upon it by the Constitution, federal law is supreme only in limited areas.
Litigation in American courts often involves complex problems of accom-
cmodation of state and federal law. In either a state or federal court, an action
based on a right derived from state law may be met by a defense based on
federal law, or conversely, one based on federal law may be met by a defense
based on state law. The federal courts are thus frequently called upon to
apply state law, and while the problem of giving effect in one jurisdiction
to the laws of another is not peculiar to American federalism, the role of
state law in the federal courts has had a unique history.

In 1842, in the landmark case of \textit{Swift v. Tyson},\textsuperscript{15} the Supreme Court
recognized the duty of the federal courts to give effect, on questions within
the law-making competence of the states, to state law that was distinctively
"local" in character, meaning in most instances that state statutes would be
applied, because statutes were presumed more to regulate local matters. But
if the subject matter of the case was considered to be "general law" (i.e.,
the general provisions of the common law), the federal courts were under
a duty both to ascertain the relevant legal principles independently and to
apply these principles regardless of what the courts of the particular state
would have done. Thus, there grew up a "federal common law," binding
upon the federal courts but not upon the state courts, and the outcome of
litigation might depend upon which court, state or federal, heard the case.
Critics deplored the resulting "forum shopping" and the frustration of state
policies. Defenders of the decision maintained that it contributed toward a
needed national uniformity in the law.

In 1938, when the doctrine of \textit{Swift v. Tyson} had been in force for
almost a century, it was overruled by the U.S. Supreme Court in \textit{Erie Rail-
road Co. v. Tompkins}.\textsuperscript{16} The opinion of the Court in this historic case, by
Justice Brandeis,\textsuperscript{17} rested finally upon the constitutional ground that, in the
absence of applicable federal legislation, the federal courts were bound to
apply state case law no less than state statutory law. This decision has in turn
given rise to a host of new problems.

The Supreme Court has interpreted the principle of the \textit{Erie} case as
requiring, in cases of diversity jurisdiction, that a federal court adjudicating

\textsuperscript{11} The state court of last resort is the highest state court to which a particular case could be
taken on appeal. It is usually, although not always, the highest court of the state.

\textsuperscript{12} Appeal is another method of review, but it is of limited significance in U.S. Supreme Court
practice.

\textsuperscript{13} It is the practice to grant certiorari only on the concurrence of at least four justices.

\textsuperscript{14} The calendar of cases pending before the court and the opinions of the Court that have
recently been announced are both available at \url{http://www.supremecourtus.gov/}. A survey
of the work of the Court during the preceding year appears annually in the \textit{Harvard Law
Review}.

\textsuperscript{15} 41 U.S. (16 Pet.) (1842).

\textsuperscript{16} 304 U.S. 64 (1938).

\textsuperscript{17} Louis Dembitz Brandeis (1856–1941) practiced in Boston, Massachusetts, for about forty
years after graduation from Harvard Law School, during which he argued many major cases
and became famous for his long written arguments, or briefs, citing social science in sup-
port of his legal claims. He was appointed an Associate Justice of the Supreme Court of the
United States in 1916, although he had previously held no judicial or other public office. In
part, because of his allegedly "radical" position on social and economic issues, his confirma-
tion aroused some of the most substantial opposition to meet any successful appointee to
the Court. He served with great distinction until his retirement in 1939.
claims arising under state law arrive at substantially the same statement of the law as would a court of the state in which it sits.\(^\text{18}\) The impact of this approach on choice of law is unique. Under this approach, a court hearing a case that might be subject to the substantive laws of a different forum, departs from the general rule that a court applies the choice-of-law rules of its forum to determine what foreign law, if any, it should apply. Instead, the federal forum gives effect to state law, and the federal court must follow the choice-of-law principles of the state in which it sits, in the manner that a state court would apply them.\(^\text{19}\) Furthermore, the extent to which federal courts may apply federal rather than state law to matters that have usually been regarded as procedural is not free from doubt.\(^\text{20}\) The issues raised by state law in the federal courts are generally complex and still in a state of flux.\(^\text{21}\)

Suggested Readings


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\(^\text{21}\) The extent to which the federal courts are bound by decisions of inferior state courts is discussed in id.

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Case Law

Case law has special significance in the United States because of the common law tradition. What is its form, where can it be found, and what authority does it have?

Form of Reported Cases

Because of the modern doctrine of precedent in the United States, some knowledge of the form of reported cases is particularly important to an understanding of American law. Case law is found primarily in the decisions of appellate courts. Except for the federal trial courts—and those of a few states—trial court opinions are not published.\(^\text{1}\) The typical case is entitled by the names of the parties who oppose one another, which are

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\(^\text{1}\) Publication was once an important requirement for an opinion to be considered as precedent, but whether an opinion is published or not has grown less important in recent years. An unpublished opinion may not be cited as authority in every court, although it may be in federal courts. With the growth of the publication of opinions by the courts on authorized Web sites, this distinction will grow even less significant.
who agrees with the decision but for reasons different from the opinion's rationale for it may write a separate concurring opinion, stating reasons for the concurrence. However, in contrast to the practice in England and other jurisdictions, concurring opinions are the exception rather than the rule in the United States. A judge who disagrees with the decision may dissent from it, with or without an opinion. Opinions need not be signed, however, and it is not uncommon for a court to write an unsigned and usually shorter opinion per curiam (by the court) when, for example, the point in issue is thought to be well settled. In most jurisdictions, a court need not give any reasons for its decision, and many appeals, particularly upon affirmance, are disposed of without opinion by what are known as memorandum decisions.

Finding Case Law

The sheer number of decisions is an obvious obstacle to finding case law, which has customarily been a matter of research in printed books. Reported decisions of the Supreme Court of the United States and of many of the state appellate courts can be found in the official reports of those courts. Those decided from at least 1887 to date can also be found in a system of unofficial reports, the National Reporter System of the West Publishing Company, with over ten thousand volumes, with some volumes of over 1,500 pages.

In the West system, state court decisions are published in seven regional sets of volumes, each covering a geographical area of the country, plus three additional sets devoted solely to decisions of the California, Illinois, and New York courts. Federal decisions are published in five sets, one each

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2 A judge in writing an opinion may well be influenced by experience at the bar, and individual literary styles vary considerably. On the writing of opinions, including dissenting and concurring opinions, see R. Leflar, Appellate Judicial Opinions ch. 7 & 8 (1974).

3 If an even number of judges should sit, perhaps because of the disqualification of one member of the court, and a tie vote results, the decision of the lower court is thereby affirmed.

4 The dissent has become peculiarly frequent in the Supreme Court of the United States, where well over half of the decisions have dissents. For an entertaining discussion of the "chores of the dissenter," see Guilmet v. Campbell, 188 N.W.2d 601, 610–11 (Mich. 1971) (Black, J., dissenting).

5 In a substantial and increasing number of states, however, the publication of official reports has been abandoned, and in many states, the official opinions of the courts are released only in an electronic file from the courts' Web site.

6 This estimate of the number of volumes does not include those devoted solely to the California, Illinois, and New York courts.
for the Supreme Court, the courts of appeals, and selected cases from the district courts, along with one for bankruptcy cases and one for decisions involving the federal rules of procedure. Other decisions of the lower federal courts are not published officially. Opinions as reported in the unofficial reports are sometimes preferred by lawyers because they are available sooner through publication in temporary pamphlets known as abstracts, are not coordinated with a system of digests or annotations, and are more compact. A second and highly selective system of unofficial reports—the American Law Reports—publishes only that small fraction of all reported cases that is thought to be of special interest and appends extensive annotations that discuss and cite related cases.

In the past, it was usual, when referring to a case, to cite both official and unofficial reports. Thus, a correct citation was *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 13 A.L.R. 4th 1 (1980), meaning that the case was decided in 1980, is found at page 260 of volume 97 of the second series of official Wisconsin reports, at page 437 of volume 294 of the second series of the Northwestern set of the National Reporter System, and at page 1 of volume 13 of the fourth series of American Law Reports, where it is followed by annotation.

Today it is common to cite only one official or unofficial report, as required by the style manual of the court or firm in which the writing is to be read. Thus, in most cases, one would cite the case as *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980). In this manner are collected well over one hundred thousand reported court decisions that each year add to the existing millions of reports.

This flood of cases is somewhat manageable because of two well-developed systems, one of digests and the other of citations. The American Digest System is coordinated with the National Reporter System and covers the appellate court reports from 1658 to the present. The several points in an opinion are digested in short paragraphs and are then numbered and classified by subject matter according to an elaborate classification scheme. The numbered digest paragraphs are printed as the headnotes to the cases as they are reported in the National Reporter System and are also collected in a series of analytically arranged digest volumes. Subject to the vagaries of the classification system, one trained in the use of these digest notes can, in a relatively short time, collect the reported cases, with a few minor exceptions, decided by the courts upon a particular point. Shepard's Citations, an index of citations, covers the National Reporter System and the official state reports. It indexes decisions which have been cited in later opinions so that in a few minutes, it is possible to compile a list of subsequent opinions in which a particular decision has been mentioned.

Computer technology has now been developed to save time and ensure thoroughness in researching case law. Several computer systems, LEXIS, WESTLAW, LOISLAW, and an increasing array of search engines available on the Web have to a considerable extent replaced the traditional systems based on the printed page. They enable the user to retrieve most published and many unpublished federal and state court opinions. In searching for cases, one may use, for example, the name of the case, the citation of the case, the name of the judge, specific words or phrases contained in the opinion or (in Westlaw) particular digest headings, as well as assess the case (in Lexis) through an automated Shepard's index.

The increasing practice of courts to publish the opinions of the court on a database on the Internet has increased the difficulty of searching through case law without using computers, although more material is available. Many courts, such as the Massachusetts Supreme Judicial Court, now publish a wider array of judicial materials than in the past, and with the aid of a computer provide free access to such materials to anyone who wishes to read them. The federal courts provide a single consolidated service by which to access a range of materials from the trial and appellate courts, including not only opinions but filings. This service is cost-free to access, although a nominal fee is charged for downloading or printing materials.

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7. The seven regional sets are now in a second series of numeration and the federal set is in a third series.

8. Decisions of the Supreme Court of the United States may be found not only in the official United States Reports and now on the Court's Web site, but also in unofficial printed reports, particularly *Supreme Court Reporter* of the National Reporter System, the *Supreme Court Reports, Lawyers' Edition*, and *U.S. Law Week*, as well as many other online databases, including Westlaw and Findlaw, Lexis, Juris, and Lexis. Each system employs the volume and page of the official reports, and all print the docket number as well as the official names of the parties, so location is normally not difficult.


10. The PACER Service Center is the local judiciary's centralized registration, billing, and technical support center for PACER. See PACER Service Center's home page, http://pacer.psc.uscourts.gov/.
Opinions of administrative agencies remain harder to find, although they, too, are increasingly available online. Although Shepard's Citations covers the decisions of some agencies, they are not reported or indexed in the National Reporter System. The most important federal regulatory agencies publish their own sets of reports, and unofficial loose-leaf services, usually in special fields, also contain agency opinions.

The Judicial Function

A judicial decision has two functions in a common-law system. The first, which is not, to be sure, peculiar to the common law, is to define and to dispose of the controversy before the court. Under the doctrine of res judicata, the parties may not re-litigate issues (whether in the same forum or another) that have been determined between them by a final and valid judgment. This determination is the responsibility of the court. It cannot abdicate its duty even should the case be a novel one for which there is no controlling authority. An old view was that the court in such a contingency was to discover the law among the principles of the common law, much as a scientist discovers a natural law, and then declare it. Today, it is more usual to admit that the court creates the law somewhat as a legislature creates law but within the narrower bounds set by the facts of the case before it and the analogous legal principles from distantly related doctrines.

Whether the court discovers or creates the law that it applies, its resolu-
tion of the controversy has an impact that extends beyond the parties before it. This is because the second function of a judicial decision, and one that is characteristic of the common law, is that it establishes a precedent so that a similar case arising in the future will probably be decided in the same way. This doctrine is often called by its Latin name, stare decisis—from stare decisis et non quieta movere (to stand by the decisions and not disturb settled points). Reliance on precedent developed early in English law, and the practice was received in the United States as part of the tradition of the common law, though it was much developed in the nineteenth century as a means of restricting the powers of the appellate courts. As a tradition, the doctrine has not been reduced to a written rule and is not to be found in constitution, statute, or oath of office. The justifications commonly given for the stare decisis may be summarized in four words: equality, predictability, economy, and respect. The first argument is that the application of the same rule to successive similar cases results in equality of treatment for all who come before the courts. The second is that consistent following of precedents contributes to predictability in future disputes. The third is that the use of established criteria to settle new cases saves time and energy. The fourth is that adherence to earlier decisions shows due respect for the wisdom and experience of prior generations of judges.

For several reasons, the doctrine of precedent has never enjoyed in the United States the absolute authority that it is said to have attained in England. The great volume of decisions, with conflicting precedents in different jurisdictions, has detracted from the authority of individual decisions. The rapidity of change has often weakened the applicability of precedents to later cases that have arisen after social and economic conditions have altered with the passage of years. Nevertheless, the doctrine of precedent, though not rigidly applied than in England, is still firmly entrenched in the United States.

Techniques in the Use of Precedent

Skill in the use of precedent is more art than science. It is no easier to acquire by reading a discussion of the doctrine than it is to learn to ride a bicycle by studying a textbook on mechanics, and the subject matter is considerably more controversial. It is possible, however, to set down the vocabulary, to make some of the more obvious generalizations, and to raise

\[12\] It is reported that the Supreme Court of the United States, where the doctrine of precedent is not at its strongest, overruled itself only nineteen times in nearly a century and a half from 1810 to 1957. Blaustein & Field, Overruling Opinions in the Supreme Court, 57 Mich. L. Rev. 151 (1958). That the constraint is in the nature of a tradition only is illustrated by the extraordinary example of Judge James E. Robinson, who served as a judge and briefly as chief justice of the Supreme Court of North Dakota and who strained some notoriety for his disapproval of the doctrine of precedent. Toward the end of his tenure, he stated the facts of cases with great brevity and rarely cited authority in his opinions. See Note, 33 Harv. L. Rev. 972 (1920).

\[11\] The doctrine of stare decisis is used here as synonymous with the doctrine of precedent, and the latter term will generally be employed.
Holmes and Cardozo\textsuperscript{15} carry more weight than those of lesser minds. And its persuasiveness may depend on the similarity of the law and of circumstances in the two jurisdictions: on a problem of commercial law, the courts of the eastern industrial state of New Jersey may be more influenced by a decision from their neighboring eastern industrial state of New York than by a conflicting one from the midwestern agricultural state of Iowa. But in any event, if it is only persuasive authority, the doctrine of precedent does not apply, and the court is not bound to follow it.

Binding authority, to which the doctrine of precedent does apply, includes decisions of higher courts of the same jurisdiction and decisions of the same court. Since a lower court is not likely to disregard a prior decision of a higher court,\textsuperscript{16} which has the power of reversal on appeal,

\begin{itemize}
\item \textsuperscript{15} Benjamin Nathan Cardozo (1870–1938) practiced in New York City after graduation from Columbia College and the Columbia School of Law, served as judge and later chief judge on the Court of Appeals of New York, and was appointed an associate justice of the Supreme Court of the United States in 1932 to fill the vacancy left by Holmes. His best-known work is a series of lectures entitled The Nature of the Judicial Process (1921).
\item \textsuperscript{16} Very rarely, a lower court will decline to follow a decision of a higher court in anticipation that the higher court will overrule its earlier decision if the case is appealed to it. An example is a New York case involving the question of whether a child can recover for breach of warranty (without any proof of fault) for injuries caused by impure food in an action against the retail seller from whom the child's father had purchased the food. Under decisions of the Court of Appeals of New York, the higher state court, in 1923 and 1927, the child could not recover for breach of warranty because the remedy was contractual in nature and since the father made the purchase, there was no contract of sale between the retailer and the child. In spite of these precedents, the trial court, the City Court of the City of New York, in 1957 allowed the child to recover. Greenberg v. Lorenz, 178 N.Y.S.2d 404 (N.Y. City Ct. 1957). An intermediate appellate court, the Appellate Term of the Supreme Court, affirmed, stating that, "Though it is not within the competence of an intermediate appellate court to disregard controlling precedent, nevertheless when the higher appellate court—breaking new ground—establish a new trend and render it clear that if the instant question were before them they themselves would overrule earlier pronouncements, it becomes the right, nay the duty, of an intermediate appellate court to take cognizance of it." One of the three judges dissented. Greenberg v. Lorenz, 7 Misc.2d 883, 178 N.Y.S.2d 407 (1958). A higher intermediate appellate court, the Appellate Division of the Supreme Court, reversed in a short per curiam opinion based on precedent. Two of the five judges dissented. Greenberg v. Lorenz, 5 A.D.2d 968, 183 N.Y.S.2d 46 (1959). But this decision was in turn reversed by the Court of Appeals of New York, which reinstated the trial court's judgment for the child and, as the Appellate Term had predicted, overruled the earlier decisions insofar as they applied to the case. Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961). The situation in the federal courts is discussed in Kniffin, Overruling Supreme Court Precedents: Anticipating Action by United States Courts of Appeals. 51 Fordham L. Rev. 53 (1982).
\end{itemize}

\textsuperscript{13} In such situations, courts have often been receptive to data from the social sciences.

\textsuperscript{14} The authority of state court decisions in the federal courts is discussed in connection with Erie Railroad Co. v. Tompkins, discussed in Chapter 4, supra.
the significant question is the extent to which a court will follow one of its own prior decisions. The question is squarely raised by a single decision, for though the weight of persuasive authority may vary with the number of similar decisions, one of a court’s own prior decisions is enough to constitute a precedent.

Fundamental to the answer of when an earlier opinion will bind a later court is the distinction between the “holding”17 of a case and the “dictum.”18 The distinction stems from the common law’s faith in adversary proceedings and the resultant belief that judges have the competence to decide only those matters that are necessary for the decision in the case. As to these matters, which have presumably been thoroughly argued by the parties, judges’ decisions are to be treated as precedent and are “binding” authority. But judges, unlike legislators, have no power to lay down rules for cases that are not before them, and what they say on such other matters is not binding. In the words of Chief Justice John Marshall, “It is a maxim, not to be disregarded, that general expressions in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.”19 It is characteristic of the common law that a point of law may remain unsettled until some losing party determines to assume the burden of presenting that issue in an adversary proceeding on appeal. The “holding,” then, is the rule of law that was necessary for the decision. Whatever else the judges said that was not necessary to their decision is only “dictum.”

17 In the United States, the word “holding” is generally used instead of the term ratio decidendi, used in England.
18 Dictum is short for obiter dictum, Latin for “things said in passing.” The plural is dicta. When the term obiter dictum is used to refer to an older judicial statement, the emphasis may suggest that the dictum is not reliable.
19 Marshall made this statement in avoiding an application of Marbury v. Madison, in which he himself had written the opinion eighteen years earlier. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821).

Dictum is, nevertheless, authority worthy of respect. It may well be followed by the same court in later cases; it is usually sufficient to persuade a lower court, and it is often regarded by lawyers as a reliable basis for counseling. But, at least in principle, it is only persuasive authority and, unlike the holding, is not binding on any court. “Judges,” said Justice Cardozo, “differ greatly in their reverence for the illustrations, and comments and side-remarks of their predecessors, to make no mention of their own.”20

The holding of a case must be determined from an analysis of the material facts, from the decision, and from the reasoning of the opinion. Even this may be more difficult than it would seem at first. It is often hard to know how far the process of abstraction should be continued, to know how broad a statement of the rule is justified. The formulations of rules of law contained in the opinion cannot always be relied upon as authoritative; the rule that the court actually applied may never have been articulated or may have been stated in several different ways in the course of the opinion. Furthermore, the facts may have been stated so concisely that it is hard to tell what they were, or they may have been set forth in such ample detail that it is difficult to determine which facts the court thought material. Fortunately, no case is decided in isolation, and some of these difficulties may be resolved when the opinion is read against the background of other related decisions and general principles.

The rule that the court intended to lay down in one case may not, however, be the holding in the eyes of a later court. When a court is called upon to apply the doctrine of precedent, it is faced with not one but two concrete fact situations, that of the earlier decision and that of the case then up for decision. With both fact situations in mind, the court derives a rule from the first and decides whether it is applicable to the second, that is, the court determines whether the second case is a “like” case. In many instances, the precedent gives a distinctly clear and reasonable rule that the court will apply, more often than not with no inquiry into its merits. At other times, a desirable precedent may not seem to cover an appropriate case, or an undesirable precedent may seem to cover an inappropriate case.

At this point, it should be recognized that the doctrine of precedent does not demand unbending adherence to the past but admits of more supplie techniques that permit an able court to profit from earlier wisdom.

and experience while rejecting past folly and error. If it seems desirable to the judge in the later case to extend the principle of a prior decision to the present case, the holding of that prior decision may be read more broadly than had been intended by the court that handed it down; differences in the facts of the two cases will be treated by the later court as immaterial; and what might have been considered as dictum upon a narrow reading of the earlier case may be regarded as its holding. If, on the contrary, the later judge deems the rule of the earlier decision to be undesirable in deciding the case at hand, the later court may narrow the holding of that prior case in order to distinguish it from the one before it; differences in the facts of the two cases will be treated by the later court as material; and what might have been considered as holding upon a broad reading of the earlier case will be regarded as dictum—as not “necessary” to the disposition of the dispute then before the court.

Within limits, every decision is subject to such broadening and narrowing. Just where the limits are and just what attitude a given court will take on a given set of facts can be predicted—if at all—only on the basis of experience in working with a tradition that has been handed down through generations of common-law students, common-law lawyers, and common-law judges. As Justice Cardozo put it, “Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which these conceptions had their origin, and which, by a process of interaction, they have modified in turn. None the less, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, the first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. Stare decisis is at least the everyday working rule of our law.”

But even a decision that is a “binding” authority is not absolutely binding. On rare occasions, a court will be faced with a situation in which it cannot render what it regards as a just decision and still stay within what it sees as the limits imposed by the doctrine of precedent. It may resolve the dilemma by following precedent in spite of the injustice in the particular case on the ground that the policies underlying the doctrine outweigh those in favor of the opposite decision. Perhaps it will explain that any change is for the legislature and not the court to make. This result might not be surprising in a case involving commercial law or property law, where predictability is particularly important and where remedial legislative action is generally feasible. On the other hand, the court may be unwilling to follow precedent. The decision may have been clearly wrong when rendered, it may be so old that altered conditions have made it inappropriate, or the composition of the court may have changed so that what was formerly the view of a vehement minority is now that of the majority. For any of these reasons, or for others, the court may refuse to follow precedent and may overrule its earlier decision. This result might not be surprising on a constitutional issue where legislation is not an available remedial device, or on a procedural question where retroactive change is not exceptional. Tradition demands that where possible, the doctrine of precedent be honored by careful distinguishing rather than by outright overruling of objectionable decisions. But in point of fact, the decision which has been distinguished and expressly “limited to its particular facts” by a later opinion is often so whittled down as to be virtually overruled.

Two Puzzles in Precedent

Among the puzzling problems that arise out of the doctrine of precedent, two are especially intriguing. The first concerns the weight to be given to a.

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22 As in the case of wines, some precedents improve with age, while others deteriorate. Certainly the accretion of supporting authorities with the passage of time lends strength; on the other hand, changing circumstances erode it.

23 “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. ... This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.” Justice Brandeis dissenting in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932).

24 Occasionally, a court will simply ignore an embarrassing precedent. This questionable technique leaves the prior decision of doubtful validity in later cases.
multi-legged holding. It should be apparent that, even among the so-called binding precedents, the value of a decision may be lessened by a number of factors. For example, dissenting or concurring opinions, while they may indicate that the particular judges have hotly disputed the point and are not apt to change their views, usually weaken the authority of a decision and make it less likely that it will be followed by a later court of different composition. Similarly, a memorandum decision, which sets forth no reasons, may have effect as precedent if it affirms a decision of a lower court which stated the facts and its reasons in an opinion, but its weight is much lessened by the circumstance that the higher court gave no reasons for its affirmation of the opinion below. What is the weight of a multi-legged holding—a decision that is based upon several grounds rather than a single ground?

Suppose the case of an appeal from the judgment of a trial court in which three distinct errors are cited as reasons for reversal. Clearly, if the appellate court affirms the judgment, it has held that each of the three grounds was insufficient, since rejection of each was necessary for affirmance. But suppose that it reverses, stating that the first and second grounds were sufficient but that the third ground was not. What has the court held? Has it held anything as to the first and second grounds? Since either one without the other would have been sufficient for reversal, it can be argued that neither one was necessary to the decision and that there is therefore no holding, and the entire opinion is dictum. But each of the points was disputed and was argued before the court, and the trial court will be expected to observe both upon any rehearing before it. While neither is the sole ground of the decision, it is usual to treat each as an alternative or multi-legged holding. Yet holdings though they may be, no prudent lawyer can ignore the fact that precedents stand more firmly when they stand on only one leg, and alternate grounds make a holding less reliable. The same words of caution apply with even greater force to the third ground, which was also disputed and was argued before the court and is to be observed by the trial court upon any rehearing, but which was clearly not necessary to the reversal. Whether it be dignified with the name of holding or be classified as dictum, it is obviously an authority of a still lower order than the decision on the first two points.

The second puzzling problem relates to the retroactive effect of a decision that overrules a prior decision. Of course, to the extent that a court in reaching any decision announces a new principle of law and applies it to the case already before it, there is an aspect of retroactivity, but the effect is particularly apparent where an earlier decision has been overruled. Suppose that two similar transactions have been concluded, one between A and B, the other between C and D. In a dispute between A and B, the highest court of the state decides that such transactions are invalid. After this decision, yet a third similar transaction is concluded between E and F. Then in a dispute between C and D, the highest court decides to overrule its earlier decision in the case of A v. B and holds that such transactions are valid. Which decision, that in A v. B or that in C v. D, determines the validity of the transaction between E and F that was concluded in the interval between the two decisions? Is the decision in C v. D retroactive in its effect, or does it apply only to transactions entered into after it was handed down? According to the older theory that judges merely discover existing law and then declare it, the decision of the court in A v. B was simply an erroneous interpretation of what the law was then and still is, an interpretation that was later corrected in C v. D. And since the law was always as stated in C v. D, the transaction between E and F was therefore a valid one, even though it took place before the court had discovered its error. According to the newer theory that judges actually create or make law by their decisions, the decision in A v. B made law that was good law until it was changed in the decision in C v. D. Because the transaction between E and F was concluded after the first decision and before the second, during the time when the decision in A v. B was law, the transaction was invalid. Over the years, the conflict between these opposing theories has been reflected in conflicting cases, though other considerations may be more important than either theory. Clearly, for example, the case for retroactivity would be weaker if the decision in A v. B had held that the transaction was valid, and the decision in C v. D had held that it was invalid. And it would be still weaker if E and F had in fact relied upon the decision in A v. B when entering into their transaction.

The problem of the overruled decision, like that of the multi-legged holding, admits of no simple solution. Occasionally a court, in an attempt

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25 A memorandum decision, however, is valueless as a precedent if the facts of the case cannot be determined.

26 For more on the overruled decision, see Chaifee, De Jure or Discover Law? 91 Proc. Am. Philos. Soc’y 465 (1947); Lobinger, Precedent in Past and Present Legal Systems,
to avoid the unsettling effect of retroactivity, has refused to overrule an earlier decision but has expressed disapproval of the precedent and issued a warning that the old rule will not be followed as to facts arising after the new decision.\textsuperscript{27} Occasionally a court has overruled the earlier decision but has indicated that the new rule is not retroactive and will not be followed as to facts arising before the new decision.\textsuperscript{28}

\textbf{Suggested Readings}


See G. Fletcher & S. Sheppard, \textit{American Law in a Global Context: The Basics}, Introduction and Chapters 1 through 4 and the appendices, which discuss the briefing of cases and provide illustrations of briefs compared to case opinions.

\textsuperscript{44} \textsc{Mich. L. Rev.} 555 (1946). A more recent and magisterial consideration is M. Gerhardt, \textit{The Power of Precedent} (2008).

\textsuperscript{27} \textit{E.g.}, Hare v. General Contract Purchase Corp., 249 S.W. 2d 973 (Ark. 1952). It has been held that such decisions by a state court do not violate the guarantee of due process in the federal Constitution. Great Northern Railway v. Sunburst Co., 287 U.S. 358 (1932).