

TEACHING U.S. LAW TO FOREIGN LAWYERS:  
A REVISED APPROACH FOR  
AMERICAN LL.M. DEGREES AND RELATED PROGRAMS

The recent surge in foreign students seeking Masters of Laws degrees (LL.M.s) in the United States comes at a time when other private and governmental initiatives are promoting the teaching of American law abroad. The combination creates a foreign interest in American law that has not been seen since the 1950's. Today's colloquium discusses new approaches to the teaching U.S. law to non-U.S. lawyers and law students. The panelists include Charles F. Abernathy (Georgetown University Law Center and the International Law Institute), Dorothy Mayer (Georgetown University Law Center), and William Mock (John Marshall School of Law). The remarks that follow relate to the presentation by Prof. Abernathy, the author of the first modern casebook on teaching U.S. law to non-U.S. lawyers and law students, *LAW IN THE UNITED STATES* (International Law Institute Press, 1996).<sup>1</sup>

I. An Integrated Philosophy and Pedagogy for Teaching U.S. Law

Most institutes and professional legal organizations have traditionally taught American law to foreigners in a fact-based style that seeks to convey law as substantive information and knowledge to be memorized. American law under this approach is just another course in a foreign lawyer's repertoire, just as he would know domestic antitrust law or European Union Law. These courses assume a background in what the teachers already know, the American legal method. *LAW IN THE UNITED STATES* suggests an alternative approach that concentrates on what is usually omitted, the legal method and the thought processes of American law. Substance is conveyed -- for example, the usual equal protection cases are covered in the chapter on individual rights -- in a consistent and sustained manner, but the emphasis is

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always on the manner in which the substance was derived and justified, not on the substance as matter to be memorized.

This pedagogy is designed to convey to foreign students what is unique about U.S. law, and that is something substantially more sophisticated than the traditional "common law" or "case law" approaches to Anglo-American law that are presented in introductory courses in most European, Latin American, and Asian law schools. As taught in many such schools, the common law ascribed to American law is stereotyped in one of two ways: 1) the cases are given as the law, and law is presented as consisting of the list of cases, presumably all reconcilable and memorizeable; or 2) the cases are subordinated to doctrine, and the doctrine is taught as a list of topics cognizable under code-based systems, with the cases as mere exemplars of the doctrinal rules.

The new option offered here is not a new theory in American philosophy of law, but rather the application of traditional American theory to the teaching of American law to foreign students. It is a process-based approach that presents American law not as a static set of doctrines, but as an on-going process, the parameters of which, when mastered, offer a life-long approach to American law that can be readily updated.

## II. What Is the Unique Blend of American Law?

Since the categorical days of the 1950's, the great divide between common law and code-based systems of law has grown much smaller. Many code-based systems now use some version of case law, and law in the United States depends much more on interlocking statutes than it did a century ago. What are the elements uniquely blended in modern American law?

### A. Elements of Blended American Law

LAW IN THE UNITED STATES presents American law not as a common law system, but as a sophisticated blend of three different types of law -- common law, statutory law, and constitutional law.

Common Law. Despite the rise of statutory vehicles for expressing legal rules, a substantial amount of American law remains in the hands of common law courts that produce legal rules through the case-by-case evolution of principles thought to be fair, just, and efficient. It remains possible to study these principles in modern cases that reflect the long evolutionary process of law in the hands of judges. One may, for example, study the common law evolution of torts and contracts principles to see the creation of

strict products liability rules in the early part of the twentieth century and their continued evolution into the DES liability-allocation cases of the late 1980's and 1990's.<sup>2</sup>

Code-Based or Statutory Law. The federal government and the states have seen parallel rises in legislative activity in the twentieth century, not only in the growth of the overtly regulatory (agency-based) aspects of government but also in the legal rules assigned to courts for enforcement. These pieces of legislation are often organized and labeled as "codes" or "codifications," and in some areas, such as commercial law, the codes are sufficiently integrated and widely followed that they bear the hallmarks of European codes.<sup>3</sup>

Constitutional Law. Perhaps unique to U.S. law, with German law the only serious contender, is the dominating aspect of constitutional law and the American constitutional court in developing American law. This feature of American law has two-subparts, separation of powers (checks and balances, including federalism) and individual rights. From its beginning in *Marbury v. Madison*, the American Supreme Court's power of judicial review of the constitutionality of ordinary law has created a vast potential for conflict between ordinary law and constitutional law.<sup>4</sup> Lurking beneath this overall problem are equally strong subsidiary ones. Separation of powers decisions have given the Court power to set the parameters of legislative and executive power,<sup>5</sup> of federal and state power.<sup>6</sup> In the area of individual rights the Court assumes the power to segregate the principal domains of social life, that which is public and subject to legislative and common law control and that which is private.<sup>7</sup>

#### B. The Blend of American Law: Hierarchy in Theory and Practice

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See, e.g., Chapter 2, *The Traditional Common Law System*, in LAW IN THE UNITED STATES.

See, e.g., Chapter 15A, *Private Regulation of Affairs: Obligations Assumed by Private Agreement*, in LAW IN THE UNITED STATES.

See, e.g., Chapter 5, *Federal Judicial Power*, in LAW IN THE UNITED STATES.

See, e.g., Chapters 6 & 7 in LAW IN THE UNITED STATES.

See, e.g., Chapter 8, *Federalism*, in LAW IN THE UNITED STATES.

See Chapters 10-12 in LAW IN THE UNITED STATES.

The theoretical hierarchy in the three elements of the blend of American law is traditionally considered simple and settled. Constitutional law sits atop the pyramid, controlling all law below. Statutory law displaces common law. Common law remains viable where not displaced. The hierarchy has substantial variations, even as conceived two hundred years ago in the prime of American common law. Case law that evolves in the interpretation of statutes for example, stands at the same level as statutes, effectively allowing case law to displace the statute that it interprets. Even with this traditional variation, however, American law stands in contrast to code-based or civil law systems that adopted a hierarchy that places code-based law above cases interpreting it; moreover, in practical effect, code-based law in many civil law nations warped the hierarchy of law because the code was more permanent and stable than even constitutional law.

The process-oriented approach of LAW IN THE UNITED STATES teaches American law as a blend of the three sources of law with much more sophisticated rules of interaction that can be captured by use of the word "hierarchy." This sophistication is introduced in the first case, the seemingly minor decision in *Preiser v. Rodriguez*. *Preiser* began as a suit in federal court brought by a state prisoner claiming that he was being unconstitutionally held in prison beyond the legal length of his sentence. The question for decision was how such a claim must be presented, either by writ of habeas corpus under 28 U.S.C. 2254 or by civil action under 42 U.S.C. 1983. The issue is important because of practical considerations, since section 2254 requires the exhaustion of state remedies not demanded of a plaintiff under section 1983.

Constitutional and Statutory Law. The *Preiser* case introduces the student to a concept widely known in German law, that is that statutes prescribe the procedural mechanism for enforcing constitutional law and that accordingly statutory law may have serious practical consequences for the application of constitutional law.

Statutory and Common Law. Despite the fact that the habeas corpus and civil rights statutes are sections in the United States Code, both refer to other sources of law. Both sections, as noted above, refer explicitly to constitutional law, but section 2254 also incorporates the traditional common law notions of habeas corpus. (The reader also, incidentally sees that the constitution adopts the common law idea of habeas corpus.) The Court must therefore invest considerable time discussing what Congress thought it was doing when it adopted the concept of habeas corpus. This in turn entails a discussion not only of the pre-adoption interpretation of habeas corpus, but also the continuing course of interpretation after legislative adoption of the concept.

Statutory Law as a Code: Statutes and More Statutes. Finally, the Court in *Preiser* must decide the discreet issue before it, which of two apparently equally applicable statutes applies in the case before the Court. The Court resolves this issue by referring to a principle of statutory interpretation familiar to code-based lawyers:

when faced with two applicable statutes, one general and one specific (with specific procedural details), the specific prevails over the general. Lawyers and law students from code-based backgrounds see that, as to issues of statutory interpretation, the rules in the U.S. run parallel to rules they already know from their own experience

C. *Post-Preiser*: Sophisticated Views of the Hierarchy of American Law

The *Preiser* case introduces the three elements of American law. The remainder of the introductory chapter in LAW IN THE UNITED STATES covers the institutional considerations that are relevant in creating a hierarchy of the three elements of American law.

Stare Decisis and Judicial-Legislative Interaction. Lest students begin to believe that American codes are just a variation on their own experience, a final note after the *Preiser* case informs the reader that Congress later legislated a change to the U.S. Code that changed the legal rule applicable in the case. This theme leads to a succeeding discussion of stare decisis and the power of the Court to create common law under the guise of interpretation of legislation. The *Patterson* case, the vehicle for treatment of this issue, involves interpretation of a federal statute that outlaws racial discrimination in the making of "contracts." The Court is called upon to decide the scope of the activities included with the practice of making contracts. The decision not only demonstrates once again how federal statutes can build on common law notions, it also demonstrates how changing interpretation of statutes can have the same practical effect as the judicial creation of common law -- the Court controls issues of policy and can change its policy choices. The *Patterson* case not only introduces the student to modern ideas of stare decisis, including deference to legislative choice in the statutory arena, it also shows how the concept can be manipulated. In this instance, the Court's interpretation, the third reinterpretation of the statute in less than two decades, is later explicitly rejected by Congress.

The Constitution and Common Law as an Issue of Federalism. To the extent that *Preiser* introduced the idea that the Constitution adopts common law, the Court's decision in *Tennessee v. Garner* argues against such a general principle, for in that case the Supreme Court decides that the Fourth Amendment makes unconstitutional a common law principle authorizing the shooting of fleeing felons. How can the common law be unconstitutional? The Court's discussion follows the history of the common law principle, its rationale, and explains how that rationale is inapplicable given the modern changes created by statutory law (criminal law) in the United States. *Garner* in effect creates a national rule, in the name of constitutional law, that displaces common law on the issue of governmental use of deadly force against citizens. (The Court's later refusal to create a federal rule to cover workplace accidents by state employees is also discussed in the section.)

State Codes as Directives for Continued Judge-Made Common Law. The process-oriented approach to learning American law is finally raised explicitly in the last case in the introductory section of LAW IN THE UNITED STATES, *Li v. Yellow Cab Co.*, a case involving California's civil code. Section 1714 of that code explicitly adopted the concept of contributory negligence as a complete defense to a claim of negligence, but despite the statutory prescription the California Supreme Court held that it had power to reject contributory negligence and adopt the modern emerging common law idea of comparative negligence. Besides giving code-based lawyers a strong counter-intuitive picture of American law, the *Li* decision provides a sophisticated discussion of the nature of American codes, suggesting that they are quite different from the European codes that inspired them -- and the difference recognizes the continued importance of common law as made by judges.

### III. The Parameters of American Law: The Sources of American Law-Making and Their Limits

#### A. Illustrative Sources of Law

If the hierarchy of American law is less explicit than the conventional listing of "Constitution-statute-common law," then students of American law must learn something of the methods of lawmaking -- the methods for deciding cases under each element of American law. To what materials does a judge look in deciding what constitutional law is or should be? To what will the judge look in statutory and common law cases? LAW IN THE UNITED STATES emphasizes that these "sources of law" or "methods of interpretation" may vary depending on the type of law being interpreted or made. Since the richest modern discussion of this issue occurs in American constitutional law, LAW IN THE UNITED STATES concentrates on the issue as presented in this area of law. The topic is treated pervasively, however, throughout the text as the key issue in understanding the distinctiveness of American law. Although the list of sources of constitutional law is fairly lengthy, let me mention three here and suggest what they tell non-U.S. students about the sources of American law.

*Marbury, Lochner* and Constitutional Text. American constitutional law is distinctive in part because the American constitution is quite short and somewhat general. Nevertheless, since *Marbury v. Madison*, if not before, the accepted practice has been to treat the Constitution as itself law, binding on the courts. Early cases used approaches to interpreting the document that were theoretical and deductively analytical, paralleling in some ways the methods of interpretation in code law nations. This soon gave way, however, to approaches that recognized that much of the text is more general and not self-defining., among them such cases as *Harper v. Virginia State Board of Elections*, where the Court announced apparently incompatible positions -- that the Court was not authorized to read its social policies into the Constitution, but that neither was the Constitution

static and free from changing interpretation. This move from a "structural" approach to an "organic" approach is presented as an archetype of the competing forces in American law that drive simultaneously for certainty and flexibility.

Intent of the Framers, History and Tradition, and the Common Law. If the constitutional text is general, then it may follow that its more precise meaning is to be found by looking at the intent of its drafters, their historical culture, or perhaps even their legal culture. Many European students will find these concepts to be familiar elements of the hermeneutical approach to interpreting the civil code. In American constitutional law, each of these approaches assumes that there was an intended or assumed meaning of the legal text and that it can be reliably derived by an impartial searcher. These approaches envision the constitution as contract, a document which is binding because, as with statutes, it has been enacted by common assent. Accordingly, in *Youngstown Sheet and Tube v. Sawyer (The Steel Seizure Case)*, the majority presents the issue of the extent of presidential power as one decided by the drafters of the constitution. Justice Frankfurter, concurring in the same case, sees the same issue as one decided by common historical practice and assent. In a similar vein, the majority in the *Lochner* case interprets the word "liberty" in the Due Process Clause by reference to the common law and the liberties recognized by it, assuming in the process that the drafters of the clause had an implicit understanding and consensus about the meaning of the word "liberty" as used by lawyers..

Precedent, Modern Values, and Politics. The "living constitution" is a strong metaphor in American constitutional law, and changing interpretations of the constitutional text are often accomplished by use of precedent (the common law approach to deciding cases), the citation of modern values, and the implicit use of political judgment. In *Griswold v. Connecticut*, for example, an early outspoken proponent of a living constitution, Justice Douglas, used the common law style to argue that a right to use contraceptives is only a small step beyond the previously accepted rights to association. *Roe v. Wade*'s recognition of a right to abortion takes the same approach, building one block beyond *Griswold*'s right to contraceptives. Finally, however, in *Bowers v. Hardwick*, the Court stops the accretion, refusing to recognize a right to homosexual sodomy. The equal protection cases studied under *Brown v. Board of Education*, present similar themes. All these cases drive toward the same ultimate issue for courts: if court's may change interpretations of law based on their modern political values, what are the limits of change or of judicial authority?

- B. The Interplay Between the Sources of Law and the Elements of American Law: A More Sophisticated Hierarchy

Focussing on the sources of American law gives the student a more sophisticated way of seeing the three elements of American law as something more than a hierarchy. To be more precise, the hierarchy that exists consists more in the variations on how judges make or interpret law for each element than on the theoretical hierarchy itself. Thus common law explicitly offers itself as little more than the policy choices of judges, albeit tempered by a strong recognition of historical patterns and traditions that might signal the likelihood that the common law thus created will not be overridden by the legislature. Legislative enactments themselves appear as more or less clearly manifested statements of change from the common law, thus allowing judges more or less room for interjecting their continuing common law notions. Constitutional law then becomes a negative challenge, that of preventing constitutional interpretation from becoming just another form of common law decision making.

#### IV. Pedagogy and the Previously Trained Lawyer

The surge in former law students interested in American law is matched domestically in the United States by a surge of older American students interested in changing career paths to enter law. The problems encountered in teaching these students remarkably parallel the problems seen in teaching students already trained in a foreign legal system, especially the usual code-based systems. The pedagogical challenge is that older law students come to law already set in the ways of thought of their previous career, whether that may be scientific (for doctors and such), intuitive (for writers), or some specific mixture of approaches. Such students have a strong tendency to add their new legal knowledge to their previous thought process, thinking about law as a doctor might, for example, rather than as a lawyer would.

The same challenge comes in teaching foreign law students trained in the usually categorical and more scientific approaches to law that are not dominant in American law. Under the old approach of conveying substantive knowledge to foreign lawyers and law students, a lawyer well-trained in U.S. law left as a person who thought about American law as a civil-law lawyer would. Under the new approach suggested in *LAW IN THE UNITED STATES*, a foreign lawyer or student will only use American law authentically and accurately, if he knows American law and how American lawyers think about it -- how they conceive its hierarchy and how they look to various sources to make American law.

Learning this way of thinking like an American lawyer would think, variously in different subareas of American law, may be analogized to learning how to ride a bicycle. It must be done and practiced, not read about or merely observed. The case method that makes American lawyers the distinctive thinkers that they are -- the distinctive bicycle riders that they are -- is a necessary part of the educational process. The helpful hand

to balance new riders can be provided in notes that accompany the cases, notes designed specifically to demonstrate to code-educated lawyers what is happening in the American courtroom.

A tangible collateral benefit to the process-based approach to teaching American law is that students trained in the new approach find that they have life-long skills in finding and understanding American law, something much more valuable than a snapshot of American law memorized in a year or month of study.