

HERITAGE OF OUR FREEDOMS

Milestones in Legal History

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by James T. Ranney

Introduction. My name is Jim Ranney. I used to be a law professor. And in that role I used to give the slideshow you're about to see to beginning law students, on their very first day of class. And I started by telling them that when *I* was a law student (at Harvard) in the late 60's we were required to take a full *semester* of legal history. But now, I joked, we have condensed all that you “really need to know” about legal history into this mere two hours.

And I used to tell them that I had four major purposes in giving this show, all of them, it turns out, fully applicable to mature attorneys.

First, I would say, to provide a little perspective on our current legal institutions. At a time when there are millions of new cases handed down each year by courts of all types and over 150,000 new statutes and ordinances a year in this country, it seems appropriate to take at least a couple of hours to reflect on how we got to where we are.

Second, this historical perspective lends itself to making some key points about the nature of law, and the role of law and, in particular, the importance of “the rule of law” in securing free democratic institutions. We'll see, I'd tell students, that law is very much a product of the needs of a given society, that it does not “come down from on high” (or spring up from the earth like the monolith in “2001”) but is rather the consequence of social and economic forces in which ordinary human beings—maybe someday yourselves—play a vital role.

Third, I told students that, believe it or not, I hoped the show would actually be enjoyable. And I realized that this violated a rule somewhere about how law school is supposed to be. But I did hope they enjoyed it. Lincoln once wrote a book and in the preface said, “Those

who like this sort of thing will find this the sort of thing they like." And that may be true of this slideshow.

Fourth and last, I said something very vague. I said I hoped that this presentation "will say something to you in a personal way—about the importance of the venture you are now beginning, and of our hopes and aspirations for you." What in the world did I mean by that? Well, as I've analyzed it since, therein lies the "ethics" and is why you're getting "ethics" credits for this seminar. I think you'll see what I mean once we get into the show, but the essential premise is in a single sentence of a letter I wrote to the education institute director: "I think [the show] makes people feel good to be attorneys, to appreciate their importance in our system of government, and to more generally 'take the high road' ethically in their daily practice (maybe they could even get 'ethics' credits, it suddenly occurs to me)." So that is why you're getting 3 ethics credits for something which I hope is fun. But even though I joke about it, I am serious about this. The reason is simple. I don't think that the way to ethical behavior is by studying a whole bunch of "hard cases" and the subtle interplay between various vague and largely self-protecting canons of ethics. We don't need that. Most of the time, we *know* what is the right thing to do. The *key* question is how best to *motivate* the right behavior. My idea is simple: positive psychology beats negative psychology. So, the "ethics" will come by indirection, which may be the very best way. In short, you can just sit back and relax (no notetaking required) and hopefully enjoy.¹

¹Title slide.

I. ANCIENT LEGAL SYSTEMS²

A. Sumerian, Egyptian, and Hebrew (ca. 2500-500 B.C.). We begin, in our study of ancient legal systems, in the middle of the so-called "fertile crescent"³ in ancient Sumer (the concept of the "fertile crescent," by the way, was discovered only in the last 150 years). Shown here are some of the ancient Sumerian cities, such as Babylon, south of modern-day Baghdad in Iraq, and Ur at the southwest tip of what archaeologists believe was an ancient lake, and Susa, northwest of the lake. We'll see each of these cities in a minute.

In these ancient sites,⁴ such as Ur, shown here, large and impressive structures, such as the temple⁵ shown here built by King Ur-Nammu about 2240 B.C., were brought into existence by a highly organized society.⁶ (This is an artist's recreation of the ancient city of Babylon).

A complex agricultural system,⁷ with large-scale cooperative irrigation and cultivation, leads to a remarkably complex legal system: there is a need for land tenure since they are no longer nomadic tribes; thus there is a need for things such as boundary stones,⁸ deeds,⁹ (this

²Subtitle slide: Part I. Ancient Legal Systems:

A. Sumerian, Egyptian and Hebrew (ca. 2500-500 B.C.)

B. Greek law and philosophy (ca. 500-100 B.C.)

C. Roman law (ca. 100 B.C. - 1100 A.D.)

³Map showing ancient Sumerian cities and their relation to modern cities.

⁴45-degree-angle aerial view of Ur as excavated.

⁵Huge temple built by King Ur-Nammu, ca. 2240 B.C.

⁶Artist's rendering of ancient Babylon.

⁷Ancient Egyptian pictorial representation of agriculture system.

⁸Large shiny-black (engraved) Sumerian boundary stone.

⁹Stone-tablet deeds.

photograph is said to illustrate the early distinction between a warranty and quitclaim deed; don't ask me which is which), contracts,¹⁰ and banking and mortgages.¹¹

Recent research on these Codes,¹² conducted by Professor Yoffee at the University of Arizona, has found codes dating back to about 2400 B.C. The code shown here, of Hammurabi, is more recent (about 1700 B.C.) and borrows heavily from earlier codes. It was discovered in 1909 in ancient Susa (now called Shusha),¹³ about sixty miles north of the northwest tip of the Persian Gulf, where the Iranians and the Iraqis had their war in the mid-80's. Despite the length of the code¹⁴ (containing 282 detailed principles of law [my students had some excerpts, but didn't think necessary here]), archaeologists seems quite certain that the code was not meant to be binding upon the king¹⁵ (believed to be King Hammurabi himself), and was used as much for propaganda as anything else (Hammurabi used it to try to convert a recently conquered territory into acquiescing to his rule [saying, in effect, "here's how wise I am"]). In spite of this fact, early on we see the appearance of a separate person who we would today call a "judge"¹⁶ to handle most of what we would call "cases." Archaeologists tell us this occurs about 2370 B.C. in Sumer, and about the same time in Egypt, here a royal Egyptian judge of King Harmhab's reign.

¹⁰Stone-tablet contracts.

¹¹Same as 10.

¹²Hammurabi's pillar code (rare 1920 photo showing Egyptian with pointer, pointing to Hammurabi receiving the code from the Sun God).

¹³Ancient city of Susa.

¹⁴Detail of top of pillar code.

¹⁵Bust of King Hammurabi.

¹⁶Ancient Egyptian judge or scribe.

To summarize briefly as to ancient Sumerian and Egyptian law, we see very sophisticated systems—already using documentary evidence and witnesses as well as ordeals; very detailed commercial and irrigation laws—in very controlled societies.¹⁷ Not surprisingly, in such hierarchical societies,¹⁸ there are great disparities between those on the top of the pyramid¹⁹ and those at the bottom of the societal heap.²⁰

As to early Hebrew law,²¹ much of it is strikingly similar to Sumerian. Vast portions of the Pentateuch (the first five books of the Old Testament, or Torah) come rather directly from Sumer or, perhaps, it is believed, a common third source. This slide shows the Book of Deuteronomy, in a Greek translation of about 250 B.C. This²² is the Torah, a fifteenth-century version from Cairo. A recent book surveying the latest archaeological work²³ suggests that there was indeed a single historical figure who can be called Moses and that the subsequent Ten Commandments and the Pentateuch are the product of several centuries of work by many authors, from about 1200 B.C. to the fifth century B.C.

B. Greek law and philosophy (ca. 500-100 B.C.).²⁴ In most courts of this country

¹⁷Pyramids at Gizeh (color).

¹⁸Looking down from one of pyramids at sunset.

¹⁹Ornate gold and jewel-colored Egyptian plate showing royal couple.

²⁰Ancient stone art-work showing dozens of persons working on a pyramid.

²¹Book of Deuteronomy, ca. 250 B.C. (Greek translation).

²² Fifteenth-century copy of Torah (from Cairo).

²³Rembrandt painting (color) of Moses holding aloft the Ten Commandments.

²⁴Marble bust of Solon.

witnesses swear to "tell the truth, the whole truth, and nothing but the truth." And according to one scholar, this oath is derived directly from the oath required of *jurors* by this man, Solon, in his Constitutional Code for ancient Athens, about 594 B.C.

We know very little of the ancient Greek law codes.²⁵ Tradition has it that the first Greek "law giver" was King Minos of Crete, about 1600 B.C. Then we have Draco's code, 621 B.C., mostly on homicide. Then Solon's, 594 B.C., one of the most famous of all time. But we have only pieces of it in speeches of famous Greek orators. We do have a large portion of the Gortyn Code, of about 460 B.C., shown here.²⁶ It is still a fairly primitive code, only a bit above that of Hammurabi, but probably more sophisticated than the roughly contemporaneous Twelve Tables of Rome. It deals with such things as the laws of inheritance, the procedure for litigating ownership of a slave, the law of suretyship and the like. But we are still very much in the dark in this area and have to speculate as to a great deal.

We *do* know²⁷ what the Greeks were capable of in art, architecture, and philosophy. The Parthenon was erected at the height of classical Greece, about 447-432 B.C., completed three years before Plato was born and one year before the beginning of the Peloponnesian War, which lasted 27 years and marks the end of the Golden Age of Greece. In Solon's time, the laws were placed atop the Acropolis.²⁸ Certainly, the Parthenon gives us some idea of what the Greeks

²⁵Greek (Crete) Gortyn Code, ca. 460 B.C.

²⁶Same, except in closeup.

²⁷Sunset shot of Acropolis, featuring the Parthenon.

²⁸From interior of Parthenon.

were capable of doing. We do know that Greek commercial law was very advanced²⁹ due to extensive foreign trade and, in part, to a not inconsiderable "empire." In fact, the commercial law of the trading island of Rhodes³⁰ (this shows the Propylaea at Lindos, Rhodes) is the origin of Roman and British and now American maritime law. This³¹ shot shows the remains of the Greek temple at Sardis, Turkey and is, for me, most evocative of the power of ancient Greece. As Pericles said in his famous funeral oration, "Future ages will wonder at us, as the present age wonders at us now."

The primary legal institution of ancient Greece³² is the jury, described in great detail in Aristotle's Constitution (this manuscript was lost, by the way, for over 2,000 years, found in 1888 and first published in 1920). Most jury trials³³ occurred on the Pnyx Hill.³⁴ As the jury is the primary institution of Greek law, so the primary focus is on the orators,³⁵ here, the famous orator Demosthenes, who lived from 384 to 322 B.C. This is a Roman marble copy of an original Greek bronze statue which was set up in the market place at Athens. The Greeks are famous for having had lots of litigation. In a play by Aristophanes, one of the figures looks down from a cloud, and says he cannot believe that they are over Greece, because he can see no

²⁹Map of ancient Greece's empire.

³⁰Color shot of Propylaea, Lindos, on island of Rhodes.

³¹Greek temple at Sardis, Turkey.

³²Frontispiece of Aristotle's **Athenian Constitution**.

³³Pnyx Hill, Athens.

³⁴Pictorial representation of Pericles' oration from Pnyx Hill.

³⁵Demosthenes (marble copy of bronze original).

juries sitting.

Although the Greeks themselves did not distinguish all that much between "law" and "philosophy," to the extent that we today separate the two out, we would have to say that the main influence of Greece on future law is in the area of philosophy. Plato,³⁶ a student of Socrates,³⁷ founds his famous school, the Academy, at Athens in about 388 B.C.³⁸ (this is a mosaic representation of the school, found at Pompeii). This³⁹ is a vastly romanticized version by Raphael; I just couldn't resist it. Greece becomes part of the Roman Empire in 146 B.C., and many Greek philosophers, historians and the like go to Rome as tutors for Roman aristocrats' children. And some Roman children are sent to Greece for their education. It has been said that "captive Greece her captor captive took," meaning that ancient Rome was strongly dependent upon Greece for much of its culture. Many of the most famous jurists of the classical period of Roman law, e.g., Gaius, of Gaius' Institutes, who we'll see in a few minutes, frequently quote the Greek philosophers.

Plato's most famous pupil⁴⁰ is Aristotle, briefly described in sweeping terms in the normally mild-mannered Encyclopedia Britannica as "a Greek philosopher, logician and scientist, he, perhaps more than any other thinker, has characterized the orientation and content of all that is termed Western civilization." Aristotle's impact on the law is suggested in a law

³⁶Plato (bust of head).

³⁷Socrates (full-body statue; color).

³⁸Ancient mosaic from Pompeii showing Plato's Academy.

³⁹Raphael's painting of School at Athens.

⁴⁰Aristotle.

review article captioned, "The Aristotelian Basis of English Law, 1450-1800."

C. Roman and canon law (ca. 100 B.C. - 1100 A.D.). We shift⁴¹ then to Rome, the "company town" of a tremendous and far-flung empire. We see in Roman law incredibly sophisticated works, far more so than Anglo-Saxon law, and *even* more so than some relatively modern British and American law of the 18th, 19th, and even 20th centuries. [My students were given an excerpt re a point of criminal law. It took American law until 1962 to finally reach the same position.] This remarkable development is due to several primary factors: first, to the Roman peace (the Pax Romana).⁴² Despite the fact that this is maintained by ruthless suppression, and border battles, this relative period of peace permits a creative development of the law. Second, because of this empire, great minds and ideas from all over are drawn upon.⁴³ Three of the most *famous* jurists and "law-givers" come from Syria, Africa, and Yugoslavia. Third, the problems generated by this vast empire, coming from a wide variety of civilizations, inevitably must have added to the richness of the law. Imagine, if you will, an empire stretching from modern Turkey, including all of France, Germany, Spain, and over to England. What if that much territory were united under one legal system today; what would its impact be upon the development of the law? It would obviously be tremendous. And here, representative of this empire, we have the famous Via Appia (the "Roman Way"),⁴⁴ ancient Thamugadi,⁴⁵ in North

⁴¹Artist's recreation of Roman Forum and environs (showing people).

⁴²Map of Roman empire at its height.

⁴³Roman empire in 161 A.D..

⁴⁴Via Appia.

⁴⁵Roman outpost of Tingad (Thamugadi), North Africa.

Africa, founded by the Emperor Trajan in 100 A.D. for legionary veterans, and an ancient aqueduct⁴⁶ in Spain, built about the same time (and still in use, by the way).

As to the nature of early Roman law: we do have early on a famous "code," the Twelve Tables, of about 450 B.C.⁴⁷ (the story as to its creation is that the plebians got tired of never knowing what their rights were, and being constantly at the mercy of the patrician judges, so they demanded its creation, envoys reportedly being sent to Greece for a copy of Solon's Code to use as a model). But despite the existence of this code, there is, ironically, an essentially common law development (a "make it up as you go" process, with extensive use of legal fictions) for many hundreds of years. Here,⁴⁸ symbolic of that development, is the earliest extant record of a civil judgment in Roman law, from Genoa, dated 117 B.C.. The development of the so-called *jus gentium* (again, basically just a form of common law) occurs at the hands of (1) lawyers (e.g., Cicero,⁴⁹ the most famous Roman lawyer, also a statesman, scholar, and writer, best known⁵⁰ as an orator, laying the foundations of subsequent prose form for all of Europe; he died the year after Caesar, 43 B.C.), (2) magistrates (this⁵¹ ivory diptych shows an early praetor) and (3) the juriconsults,⁵² sort of combined law professors and lawyers. This is Julianus, who

⁴⁶Roman aqueduct in Spain.

⁴⁷Litho of 12 Tables of Rome.

⁴⁸Judgment at Genoa, 117 B.C.

⁴⁹Bust of Cicero.

⁵⁰Painting showing Cicero's famous oration against Cataline.

⁵¹Early representation (cameo-style) of Roman praetor (judge).

⁵²Statue of Judge Julianus.

drafted the Perpetual Edict of 130 A.D., and this⁵³ is Gaius of Gaius' Institutes, 161 A.D. (students had excerpts in written materials). So this great classical common law period of Roman law, which draws upon Greek, Hebrew, and Byzantine sources, centers about the year 200 A.D., about 100 years before this⁵⁴ basilica, which was used as a court, was built by the Emperor Constantine the Great.

The culmination of Roman law comes with this man,⁵⁵ the Emperor Justinian, whose **Corpus Juris Civilis**, of 528-539 A.D., is the result of a 16-man commission,⁵⁶ which drew upon, they said, some 2,000 prior books on Roman law. There are several parts: the Code, which compiled the prior edicts of the Emperors; the Digest, which compiles the opinions of the great jurists and judges of the golden age of Roman jurisprudence; and the Institutes, which were a 173-page synopsis for student use (sort of a glorified “Gilberts” or “Sum & Substance” of its time).. This⁵⁷ is the frontispiece of the original Digest, and here⁵⁸ is a modern collection of the entire **Corpus Juris Civilis**.

But Justinian's **Corpus Juris Civilis** is lost for some 600 years following the fall of the Roman Empire, and during a so-called “Romanesque” or “reception” stage, a number of crude

⁵³Statue of Gaius.

⁵⁴Roman basilica, used for courts.

⁵⁵Mosaic (color closeup) of Emperor Justinian.

⁵⁶Mosaic of Justinian and his ministers.

⁵⁷Frontispiece of original of Justinian's Digest.

⁵⁸Modern picture of Justinian's Corpus Juris Civilis.

Germanic adaptations are created,⁵⁹ here King Euric's Visigoth Code (the code for the southern "Goths," or southern Germans), dated ca. 466 A.D..

Finally, however, in the mid-11th century, the **Corpus Juris Civilis** is rediscovered, triggering a "renaissance" of Roman law study.⁶⁰ As a result, the University of Bologna Law School is founded about 1087. It is the first law school in the world still in existence (there were a number of earlier law schools in the early Roman Empire). Professors, called Glossators, do "glosses" or commentaries on the text of the **Corpus Juris**. This⁶¹ is a representation of an early law school class. You will note, I told my students, a two-foot-high pedestal on which the professor stands. The little 3-inch platform in the front of our classroom, I said, is the only vestigial remainder of that. You will also notice, if you look closely, what appear to be early exemplars of what are now called "back benchers" in the upper portion of the photograph.

This scholarly Roman law becomes a highly organized and analytically fine-tuned body of law, which will, as we'll see, have a significant effect on the development of British law in its most creative period.

Shifting, then, to the closely related topic of the growth of canon law: The beginning of the canon law as a science occurs at about the same time as the renaissance of Roman law. Gratian's Decretum,⁶² (ca. 1140) is the first systematic arrangement of canon law and draws upon a variety of canonical sources, but also a great deal of Roman law. Canon law, in turn, is

⁵⁹Frontispiece of King Euric's Visigoth Code.

⁶⁰University of Bologna School of Law (founded ca. 1087).

⁶¹Representation of early law class at Bologna.

⁶²Frontispiece of Gratian's Decretum (ca. 1140).

frequently cited by many Roman legal scholars. The next milestone in the evolution of canon law is Gregory IX's Decretals⁶³ of 1234 A.D., shown here.

Of course, preceding these collections, the most important historical milestones to highlight are, first, the New Testament, circa 100-200 A.D.⁶⁴ (this is the earliest known fragment of it, from the first half of the second century A.D. found in Egypt in 1926); second, Constantine's⁶⁵ Edict of Toleration, of 313 A.D., which marks the beginning of the collaboration between Roman law and canon law (Constantine converts to Christianity, from the rival Sun God); and third, the work of St. Augustine⁶⁶ around the year 400 A.D. and, later, St. Thomas Aquinas⁶⁷ of 1267-1273. These scholars attempt to reconcile and consolidate Christian doctrine and classical Greek philosophy.

As to the impact of canon law on later common law developments: we've already noted the very close ties between the Roman law Glossators and the canon law scholars. And Roman law, as we'll see, had a significant impact on British law. Second, the fact that canon law was earlier systematized and collected in books made this a ready reference source for those who were looking for some kind of larger analytical framework in their researches. Third, many of those who were doing such research in the courts of post-Conquest England, the judges, were actually clerics, already knowledgeable in both Roman and canon law. There were two main

⁶³Frontispiece of Pope Gregory IX's Decretals, 1234.

⁶⁴Earliest known fragment of New Testament (tan color, blue background).

⁶⁵ Bust of Emperor Constantine.

⁶⁶St. Augustine (color painting).

⁶⁷St. Thomas Aquinas.

areas of substantive impact of the canon law on the common law. First, as to certain religious "subject matters," not only topics such as marriage, divorce, and wills, but also perjury, bigamy and certain kinds of fraud. Second, canon law directly impacted those who were religious "subjects"—not only clerics but all those in holy orders such as university students.

II. ENGLISH LEGAL HISTORY (ca. 1100-1700)⁶⁸

We *can* go back in British history, if we like (and I do), prior to the Norman Conquest and even prior to the Anglo-Saxon Codes, to the almost four centuries when Great Britain was a Roman province. This⁶⁹ shows the beach head of the original invasion of 43 A.D. at Richborough, Kent. While some of the archaeological remains of this long period of time are impressive (this⁷⁰ is the Roman theater at St. Albans [Verulamium]; this⁷¹ is the Roman spa at Bath [Aquae Sulis]; this⁷² is Hadrian's Wall and this⁷³ shows the construction of Hadrian's Wall; this⁷⁴ is a fort of the Saxon shore, built about 290 A.D.; this⁷⁵ is an artist's recreation of Londinium as it is believed to have looked about 250 A.D.), in spite of all this it appears that

⁶⁸Subtitle slide: Part II. English Legal History (ca. 1100-1700).

⁶⁹Aerial view of site of beach-head of Roman invasion of 43 A.D., at Richborough, Kent.

⁷⁰Aerial view of archaeological remains of Roman theater at St. Albans (Verulamium), G.B.

⁷¹Roman spa at Bath (Aquae Sulis).

⁷²Hadrian's Wall (color shot).

⁷³Portrayal of construction of Hadrian's Wall, from Trajan's Column in Rome.

⁷⁴Roman fort of the Saxon shore, ca. 290 A.D.

⁷⁵Artist's recreation of Londinium, ca. 250 A.D.

precious little⁷⁶ of Roman Britain remains. (Although they keep finding stuff: wonderful Roman statue fished out of the Thames last year.).

Instead, whatever of Rome remained appears to have largely⁷⁷ given way before huge⁷⁸ migrations of Germanic⁷⁹ tribes of Angles, Saxons,⁸⁰ Jutes and Danes, over the next 600 years.⁸¹ (This last slide, by the way, shows a Norse, or Viking, assembly, which is believed by some scholars to have been an antecedent to the much later system of trial by jury).

Looking, then, at the pre-Conquest legal structures, we find the following: first, significant pre-existing legal structures, such as county courts,⁸² many of which are directly descended from the courts of previously separate Anglo-Saxon kingdoms, and a variety of other local courts, such as manorial courts. Second, the "law" of this time is mostly customary, although there are a great many early Anglo-Saxon codes, starting in about 600 A.D. with that of King Ethelberht.⁸³ This code is allegedly precipitated by a visit from St. Augustine⁸⁴ several

⁷⁶Desolate Roman road.

⁷⁷Litho of Viking landing.

⁷⁸Oseberg ship (Oslo).

⁷⁹Color painting showing Viking ships.

⁸⁰Viking helmet (from Valsgarde)(greened-bronze; lower half chain mail).

⁸¹Artist's representation (nice color painting) of Norse Althingi (assembly).

⁸²Anglo-Saxon king and his witan, and a culprit about to be hung (ancient drawing, from British Museum).

⁸³Frontispiece to King Ethelberht's dooms (code), ca. 600 A.D.

⁸⁴Lithograph showing St. Augustine preaching to King Ethelberht and his queen.

years prior. Here⁸⁵ is King Alfred's code of around 890 A.D., showing big Al himself. These codes are very primitive, not very different from the Germanic Lex Salica⁸⁶ of about 496 A.D. But at least by the time of King Alfred, the blood feud is sought to be regulated by royal power: it is now unlawful to kill someone until you seek redress by money damages. This system of monetary compensation, of payment of "wergild," helps keep the peace, and is dependent upon a kinship-based system of collective responsibility which becomes possible at this stage of economic development because at least some people have enough wherewithal to pay the "fines" (things like cattle) involved. Legal history scholars tell us that by King Knut's time, about fifty years before 1066, the "pleas of the crown" are already rather well developed, there being a financial incentive to expand royal jurisdiction, which was exploited even more by William the Conqueror and his successors.

These Anglo-Saxon codes continue from 600 all the way up to 1066 A.D.

With 1066, the Conquest, some rather major changes occur. The story of the Conquest itself, as illustrated on the famous Bayeaux tapestry,⁸⁷ is as follows: Harold promises Edward the Confessor that William of Normandy will be king upon Edward's death. When Harold goes back on that promise, William⁸⁸ gathers his forces and lands on the southeast coast of England. On

⁸⁵Detail of frontispiece of King Alfred's code, showing the King (ca. 890 A.D.).

⁸⁶Frontispiece of Germanic Lex Salica (featuring large calligraphic letters, in color).

⁸⁷Bayeaux Tapestry, showing Harold promising that William is to be the next king.

⁸⁸Litho of William the Conqueror mounted on horseback, surveying his troops as they land.

this⁸⁹ now-quiet field at Hastings the Normans charged from the misty trees⁹⁰ on Telham Hill, into the meadow and up the slope,⁹¹ engaging in a pitched battle⁹² that would change the history of England, little realizing what the consequences of this battle would be. But William the Conqueror accomplishes, by force of arms,⁹³ the anomaly of a unified and centralized feudal state, one in which all sub-tenants swear loyalty directly to the king. Although there are 180 great tenants, there is only one army, that of the king.

Surprisingly, there is no immediate dramatic change in the law. In fact, William swears to follow the law of Edward the Confessor, who is, after all, his cousin. The only initial impact, then, is that of a much more centralized administration, represented here⁹⁴ by Pembroke Castle in Wales, and by the Tower of London⁹⁵ (the fortifications for this were begun by William the Conqueror and the central keep was built about 1078 with limestone from Normandy), and by the famous Domesday Book,⁹⁶ compiled in 1085 and 1086, detailing the feudal land holdings of the king, and using the sworn inquest of local knights⁹⁷ for its creation. (Domesday was so

⁸⁹Field at Hastings (today).

⁹⁰Battle scene (color) from Bayeaux.

⁹¹Color representation of battle.

⁹²Same.

⁹³Ancient color portrayal (from William the Conqueror's surcoat, Bodleian Library, Oxford) of Norman lords swearing allegiance to William.

⁹⁴Pembroke Castle (early Norman castle).

⁹⁵Tower of London.

⁹⁶Color shot of Domesday Book.

⁹⁷Color representation of Norman inquest.

called, by the way, because it was thought of as being as authoritative as the last judgment on Doomsday).

So the initial innovation, then, is merely a stronger central administration. But gradually a common law is created, tremendous strides being made in the reign of this man,⁹⁸ Henry II (1154-1189).⁹⁹ Three primary factors account for the creation of this common law: First, there is a centralized court,¹⁰⁰ Westminster Palace, built in 1199 by William Rufus (William II) as a banquet hall and occupied as a central court about 1300. It is the oldest courthouse in Europe. In this 17th century lithograph, you can see, if you look closely, certain numbers. No. 4 is Parliament; No. 5 is Westminster Hall, where the courts of Kings Bench, Common Pleas and Chancery are all located; No. 6 is Star Chamber; No. 7 is the Clock Tower. The centralized royal courts¹⁰¹ are within sight of each other, so that the judges quite literally do a lot of elbow-rubbing. This close contact permits the exchange of ideas, a certain tendency toward uniformity of the law, and a valuable accumulation in one place of a great deal of expertise. And the best men in the realm, many trained in Roman and canon law, are employed as judges. We've seen how both Roman law and canon law are flourishing right at this time. 1066 is about ten years after the discovery of Justinian's Corpus Juris Civilis; Domesday (1085-86) occurs at almost exactly the same time as the founding of the University of Bologna (1087). As Pollock and Maitland tell us, "Of all centuries, the twelfth is the most legal."

⁹⁸Effigy of Henry II.

⁹⁹Litho of Henry II.

¹⁰⁰17th century litho of Westminster.

¹⁰¹Interior of Westminster.

A second factor in the creation of a common law, a law common to all of England, is the royal use of itinerant justices¹⁰² and local, but royally controlled, "shire reeves" (this gives us our modern term sheriffs, by the way), both of which facilitated central royal control. (The slide, by the way, is a 14th century representation of peasants working under a reeve, and is captioned, "A bailiff of Such Savage Efficiency as the Norfolk Reeve").

A third factor yielding a common law is the availability of a wide range of royal writs,¹⁰³ which were originally simply royal orders available on an extraordinary basis, i.e., whenever somebody could talk the king into issuing one. This writ is a writ of William the Conqueror himself, in 1087. This¹⁰⁴ is a writ of William II, in 1099, to Thomas, Archbishop of York, and Ranulf, Bishop of Durham and all sheriffs and lieges in England. This¹⁰⁵ is an 1103 writ of Henry I, and this writ¹⁰⁶ is of Henry II, ca. 1173, to his justices, sheriffs and bailiffs, wherever Reading Abbey has lands.

Before long, these writs grow in numbers (a recent study shows that in Henry III's reign the Chancery purchases of wax for seals increase from 3.63 pounds per week in the 1220's to 31.9 pounds a week by the late 1260's). This increased business leads to a certain bureaucratization of the writ process. The king is obviously too busy to handle these writs himself (in fact, British kings are frequently gone for long portions of their reigns conducting

¹⁰²14th century drawing of shire reeve (Br. Mus.).

¹⁰³Writ of William the Conqueror (1087).

¹⁰⁴Writ of William II (Rufus).

¹⁰⁵Writ of Henry I (1103).

¹⁰⁶Writ of Henry II (ca. 1173).

wars or other business on the continent), so bureaucrats take over, and the issuance of these writs becomes more of a standardized routine. Moreover, with the incipient growth of a Parliament that is worthy of the name, the parliamentary barons become increasingly jealous of the innovations of the king's justices and they legislate, in the Provisions of Oxford, of 1258, against further new innovations. By a combination of factors, then, the writs must now follow set formulas, the so-called "forms of action." Although the justices are still able to innovate a bit by means of "legal fictions," nevertheless the "forms of action" play an important role in the development of the law. Though they are eventually abolished in England, Maitland says that because of the impact on the substantive law, they continue to "rule us from their graves."

A fourth factor in the creation of the common law, and another major innovation begun under Henry II, is trial by jury. Briefly, to review the prior methods of proof: they are all quite primitive and depend upon superstitious/religious belief. First, there is no problem¹⁰⁷ if the "defendant" is caught red-handed. Then the "hue and cry" and what might be called the prompt "hacking to death" method of trial is utilized. (The defendant presumably could not complain that he was denied a speedy trial).

Second,¹⁰⁸ a variety of "ordeals" are utilized: the hot and cold water ordeal, the hot iron ordeal, and the cursed morsel (if food with a small feather wrapped in it stuck in your throat you were guilty).

Third, various ritual oaths¹⁰⁹ were utilized, called compurgation or wager of law. If you

¹⁰⁷Early litho of "hue and cry."

¹⁰⁸Colored engraving from Lex Salica. showing cold water ordeal.

¹⁰⁹Litho illustrating compurgation, or wager of law.

could find neighbors who would swear to your truthfulness, then you could secure your freedom.

And last,¹¹⁰ trial by battle, brought over by the Normans. It seems unbelievably primitive, but we must remember that this society is not that far removed from blood feuds. Also, this mode of trial was early on subject to many exceptions; a vast body of law developing as to these exceptions, exceptions, e.g., for people who were too young, or too old, or too infirm, and the like. One of the ways in which the jury system is initially used, in fact, is to resolve preliminary questions concerning the existence of exceptions to trial by battle.

So how do we get from these primitive methods to what we today consider the more modern method of trial by jury? Well, first the ordeals are effectively abolished in 1215 A.D. when the clergy are prohibited from participation. Compurgation and trial by battle both become rare. And in 1219, scholars have discovered, there is a writ of King Henry III which permits his justices to begin using trial by jury in their discretion. Later, the accused is no longer given a choice as to using trial by jury, and is coerced into accepting what we now view as one of our cherished constitutional rights.

Later still,¹¹¹ jurors change from being witnesses to supposedly being impartial, and are also afforded the right to freedom of deliberations, a right which, we might note, is established in the trial of this man, William Penn, in Bushel's Case, in 1670.

Before leaving the subject of trial by jury, a few comments about its importance. The necessity for jury instructions and concomitant fact/law distinction, lead to the further development of the substantive law. The law of evidence is required. And lastly, as noted

¹¹⁰Litho of trial by battle.

¹¹¹William Penn.

before, because the jury gradually becomes a popular institution, it aids in the royal centralization of justice.

Another force, or set of forces, in the development of the common law relates to the early lawyers, and legal education.¹¹² With the rise of a complex writ system, we see the rise of the earliest lawyers, somewhere around 1200-1210. The famous Inns of Court are established about 1292 (this is Middle Temple). The primary institutional significance of the Inns is that they result in a closed and insular system of legal education, closed to further Roman and canon law influences. The Inns establish a system of learning by practice by close contact¹¹³ with the "legal hotshots" (called Sergeants) of the British legal system.

As to the legal literature of the time.¹¹⁴ Just as the 12th century witnesses a flourishing of Roman and canon law, we have concrete evidence¹¹⁵ of a vital and creative period of early British law in a work usually referred to by the single word *Glanvill*,¹¹⁶ written around 1187, which describes the early royal writs. The law of the king's court is treated as the law of the realm, local custom being slighted and disregarded. This¹¹⁷ is Bracton's work, written about 1256. It relies heavily upon Roman law for its structure and terminology, also canon law. Maitland calls it "the crown and flower of English medieval jurisprudence." You find much

¹¹²Middle Temple.

¹¹³Litho, interior of Middle Temple Inn.

¹¹⁴1673 ed. of *Glanvil* (Harvard Law School Rare Book Collection).

¹¹⁵Same.

¹¹⁶Same (different views).

¹¹⁷Frontispiece of *Bracton* (original printed ed., 1569)(beautiful color slide).

more synthesis and attempts at structuring of material. This, by the way, is an original printed edition, of 1569. The first printed law book in all of England is Littleton in 1481. Printing was first introduced in England in 1476 and invented about 1437, so this is one of the first law treatises printed in all of England. This¹¹⁸ is an original handwritten edition (in Latin) of Bracton. This¹¹⁹ is Littleton's Tenures, ca. 1481, with Sir Edward Coke's handwritten annotations. It is mainly devoted to the growing land law. This¹²⁰ is the frontispiece to Coke's Institutes, published 1628 to 1644. The feligree work is perhaps symbolic of Coke's convoluted style. (When Jefferson was studying law, he complained often and bitterly about the dryness of Coke's texts, but later when recommending books to a first year student, he put Coke's works first! Why do we *do* that?). Here¹²¹ is Sir Edward Coke, and this¹²² is a relatively modern library edition of the four-volume set. This¹²³ is Sir Matthew Hale of Hale's Pleas of the Crown, which were written in the 1660's and are the absolutely seminal work on all of criminal law, constituting a huge improvement over Coke. Blackstone's work is merely derivative of Sir Matthew Hale. And here¹²⁴ is Blackstone. His famous Commentaries on the Laws of England had a tremendous impact on both British and American law. They were written in 1765-1769.

¹¹⁸Page from original of Bracton (ca. 1256).

¹¹⁹Littleton's Tenures, 1481 (Sir Edward Coke's copy).

¹²⁰Ornate frontispiece of Coke's Institutes, 1628.

¹²¹Sir Edward Coke (full body shot).

¹²²Modern (1895) ed. of Coke's Institutes (4 vols.).

¹²³Sir Matthew Hale.

¹²⁴Sir William Blackstone.

What you see here¹²⁵ is the second American edition of 1771, signed by John Morton, a justice of the peace from Pennsylvania (Delaware County). He was the one who cast the deciding vote in the critical Pennsylvania delegation for independence (I recently visited his homestead on Darby Creek at Route 420 and will soon have a slide of his home).

I'd like to discuss next certain aspects of the growth of the common law, in particular the history of the doctrine of stare decisis and the development of equity courts. Despite the existence of Year Books by about 1280,¹²⁶ there is, surprisingly, no fixed principle of stare decisis until many centuries later. The Year Books are *not* used for or looked to as precedents, but are (according to most scholars) merely used to teach those young students who could not attend the actual argument in court. Thus, legal scholars have come to the view that the growth of equity courts cannot be explained entirely by the doctrine of stare decisis. Nevertheless, we do see that the commonlaw courts, for instance, here¹²⁷ King's Bench (ca. 1450) do tend to become set in their ways (for whatever reasons) by the mid-14th century and the equity courts, here¹²⁸ Chancery, exist as an "extra channel" for the law by the early 15th century. The Chancery courts are freer to adopt new remedies and new principles, are more attuned to the old royal prerogative concept (which is that these judges are more nearly the king's men than the older justices, who are increasingly viewing themselves as independent and follow the old law). How did this work? Well, to take an example, the common law courts would not consider any verbal

¹²⁵ Frontispiece to 1771 American ed. of Blackstone.

¹²⁶Page from early Year Book (from reign of Richard II).

¹²⁷King's Bench, ca. 1450.

¹²⁸Court of Chancery (nice color painting).

allegations that a contract was invalidated by fraudulent statements made prior to entering into it. Their rule was that a contract is a contract. But the equity courts would take into consideration fraud in the creation of a contract and would grant so-called "equitable relief" in the form of injunctions and specific performance. What we have, then, in the later middle ages is a very unusual situation in English law. The law consists of a body of common law supplemented by rules known as equity, all of it administered by two different sets of courts. As is well known to those of you who have read Dickens, the equity courts themselves later become quite rigid and otherwise unmanageable. And eventually in Great Britain the two systems are merged. All of which points, P.S., to the essential arbitrariness of this separation between "law" and "equity." After all, historically, the old common law courts were themselves using all kinds of "equitable" principles in their early development. Nevertheless, this historical split and a kind of rechanneling of a certain portion of the law for these several centuries, may be of more than historical interest. It points to a larger issue which remains relevant today even after the merger of "law" and "equity," which is the on-going tension between the need for certainty and evenhandedness (the claims made for standard principles of "law") and the need for flexibility, given the occasional over-generality of various principles of law. In fact, I think that the distinction between "law" and "equity" may provide some rather interesting insights into the nature of law and legal change.¹²⁹

I like to suggest to beginning law students that all of law can be summarized by the following formula: C.L. = G.R. + C.S. What this means is the Common Law, or judge-made or decisional law, or even law generally, is the product of the Golden Rule, i.e., prevailing notions

¹²⁹Graphic: C.L. = G.R. + C.S.

of morality and the like, plus Common Sense. Law is very much a human product of more-or-less normal human beings, not some kind of "Ten Commandments" written with the detail found in the internal Revenue Code. Again, to take a historical perspective, at some point somebody had the power to decide a given "case" one way or the other. At some early point of time, because a decision-maker, as the earl of a manor or the personal appointee of a king, was absolutely empowered to decide a dispute one way or the other, and because at some point he had no earlier "precedents" to look to, he obviously didn't cite any precedent because there weren't any and he didn't have to account to anyone anyway. So these judges made it up as they went, based on, what: prevailing notions of morality, decency, and common sense. The point of this (at least the major one) is that it is important for students to never lose sight of this fundamental notion, to never lose track of or lose faith in your good old-fashioned common sense in your three years here (same goes for attorneys).

Finally, on British legal history, what might be called the constitutional legal developments: the development of the concept of "the rule of law" and parliamentary democracy.¹³⁰ Magna Carta is justly celebrated as the first concrete expression of the limited monarchy concept. This¹³¹ is the preamble to the original of 1215. This¹³² is a paragraph in a later edition. Magna Carta constitutes sort of a real life "social contract," even though the king undoubtedly had no intention of being bound and his "consent" was obviously coerced. But nevertheless, in the long story of the gradual supremacy of the common law and parliament over

¹³⁰Litho (very nice) of King John signing Magna Carta.

¹³¹Preamble of original of Magna Carta.

¹³²Paragraph from later edition.

the claims of royal prerogative, this is an obvious milestone. The limited monarchy principle is "re-argued," as it were, both in the courts¹³³ by such famous figures as Sir Edward Coke, in his debates with King James I in 1608 (it may be noted that although Coke is immediately unsuccessful in his run-in with King James, he later drafts the Petition of Right, 1628, a predecessor of our Bill of Rights) and is also re-argued on the battlefield,¹³⁴ until finally after a Civil War and an Interregnum, where Great Britain does without a king for awhile, and some of the abusive prerogative courts, such as Star Chamber (which persecuted religious dissidents) are abolished, the principal of limited monarchy or parliamentary democracy is finally established, as we'll see, in 1688.

Before discussing the Glorious Revolution of 1688, one can pause to note briefly the changing role of the common law courts. Originally, as we've seen, an instrument for furthering kingly power, they become, by a remarkable sort of "bootstrap operation," a chief source of limitations upon that power. They do so by becoming first closely tied to and tools of parliament, and later are viewed as something of a power in their own right. Along the same lines, the same kind of transformation occurs in regard to the jury. Originally an instrument of royal control, it is today a palladium of our liberty.

Also before passing to 1688, we need to note developments in the growth of parliament.¹³⁵ The latest research indicates that the first body which deserves the name "parliament" occurs in 1258. Earlier bodies of nobles of the realm were largely under the control

¹³³Sir Edward Coke (closeup).

¹³⁴Old pictorial representation of British Civil War, ca. 1640's.

¹³⁵18th century engraving from 13th century drawing of early Parliament, that of Edward I in 1274.

of the king and his ministers, and were more "judicial" in nature than "legislative." This is a representation of an early parliament, that of Edward I in 1274. The Lords Spiritual sit on the left, the Lords Temporal sit on the right, with the Chancellor and the Law Lords (judges) seated on woolsacks in the center (the woolsacks are symbolic of the prosperous wool trade which is central to England's economy at this time). This¹³⁶ is an early statute, the Statute of Merton, as found in a lawyer's pocketbook of statutes (ca. 1297). And this¹³⁷ is the Statute of Westminster, of 1275 (Edward I).

Moving, then, to the Glorious Revolution of 1688,¹³⁸ this engraving shows James II throwing a demand to convene a free parliament into a rather large fireplace fire. James, a Catholic, and a believer in the divine right of kings to rule in absolute fashion, tried to "push" his religion a bit too much on his largely Protestant "subjects" and, besides, they weren't feeling like being "subjects" so much anymore. So they proceed to invite this man,¹³⁹ William of Orange of Holland, who was married to James' daughter (believe it or not), to push his claim to the throne. William of Orange lands at the Bay of Torbay with an army¹⁴⁰ and James, who has sent a duke to negotiate with William only to learn that the Duke has gone over to William's side,¹⁴¹ flees to the

¹³⁶Lawyer's pocketbook from ca. 1297, showing Statute of Merton, 1235.

¹³⁷Statute of Westminster, 1275.

¹³⁸Litho showing James II throwing a demand for a free parliament into a massive fireplace.

¹³⁹Color painting of William III on horseback.

¹⁴⁰Color painting of massing of William's troops at the Bay of Torbay.

¹⁴¹Litho showing James learning of William's landing.

continent.¹⁴² Hence, the "Glorious" or "Bloodless" Revolution¹⁴³ of 1688. This¹⁴⁴ is the Parliamentary Resolution declaring the throne vacant, dated January 28, 1688. The House of Lords, in a nice lawyer-like touch, changes the word "abdicated" to "deserted." And so a whole new understanding comes into being.

And the person who does the best job explaining all this¹⁴⁵ from a theoretical standpoint is John Locke, whose 1690 book, A Second Treatise on Government provides a philosophical justification for the Glorious Revolution and the theories of limited monarchy and parliamentary democracy. Locke espouses the concept of the consent of the governed, and the separation of powers doctrine, and a number of other fundamental political theories later used by America's Founding Fathers.

[INTERMISSION]

III. AMERICAN LEGAL HISTORY (COLONIAL TIMES - PRESENT)¹⁴⁶

Although the Colonial period of American legal history occupies a considerable time span, we will cover it quite briefly. In this earliest period, prior to the Revolution, there is little "law" at all in a sense,¹⁴⁷ especially in the primarily religious colonies, although even they create many early codes, with lots of "religious" crimes such as swearing, fornication, and missing

¹⁴²Painting showing James getting into a dingy, on his way to the continent.

¹⁴³Litho showing William's welcome into London.

¹⁴⁴Parliamentary Resolve declaring throne vacant.

¹⁴⁵John Locke.

¹⁴⁶Subtitle slide: Part III. American Legal History (ca. 1700-Present).

¹⁴⁷Color painting showing early Quaker assembly.

church. Some scholars call the Colonial period of American law one of "benign neglect," meaning that the conditions in colonial America were so rude and crude that all of the fine points of British law were forgotten, fine points which at the time included all kinds of weird doohickeys upon hickeys upon the law of real property: leaping remainders, fee tails, the Rule in Shelley's Case, careening, cavorting, reversionary doobobs and so on (don't hold me to the exact accuracy of these terms: property is *not* one of my fields of expertise). There are at this time, in fact, just precious few law books to be had. A story which illustrates this¹⁴⁸ is told in a biography of John Adams who in 1769 was appointed to defend some American sailors who, in trying to avoid being impressed by a British frigate into the British navy, killed a British lieutenant. The defense which Mr. Adams filed in a written motion was that the defendants were justified by self defense because impressment on the high seas was illegal. The British judges in their gowns and wigs, in a crowded Boston courtroom, sit down to read Mr. Adams' petition, reading it through their little half-glass reading glasses and, as they peer at him, he rather dramatically sets on counsel table, with the spines facing the judges, the British Statutes at Large, the only set of these books in all of Massachusetts. Immediately upon spying these volumes, the judges hurriedly hold a bench conference, adjourn, come back and dismiss the case. Why? Because they knew that the volumes that John Adams had so conspicuously placed on his counsel's table contained 6 Anne 37, a parliamentary statute forbidding impressment in American waters. Of course, the dismissal of the case precipitated an immediate and huge uproar in the courtroom, and John Adams became an instant patriot.

The primary method of legal education in the colonies was the apprenticeship system.

¹⁴⁸John Adams as a young lawyer.

Very few go to the Inns of Court.¹⁴⁹ The legal education of Patrick Henry, for instance, was said to consist of six weeks of independent reading, of Coke on Littleton and the Statutes at Large. Some idea of the nature of early American legal education can be gleaned from a story told (much later) of Abraham Lincoln, when he was on the Illinois Board of Law Examiners. It reads as follows: "Jonathan Birch of Bloomington, Illinois, recalled the circumstances of his 'examination' for admission to the Illinois Bar. Abraham Lincoln was, by appointment of the Supreme Court of Illinois, a member of the Board of Examiners.¹⁵⁰ The candidate found the examiner, Lincoln, in his hotel room, partly undressed, and so far as facilities permitted, taking a bath which proceeded during the 'examination': 'Motioning me to be seated he [Lincoln] began his interrogatories at once, without looking at me a second time to be sure of the identity of the caller. "How long have you been studying?" he asked. "Almost two years," was my response. "By this time, it seems to me," he said laughingly, "you ought to be able to determine whether you have in you the kind of stuff out of which a good lawyer can be made. What books have you read?" I told him, and he said it was more than he read before he was admitted to the bar....He asked me in a desultory way the definition of a contract, and two or three fundamental questions....Beyond these meager inquiries...he asked nothing more. As he continued his toilet, he entertained me with recollections—many of them characteristically vivid and racy—of his early practice....The whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all or not....[H]e wrote a few lines on a sheet of paper, and, enclosing it in an envelope, directed me to report with it to Judge Logan,

¹⁴⁹Early rural court scene (color painting).

¹⁵⁰Painting of Lincoln on horseback in winter (as circuit-riding lawyer).

another member of the examining committee, at Springfield. The next day...I delivered the letter....On reading it, Judge Logan smiled, and, much to my surprise, gave me the required certificate without asking a question beyond my age and residence, and the correct way of spelling my name. The note from Lincoln read: "My dear Judge: –The bearer of this is a young man who thinks he can be a lawyer. Examine him if you want to. I have done so, and I am satisfied. He's a good deal smarter than he looks to be."" But, just to counterbalance this a bit, it may be noted that John Adams read long and hard in his law studies, even a bit of Roman and canon law, albeit merely to impress his big city Boston interrogators. And in response to a letter from his wife Abigail wherein she had said that a prospective lawyer was asking for their daughter's hand in marriage, he wrote that, "Lawyers should never marry early...knowledge of the law comes not by inspiration, and without painful and obstinate study no man will ever have it."

Finally, on the colonial era, a word about the prevalent circuit practice which most lawyers had to engage in. John Adams did this outside Boston, in the small towns near his hometown of Braintree. John and Abigail's daughter rocked their son John Quincy to sleep with the song, "Come Pappa, Come Home to Brother Johnny." The nature of this early circuit practice is well-described in Lawrence Friedman's book on American legal history: "Lawyers traveled with a judge on horseback in a cavalcade across the prairies from one county seat to another, over stretches from fifty to one hundred miles, swimming the streams when necessary. At night they would put up at log cabins in the borders of the groves, where they frequently made a jolly night of it. This circuit practice¹⁵¹ required a quickness of thought and rapidity of

¹⁵¹Lincoln, sitting under a tree, hands clasped around one knee, talking to clients.

action nowhere else requisite in professional practice. The lawyer would perhaps scarcely alight from his horse when he would be surrounded by two or three clients requiring his services. It is surprising how rapidly such practice qualifies one to meet emergencies. Typically, the lawyer traveled light; he took with him a few personal effects, a change of linen, and a handful of law books."

We come next to the "Constitutional" era,¹⁵² in which the basic shaping of America occurs. Of course, the creation of our Constitution is a key event in our history, not only politically, but, one should not be too surprised, in the field of law. Imagine the impact on you if you were a judge or lawyer at that time, and suddenly you start on a fresh new slate, with a new charter, created in Philadelphia¹⁵³. (This¹⁵⁴ is a contemporaneous watercolor of Independence Hall, done by a British painter). To review a little American history, and the key dates: First, the delegates to the Second Continental Congress declare "independence" on July 2nd, 1776.¹⁵⁵ This¹⁵⁶ is Thomas Jefferson's handwritten draft of the Declaration. It has struck me that it is

¹⁵²Graphic: **BIRTH OF A NEW NATION**

Declaration of Independence adopted	July 2, 1776
Continental Congress approves	
Articles of Confederation	Nov. 15, 1777
Articles of Confederation ratified	March 1, 1781
Treaty of Paris signed	Sept. 3, 1783
Constitution signed by Convention	Sept. 18, 1787
Constitution ratified by ninth state	June 21, 1788
Bill of Rights proposed by Congress	Sept. 25, 1789
Bill of Rights ratified	Dec. 15, 1791

¹⁵³Color litho of Philadelphia street scene (Historical Society, Phila.)

¹⁵⁴Rare watercolor of Independence Hall, 1787.

¹⁵⁵Trumbull's painting of signing of Declaration of Independence.

¹⁵⁶Thomas Jefferson's hand-written original rough draft.

somewhat odd that we place so much emphasis upon July 4, 1776 as "the" big date in our history. We had already been at war for some time (Lexington and Concord occur in 1775), and at the time the Declaration was issued a realistic assessment, given that we faced the most awesome sea power in the world, might well be that it wasn't worth the paper on which it was written. Moreover, it is the 2nd on which it was approved, not the 4th. The 4th was the date on which a more formal Declaration was approved, which was later (on July 8th) read to the crowds in Philadelphia. It was read on a number of subsequent dates throughout the colonies (e.g., it was read to the troops at Valley Forge on July 10th; it took 27 days for mere news of the Declaration to reach Charlestown, Virginia, the same time it took to reach Paris). But passing the 1776 date, the next key dates are associated with this document,¹⁵⁷ the Articles of Confederation, which was proposed (and signed) in 1777 (in York, Pennsylvania, by the way) and finally adopted four years later in 1781. (Benjamin Franklin, in 1777, while seeking a loan for the colonies from the King of Prussia, successfully passes off the proposed Articles as already having been adopted!) Third, and from a practical standpoint a much more important date in the history of our nation, September 3, 1783,¹⁵⁸ when the Treaty of Paris, successfully ending our Revolutionary War, was signed.¹⁵⁹ Fourth, and my own personal candidate for the most important date in our constitutional history,¹⁶⁰ September 17, 1787, the date on which the Constitution itself was passed by the Convention in Independence Hall. It was, by the way, a

¹⁵⁷Articles of Confederation (National Archives).

¹⁵⁸Treaty of Paris (gorgeous color shot, showing signatures, red wax seals, and silver cannister with red and gold tassels attached).

¹⁵⁹Color painting (unfinished) of signing of Treaty of Paris.

¹⁶⁰Color painting of signing of Constitution.

Monday at about 3:15 in the afternoon,¹⁶¹ when 38 delegates signed the four-page document¹⁶² transforming a collection of formerly squabbling colonies into one united nation, the United States of America. James Madison, who keeps a journal of the proceedings, records what occurred that afternoon:¹⁶³ Quote: "Whilst the last members were signing it Dr. Franklin looking toward the President's Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have, said he, often in the course of the session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting. But now at length I have the happiness to know that it is a rising and not a setting sun." It is also reported, by the way, that Benjamin Franklin, crusty old Ben Franklin, was one of many of the delegates who felt such emotional joy on signing the Constitution that they openly wept.

This¹⁶⁴ is an original from our National Archives. It was found, by the way, after being lost for years, by a historian in 1882 "folded up in a little tin box in the lower part of a closet" in the State Department. It wasn't even put on public display until 1921, and it just bounced around in various government buildings until finally finding a secure resting place in this sealed chamber¹⁶⁵ in the National Archives in 1952.

¹⁶¹Color photo of Convention Hall.

¹⁶²George Washington's copy of final draft, with his handwritten emendations.

¹⁶³Christy painting of signing.

¹⁶⁴Frontispiece, U.S. Constitution.

¹⁶⁵Color photo of children leaning over glass-covered Constitution.

A fifth date one could choose to celebrate is June 21, 1788, which is what, do you suppose? It is the date on which the ninth state, New Hampshire, ratifies the Constitution. But what would be the possible problem with celebrating this date? Well, it would point out the essential arbitrariness of the three-fourths ratification requirement. What was the magic in this number, and what if the remaining states had refused to ratify? It was in fact a very close thing in two key states after New Hampshire. Ratification is secured in Virginia by ten votes (89 to 79) and in New York by only three votes. So it was not a guaranteed thing, and as one author says, nothing short of a miracle that we did secure a Constitution.

Finally, another significant milestone in our constitutional history occurs¹⁶⁶ when the Bill of Rights is ratified, on December 15, 1791.

So, how did we do it, how did we create (in the words of a famous Britisher, Prime Minister William Gladstone) the "most wonderful work ever struck off at a given time by the brain and purpose of man"? Well,¹⁶⁷ my own possibly idiosyncratic reading of history suggests three primary reasons. First, we were able to borrow a lot from the hated mother country, Great Britain, who in their Glorious Revolution of 1688 had established the first parliamentary democracy in the world. Although they had a lot to learn about what real democracy means (and the Revolutionary War was itself a lesson in that respect), nevertheless we were able to borrow a great deal from them. Second, by having some eleven years between 1776 and 1787, we were able to learn a few invaluable lessons—the dangers of mobocracy, of a weak central government, and of a too strong executive. Third, I believe that the fact that we had on hand some truly great

¹⁶⁶Original, Bill of Rights.

¹⁶⁷Graphic of three reasons.

men who drafted the Constitution had no small part in it. If you look at the backgrounds of many of these men, you lose (I know I did) any cynicism you might have about all this talk about the "Founding Fathers." They had terrific classical educations, they quoted during the debates on the Constitution: Thucydides, Aristotle, Tacitus and Livy. Even the less-well-known delegates. There is a fine book published in 1987 called The Enduring Constitution (written by Jethro Lieberman) and it has scattered throughout the text little inset mini-biographies of each of the 55 delegates, and the amazing thing is that even people I'd never heard of were remarkable people, like this one guy (Abraham Baldwin) who had gone to Yale, became a minister and then a chaplain in the Continental Army, then became a lawyer and moved to Georgia, and a year after moving there gets elected to the Georgia Assembly and then the Continental Congress, all this while taking care of his less fortunate brothers and sisters! And he's just one of many. Jefferson, who was not at the convention because he was ambassador to France, when he learns who some of the delegates were, calls them "an assembly of demigods." Now, this is not to say that they didn't have their idiosyncracies and their self-interested motives. And it is probably true that any above-average group that had met at this time in history and went about their task with the dedication that they did (Madison read trunks of books on philosophy of government sent by Jefferson) and the sense of history that they had (their journals show they were fully cognizant of the importance of what they were doing not only for our country but for the world) would have met with a measure of success. But again, we were blessed with what I believe was a once-in-history collection of individuals.

Taking a brief look at some of them, first¹⁶⁸ John Adams, one of the true greats among

¹⁶⁸John Adams (older man).

our founding fathers, even though he was an Ambassador to Great Britain at the time. A lawyer (as were half of the signers of the Declaration of Independence), a statesman (our first Vice-President and second President), and a scholar, John Adams drafted a tiny book called Thoughts on Government in 1766.¹⁶⁹ This book was used by many of the draftsmen of state constitutions prior to 1787 and had been read by many of the delegates to the Convention. Adams also did the original draft of the Massachusetts Constitution in 1780, which was used as a model by Madison in drafting the Virginia Plan. Thus, for me, it is John Adams who in many ways deserves to be called the Father of the Constitution.

I put George Washington¹⁷⁰ next because he has been rather downplayed by some historians as not the intellect, just a general. But one senses, from diaries of those who met him and other material, that he had, by sheer force of his person (his character and presence), a lot to do not only with our securing independence but also with our getting a Constitution. When he dies, in 1799, and word reaches Europe, Napoleon himself is seen to bow his head. And in the English Channel the British fleet fires a salute of twenty guns. This is a British Museum painting by a British painter (it was on display during a special bicentennial celebration of their glorious defeat, in 1976). And this¹⁷¹ is a very similar painting (looks to be just the obverse of the other) by a not-well-known American painter, both of them being, I'd wager, much more like what Washington really looked than what you see on a dollar bill (really fairly handsome guy).

¹⁶⁹Frontispiece to the original.

¹⁷⁰George Washington (British painter).

¹⁷¹American color painting of George Washington.

Next,¹⁷² Thomas Jefferson, who in the popular mind is probably the number one Founding Father. And he is quite the remarkable Renaissance man. Anyone who visits Monticello comes away in amazement. He studies law under George Wythe, the first American law professor (who we'll see later), he was a natural scientist, an architect, an accomplished musician, and our third president.¹⁷³ He died on July 4, 1826, on the exact same day as John Adams, and exactly fifty years after July 4, 1776. There's an interesting story about this. In their youth, Jefferson and Adams were friends, comrades in arms during the Revolution. But after a hard fought presidential campaign against each other, they became rather bitter enemies. A mutual friend (Dr. Benjamin Rush, Philadelphia) thought this was quite a shame, so he sought to effectuate a reconciliation, and eventually succeeded, with the result that a correspondence was struck up over many years which has delighted historians ever since. But some of the old competitiveness remained, so that when Adams was on his deathbed (or, in this case, chair¹⁷⁴) his last recorded words were: "Jefferson lives." He had no way of knowing (in this era before telephone and TV) that Jefferson had actually predeceased him¹⁷⁵ by several hours.¹⁷⁶

James Madison¹⁷⁷ is known as the Father of the Constitution. His "Virginia Plan," put

¹⁷²Thomas Jefferson (black and white).

¹⁷³Lovely color presidential portrait.

¹⁷⁴Photo (by author) of second-story room, and chair, where Adams died.

¹⁷⁵Top portion of newspaper National Aegis for July 4, 1826 (author's personal copy).

¹⁷⁶Text of newspaper featuring two letters (which had been solicited on April 28) from Adams (May 24) and Jefferson (June 8), responding to commemorative medals (celebrating completion of Erie Canal) sent to all surviving signers of Declaration by the newspaper.

¹⁷⁷James Madison (full body; color).

forward by Edmund Randolph, furnished the framework for discussion. He also took notes on the debates and was a co-author of the Federalist Papers. Secretary of State to Thomas Jefferson (they were close boyhood friends), he was also our fourth president.¹⁷⁸ Considered by some to be one of the less brilliant of our Founding Fathers, all he did, by the way, was complete the normal four-year course at Princeton in two-and-a-half years.

Alexander Hamilton¹⁷⁹ was a brilliant aide-de-camp¹⁸⁰ to George Washington. Sort of a self-made aristocrat, he was the foremost advocate of a strong central government. He served as our first Secretary of the Treasury and was a primary author of the Federalist Papers.¹⁸¹ This is an original edition, and this¹⁸² is an original handwritten outline of them by Alexander Hamilton.

James Wilson¹⁸³ was a lawyer, political theorist, and taught Greek rhetoric in the College of Philadelphia before turning to law. He was a member of the Committee of Detail that drafted the final draft of the Constitution. He was later a Justice of the Supreme Court (if there were ever any question about the intent of the draftsmen of the Constitution, he needed only to consult himself).

Benjamin Franklin,¹⁸⁴ last of the framers we'll look at, is another Renaissance man,

¹⁷⁸James Madison (head).

¹⁷⁹Trumbull color portrait.

¹⁸⁰Hamilton as military aide-de-camp.

¹⁸¹Frontispiece to original of Federalist Papers.

¹⁸²Hamilton's handwritten outline for Federalist Papers.

¹⁸³James Wilson.

¹⁸⁴Ben Franklin.

actually one of the quietest delegates during the debates, until a rather dramatic moment at the end: he gives his speech to James Wilson to read because he is too weak, urging acceptance of the Constitution as is (and he had great credibility in this because he had a few pet ideas, such as a unicameral legislature, which had been rejected), because, he said, "I expect no better, and I am not sure that it is not the best." [P.S.: recent biography by H.W. Brands is wonderful].

Finally, I would like to suggest that this was an era of not only great men, but of great times more generally. One can look at numerous other fields of endeavor and see this. Looking first at music: it was the era of Mozart,¹⁸⁵ whose famous *Eine Kleine Nachtmusik* was composed in 1787 (the year the Constitution was signed). His three "Great" symphonies, Nos. 39-41, are composed in the year 1788, the year the Constitution was ratified. His most famous opera, *The Magic Flute*, is composed in 1791, the year the Bill of Rights is adopted. It is the era of Haydn,¹⁸⁶ whose "Surprise" Symphony No. 94 is composed in 1791. And it's the era of early Beethoven¹⁸⁷ (this is a very rare portrait of 1806). His Symphony No. 1 is composed in 1799. Finally, in relation to music, it may be noted that the waltz becomes fashionable for the first time in England in 1791.

In art: it is the era of Turner,¹⁸⁸ Gainsborough,¹⁸⁹ and Reynolds.¹⁹⁰ This is a 1788 painting

¹⁸⁵Mozart (color painting; his wife's favorite, done near time of his death).

¹⁸⁶Haydn (rare color portrait).

¹⁸⁷ Beethoven as young man.

¹⁸⁸J.M.W. Turner painting.

¹⁸⁹ Gainsborough painting.

¹⁹⁰Reynolds portrait-work.

of Lady Betty Foster, later Duchess of Devonshire. This¹⁹¹ is Edward Gibbon, whose famous book on The Decline and Fall of Rome appears in six volumes dated 1776 to 1788. And this¹⁹² is Sir Joshua Reynolds himself, looking every bit the enlightened Renaissance man, in a self-portrait of 1788.

In literature and philosophy, we have Goethe¹⁹³ (in a 1787 painting), Wordsworth,¹⁹⁴ and Kant.¹⁹⁵

In science,¹⁹⁶ in 1787, the American inventor John Fitch launches the FIRST steamboat on the Delaware River, twenty years before Fulton's (Philadelphia is the city etched in the background). In fact, the date was August 22, 1787, right in the MIDST of the Constitutional convention, and most of the delegates came to the bank of the Delaware River (only a few blocks from the Convention) to watch the trial run. So at the very time this sketch was made, if you can imagine it, they were standing on the opposite shore! In 1790,¹⁹⁷ Lavoisier's Table of Thirty-One Chemical Elements is published. Eli Whitney¹⁹⁸ in 1793 discovers his cotton gin.¹⁹⁹ Numerous

¹⁹¹Reynold's painting of Sir Edward Gibbon.

¹⁹²Self-portrait of artist.

¹⁹³Goethe (color painting).

¹⁹⁴Wordsworth.

¹⁹⁵Kant.

¹⁹⁶Fitch's steamboat.

¹⁹⁷Lavoisier and wife (with chemistry apparatus on desk).

¹⁹⁸Eli Whitney (color).

¹⁹⁹Litho of his gin.

other scientific discoveries occur at this time: James Watt's rotating steam engine, 1781; the first steam-driven cotton factory, 1789; the first illuminating gas is used in England, 1792 (imagine what a difference that made); the first telegraph, 1794; and Erasmus Darwin's book containing the first speculation on the theory of evolution, 1794 (his grandson, of course, is Charles Darwin). So, it is an era of unbelievable creative activity. All this is not to say, by implication, that the Constitution was a perfect document. Far from it. The treatment of slaves and women stand out as the most glaring examples. More of that later.

Shifting from the era of the creation of the Constitution to the early 1800's (what some call the "Federalist" period), when a number of blockbuster cases come down which establish the essential foundations of constitutional law. It is the era of the mighty Chief Justice²⁰⁰ John Marshall, the fourth Chief Justice of the United States, from 1801 all the way to 1835. Perhaps the most famous decision in our constitutional history is *Marbury v. Madison*, in 1803. *Marbury* establishes the power of the Court to declare congressional legislation unconstitutional (a power which the British do not have). The story of *Marbury* is that President Adams had appointed *Marbury*,²⁰¹ a reliable Federalist, to be a justice of the peace. This appointment was approved by the Senate and signed, at about midnight of Adams' last night in office.²⁰² It was then sent to Secretary of State Marshall and before it could be "registered," the Adams administration expired. The new president, Jefferson, proceeded to cancel the appointment. *Marbury* sought a writ to order the new Secretary of State, James Madison, to register the appointment. The

²⁰⁰John Marshall (beautiful color).

²⁰¹Mr. *Marbury* (color locket portrait).

²⁰²Color painting showing President Adams signing judgeship papers.

Judiciary Act of 1789 purported to give original jurisdiction to the Supreme Court to grant such a writ, but it turns out that the Constitution itself rather precisely limits the original jurisdiction of the Court to cases concerning ambassadors and so on. Thus, despite the right to the office, Marbury was entitled to no remedy, because the statute went further in giving original jurisdiction than was specified by the Constitution, and was thus, the Court held, unconstitutional.

The 1820's to the 1840's is a period of American law that has been characterized as the "Discovery" era, a period of fresh growth. The movement for codification forms a natural part of this era.²⁰³ The movement for codification dates back to the efforts of Jeremy Bentham in England and was even inspired to some extent by the great Napoleonic Code of 1804.²⁰⁴ Of the many leaders of this movement it is David Dudley Field²⁰⁵ who is perhaps the most significant. Those favoring codification of the law argue that the case law approach is ex post facto, too bulky and unsystematic, uncertain and fragmentary. Of course, it may be noted that statutes have some problems too, such as the inability to deal with the unforeseen case, and their rigidity over time due to legislative inertia. In any event, the Field Code, which, amongst other things, abolishes the law-equity distinction and forms of action, is adopted in at least a few states, including California. There is, however, no strong nationwide impact, so that there remains a need for other methods of creating some little semblance of uniformity out of the huge mass of cases from the wide variety of jurisdictions in our country. This need is met in part at least by

²⁰³Bentham.

²⁰⁴Frontispiece to Napoleonic Code.

²⁰⁵David Dudley Field.

the creation, starting in 1896,²⁰⁶ of various uniform laws and by what are called "Restatements" of the Law,²⁰⁷ beginning in about 1923, which are an effort by top faculty and practitioners to state the law as it ought to be in a given area. These uniform laws and restatements are in part the product of the creation of a nationwide bar, which occurs largely at the hands of this man,²⁰⁸ Simeon Baldwin, who in 1878 sends out the call for the first conference of the American Bar Association. He was then 38 years old, a resident of New Haven; he selected most of the sponsors and drafted the original Constitution of the ABA. He was later governor of Connecticut.

Picking up on a topic we started earlier: American legal education. We spoke earlier of the apprenticeship system in colonial times as the primary method of legal education. But a few law schools are formed in America early on. The first professorship of law is established at William and Mary College,²⁰⁹ in 1779, by Governor Thomas Jefferson, who had been a private student of this man,²¹⁰ George Wythe. Wythe also taught one Captain John Marshall.²¹¹ You will note the rather longish nose he had; he established a precedent in that respect which appears to continue²¹² to the present day (some kind of self-selection process at work, it would seem).

²⁰⁶Uniform Laws Annotated.

²⁰⁷Set of Restatements.

²⁰⁸Simeon Baldwin, founder of ABA.

²⁰⁹William and Mary College, first building.

²¹⁰Early portrait of George Wythe.

²¹¹Later litho of George Wythe.

²¹²"Humor" shot of James T. Ranney and class (all with fake long noses on).

The first actual law school²¹³ is at Litchfield, Connecticut, founded in 1784 and running until 1833. Initially the school was merely an expansion of the apprenticeship system. In fact, this was the office of the chief instructor. But this little school has an incredible number of distinguished alumni, from many states, including 16 U.S. Senators, 50 Congressmen, 40 justices of higher state courts, including 8 Chief Justices and 2 U.S. Supreme Court Justices, 10 governors, and 5 cabinet members. It had a total of 1,015 students in its 49 years. Judge Tapping Reeves gave carefully prepared lectures, citing cases, mostly English, and Blackstone. There were a number of practitioner-professors also. The term of residency was 14 months.

But the availability of treatises, not only Blackstone's, but also those by Kent and Story, and the attractions of law schools associated with regular colleges, causes the eventual decline of the Litchfield School. Harvard Law School²¹⁴ is founded in 1817 (this is the first building there, no longer standing), and it is the first American law school still in existence.

We've mentioned Kent and Story. This²¹⁵ is Kent, who was the first professor at Columbia College and a prominent judge. His Commentaries on American Law are written in the 1820's, and make some very dry reading (I know because I own them, and read them for "fun"). Story²¹⁶ was a Supreme Court justice at age 32, later a professor at Harvard. His Commentaries are written in the 1830's and 1840's, and are equally dry.

²¹³Litchfield School (8 x 12 shack).

²¹⁴First building, Harvard Law School, 1817.

²¹⁵ Kent.

²¹⁶Story.

We come, then, to the Civil War and Reconstruction era,²¹⁷ a huge tragic scene in American history, arising out of slavery. It's amazing to read what both Jefferson and Adams had to say about slavery almost a hundred years earlier, how prescient they were: Jefferson (who owned slaves), "I tremble for my country when I reflect that God is just." And John Adams, "I shudder to think of the calamities which slavery is likely to produce in this country." The Dred Scott decision²¹⁸ in 1857, ruling that Negroes are not citizens and, moreover, that Congress lacked the constitutional power to make them so absent constitutional amendment, is used by this man²¹⁹ to beat Senator Douglas about the head in a series of justifiably famous debates. He thereby gains national recognition (as a result of these debates, which were published verbatim in all major newspapers, he is introduced to an important assembly of politicians in New York by none other than David Dudley Field). And so, it is more than speculation to suggest that the Dred Scott decision leads, ultimately, to Lincoln being elected president.

The constitutional and statutory changes which occur in this era signal a major shift of power away from the states to the federal government. Here,²²⁰ representative of this major shift, is the Emancipation Proclamation (being signed), here²²¹ an allegorical representation of it, and here²²² a painting showing a black soldier returning home from the Civil War, reading it to his

²¹⁷Dred Scott.

²¹⁸Cover-leaf to Dred Scott decision.

²¹⁹Lincoln.

²²⁰Lincoln and cabinet, after signing of Emancipation Proclamation.

²²¹ Allegorical color painting celebrating Emancipation.

²²²Black soldier home from Civil War, reading Emancipation to his family (nice scene).

amazed family and relatives. Next,²²³ we have the Thirteenth Amendment, abolishing slavery.

This drawing shows how the floor of the House of Representatives looked on the day the amendment passed, January 31, 1865. This²²⁴ is the actual Amendment, signed (as you can see if you look closely) by Lincoln the next day, February 1st. The Thirteenth Amendment was finally ratified on December 6, 1865,²²⁵ eight months after Lincoln was assassinated (this picture was taken four days before the assassination). In addition to the Thirteenth Amendment (abolishing slavery) and the Fourteenth Amendment (with its due process and equal protection clauses), you have²²⁶ the Fifteenth Amendment, guaranteeing blacks the right to vote (this lithograph is a contemporaneous portrait from the front page of Harper's Weekly).

We come next to what has been called the era of "legal formalism," roughly from the 1870's to the 1920's.²²⁷ The term "legal formalism" refers to a mode of legal thinking which placed great emphasis upon juristic conceptualism and, according to its critics, a so-called "mechanical jurisprudence." This school of legal thought has been associated in error, I believe, with Langdell (shown here, as a young professor of Contracts at Harvard Law School) and the case system of legal education²²⁸ introduced by Dean Christopher Columbus Langdell.²²⁹ In any

²²³Painting showing House of Representatives rejoicing upon passage of Thirteenth Amendment.

²²⁴Original of Thirteenth Amendment.

²²⁵Last photograph of Lincoln.

²²⁶Newspaper litho showing first blacks voting.

²²⁷Langdell, as law professor.

²²⁸Langdell, as Dean.

²²⁹Langdell Hall.

event, the era of legal formalism in the context of constitutional law coincides with what is called the "Lochner" era²³⁰ (Mr. Lochner is the one in the middle of the picture), when a conservative Supreme Court read natural law concepts of "freedom of contract" into the Fourteenth Amendment due process clause in invalidating progressive social and economic legislation.

The legal formalism school is attacked by the "legal realists,"²³¹ one of the first being Oliver Wendell Holmes. Holmes led the attack on the notion that the law was invariably merely "found" in prior clear and well-delineated precedents, and even happily admitted on one occasion, "sure, judges make law; I've made a little myself." Although the legal realists have by now pretty well carried the day, it may be noted in passing that an emphasis upon legal conceptualism is not without some value. The entire field of torts as a separate conceptual area is said not to have developed until the 1870's. And contracts did not develop as such until the 1860's and 1870's, Langdell's casebook appearing in 1871. And some change does occur in the era: The "last clear chance" doctrine is created in 1842, making a significant hole in the contributory negligence doctrine, which had been used by many courts to deny relief to victims of train accidents and the like. The famous *res ipsa loquitur* doctrine, which basically says that when a man has been flattened by a falling safe the mere fact that he cannot prove for sure exactly how the company involved might have been negligent will not preclude relief where "the thing speaks for itself", is recognized in 1863. But it is true that for the most part in this era, it takes legislation, for instance federal legislation in 1903, in order to abolish the notorious

²³⁰Bakery in Lochner case.

²³¹Oliver Wendell Holmes (in middle age).

"fellow-servant rule," which provided that when a fellow employee (for instance, a fellow worker on a train) was the source of your injuries, you had no recourse against the company but were left with your remedies against the insolvent fellow employee.

We come next²³² to the Progressive and New Deal eras. As to the need for the legal handiwork of this era: there was no workers compensation, no provision by companies for the medical care of their employees, nor were there any pensions, so that when this steel worker in Pittsburgh had his foot run over by a train he was simply out of luck. There was no mine or worker safety legislation,²³³ no food and drug act or meat inspection legislation.²³⁴ Life was often²³⁵ "solitary, poor, nasty, brutish, and short." There was no unemployment insurance²³⁶ until Wisconsin finally pioneered in this area in 1932. Speaking of Wisconsin,²³⁷ my home state, this is Senator Robert LaFollette, the leader of the Progressive movement, a lawyer, and the first U.S. politician to rely heavily on law professors to draft reform legislation. This,²³⁸ of course, is another famous progressive, noted for being a trust-buster and an enthusiastic conservationist²³⁹

²³²Steel worker without a leg.

²³³Boys in coal mines.

²³⁴Same.

²³⁵Color painting allegorically depicting harshness of factory workers' lives.

²³⁶Unemployed worker.

²³⁷Senator La Follette.

²³⁸Teddy Roosevelt.

²³⁹Teddy Roosevelt with naturalist John Burroughs.

(shown here with naturalist John Burroughs). This²⁴⁰ is Roosevelt's first ranch, the Maltese Cross cabin at Theodore Roosevelt National Park in Medora, North Dakota, just across the border from Montana. And this²⁴¹ shows the interior²⁴² of Roosevelt's little cabin.²⁴³ Last, but not least,²⁴⁴ we have FDR, on his first day in office, signing the Emergency Bank Act. The election of FDR brings a huge barrage²⁴⁵ of federal programs and agencies: the TVA, the NRA, the AAA [Agricultural Adjustment Act], the SEC, the FHA, NLRB, WPA, REA, Social Security²⁴⁶ (being signed into law here). This legislation yields a whole new field of law called "administrative law." Some of the New Deal²⁴⁷ affected Montana (where I previously taught). This, the first cover of LIFE magazine, on November 23, 1936, in a photograph by the famous photographer Margaret Burke-White, shows the Fort Peck Dam in northeastern Montana. And here²⁴⁸ is FDR in a touring car inspecting the completed dam. This²⁴⁹ shows the little shanty town of Wheeler, which grew up during the construction of the dam. And here²⁵⁰ are some street

²⁴⁰TR's cabin in Badlands (western North Dakota).

²⁴¹Interior of cabin.

²⁴²Same.

²⁴³Same (have lots of these because I visited, and was teaching at the time in Montana).

²⁴⁴FDR signing first of many new laws.

²⁴⁵Cartoon showing FDR explaining his new "alphabet soup" agencies.

²⁴⁶FDR signing Social Security Act.

²⁴⁷Cover of first LIFE magazine, showing Fort Peck Dam.

²⁴⁸FDR in touring car inspecting the dam.

²⁴⁹Wheeler, a shanty town during dam construction.

²⁵⁰City sign for shanty town of "New Deal," with several urchins in front of the sign.

urchins outside of another shanty town, appropriately named "New Deal."

The late 1950's and 1960's²⁵¹ are the Warren Court's era of "judicial activism." Although the term is sometimes used in a pejorative sense and there are those who criticize this activism, it must be said in its defense that it arose out of the intransigence and sluggishness of the legislative branch of government. For instance as to reapportionment, the legislature has no particular incentive, does it, to change the way they themselves, who have already been successfully elected, will be elected. It is probably *Brown v. Board of Education* (1954), the desegregation decision, which is the biggest initial act of judicial intervention. In the criminal procedure area, *Mapp v. Ohio* (1961), the search and seizure exclusionary rule case, signals the beginning of what several commentators have called the "due process revolution": the *Miranda* decision and so on, whereby the Court uses the Bill of Rights provisions, the Fourth, Fifth, and Sixth Amendments in particular, to dictate many of the details of state and federal criminal procedure.

This²⁵² single signature on a few court decisions changed 90 percent of the way things were done in the Philadelphia District Attorney's Office where I worked in the early 1970's.

We come, finally, to the modern era, today,²⁵³ or is it "post-modern"? And I used to say, in the 1980s when I was a law professor and being a little over-cute, that "the 1980's is the era of Reggae and Reagan, of "negativism" (as in Spiro Agnew's "nabobs of nattering negativism") and

²⁵¹Earl Warren.

²⁵²Earl Warren's signature (on a book I own, re history of Harvard Law).

²⁵³Mushroom cloud from A-bomb.

nuclear war, of Vietnam²⁵⁴ and interesting new strains of V.D."²⁵⁵ Now, if I were to do the same routine, I'd probably start by saying that it's the era of terrorism²⁵⁶ and TV-news-induced trauma.²⁵⁷ Speaking of which, there's a true family story indicative of this. My brother, some 13 years younger than me, grew up in the mid-60's, during the height of the Vietnam war, with constant news reports of body counts, and the like. For the first decade of his life he thought that our local news station which we always listened to, which called itself "News in Depth," was "News and DEATH." (Not unnaturally). Finally, one day, when he was a teenager, he asked us, "Did they just say 'news in depth'?" and he explained what he had been hearing for the prior decade. [Look at our own news coverage: if they can't find enough homicides and fires in Philadelphia proper, they range into New Jersey and tri-state region to pick up the necessary body-count, all designed, no doubt, to make us feel better, right?]

Well, so, as Alistair Cooke said at the conclusion of his famous "America" series, "the race is on" between a host²⁵⁸ of negative forces,²⁵⁹ ranging from such mundane things as pollution of various kinds,²⁶⁰ to things which literally threaten to destroy us, and, at the same

²⁵⁴Vietnam: helicopter picking up wounded.

²⁵⁵Severely wounded soldier (Korea, actually).

²⁵⁶Photograph on cover of Economist, showing collapse of World Trade Center.

²⁵⁷Cartoon showing newscaster (with pics of Iraq, N. Korea, Terror Alerts! etc), saying: "...NOW BACK TO YOUR REGULARLY SCHEDULED ANXIETY...".

²⁵⁸"Sign pollution," Tucson.

²⁵⁹Rush hour traffic, large city.

²⁶⁰Incredible aerial shot of pollution, New York City.

time, a growing array of positive powers in the world. We know what evil²⁶¹ man is capable of,²⁶² and we know, at the same time²⁶³ the incredible power of man²⁶⁴ for good. It was Albert Schweitzer who said: "That everyone shall exert himself...to practice true humanity toward his fellow man, on that depends the future of mankind." We know of man's almost unbelievable²⁶⁵ technical capabilities, and our capacity for love.²⁶⁶ And since law deals with all of life, you as lawyers will have something, maybe even a considerable something, to say about how it all comes out. Lawyers are rightly viewed as "problem solvers." You'll be amazed at the extent to which people in your communities will look to you for solutions to all sorts of problems, not only when they have a strictly legal problem but also for things such as zoning issues, consolidation efforts, public land acquisitions, referenda, and so on. You will find that you have to be not only "lawyers" in a narrow technical sense but also, at times, social workers, marriage counselors, psychiatrists, economists, experts in medicine and so on. For the law²⁶⁷ is omnipresent²⁶⁸ (this shows a little kid saying, "Mom, Dad...I think you know Mr. Reinitz, my

²⁶¹Famous picture of Jews being led off at gunpoint by Nazi soldiers.

²⁶²Auschwitz dead.

²⁶³Gandhi.

²⁶⁴Albert Schweitzer.

²⁶⁵Space walk (showing earth behind; beautiful shot).

²⁶⁶Grandfather hugging his grand-daughter.

²⁶⁷National Law Journal front-page article on "The Pine Tar Decision," showing headline and picture of Billy Martin et al arguing at home plate.

²⁶⁸Cartoon: Kid introducing his mom and dad to his lawyer: "Mom, Dad...I think you know Mr. Reinitz, my lawyer."

lawyer."). I mean,²⁶⁹ it's almost getting ridiculous!

There are, however, two rather substantial reasons why we have so many lawyers. First, we are a society that values freedom (like the Greeks, who had lots of litigation). What does that word "freedom" mean, by the way? We talk a lot about it in this country, but I like to put it rather concretely (and I'm a liberal Democrat, by the way). It means telling some arrogant and incompetent bureaucrat to go to hell, when he tells you that he thinks you and your ideas are no good, and you can go out in the market and prove him wrong. We are NOT a command economy, not a totalitarian society, or one where class or status or some Ayatollah or Taliban hierarchy keep everything nicely controlled. We've seen the development of "the rule of law", from the Twelve Tables of Rome to the triumph of parliament and the common law in the Glorious Revolution to the story of our own Constitution, with its emphasis upon a careful balancing of institutional arrangements to safeguard personal freedom. There is no need for lawyers in a despotic state. The possibly apocryphal story is told that when Peter the Great of Russia visited England in 1698 and saw lawyers in their fine wigs and robes arguing cases in Westminster Hall, he asked what in the world they were doing and when it was explained to him what they were, he exclaimed, "In my Empire I have two men learned in the law, and I shall hang one of them as soon as I return home."

The second basic reason for the omnipresence of the law is that we are a very complex society, as complex as any on the face of the earth. [Gotta have a G.D. lawyer in the family just to get through LIFE nowadays.]

²⁶⁹Cartoon from Nat. L.J. (6-24-85) showing three little pigs suing Big Bad Wold (each at counsels' table).

All of this is not say that we and our institutions and our legal system are perfect. Far from it. But our Constitution has carried us a long way, and we have much to which we can point with pride.

I hope someday to convert this presentation into something which could go on public TV, and so in order to give a funding sponsor an idea of the concept for a possible rah-rah America conclusion I started collecting certain slides which could go with the music for "America the Beautiful." So, here just for the heck of it, are those slides: Oh Beautiful,²⁷⁰ for spacious skies, for²⁷¹ amber waves of grain, for purple mountain²⁷² majesties²⁷³ above the fruited plain.²⁷⁴ And finally, "from sea to shining sea."²⁷⁵ And during this patriotic finale, I would have some kind of "voice over" which would ask the audience (and you can now ask yourselves): For all the problems we do have, would those of you who are women rather be living today or before,²⁷⁶ [You see that very handsome couple leading the march? Well, they were classmates of mine at Harvard Law. The story of their courtship would make a X-rated book. They were totally unaware their picture had been taken, much less placed in a high school history text, which I sent

²⁷⁰Gorgeous sun-through-golden-clouds shot, with elk grazing below.

²⁷¹"Golden waves of grain" shot.

²⁷²Northern Washington shot.

²⁷³Glacier peaks.

²⁷⁴"Fruited plain" shot.

²⁷⁵"Shining seas" shot.

²⁷⁶"Women's lib" demonstration, downtown NYC.

them.] when your mothers and grandmothers did not have the kind of job²⁷⁷ opportunities you are beginning to have? Just think of it: Harvard Law School did not even admit women until 1950! No right to vote until 1921! And here is what the U.S. Supreme Court said in 1873 in a decision upholding the exclusion of women from law practice: "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman....The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." So, maybe we've come a little way since then.

And those of you who are members of a minority group,²⁷⁸ would you rather live now or before, when you couldn't even play baseball for a major league team? To illustrate how far we have come:²⁷⁹ A story is told of Sarah Vaughan (one of my favorite female vocalists). It was 1965, and President LBJ was continuing Kennedy's White House "evenings in music," with Miss Vaughan as the featured performer. She had wowed her audience, held them spellbound, and afterward, when almost everyone had left, White House aide Bill Moyers had come by the room she had used as a dressing room to find her sobbing uncontrollably. He rushed up, put his arms around her, and asked her what was wrong. After she collected herself she said, "Nothing is wrong....It's just that 18 years ago when I came to Washington I couldn't even get a hotel room, and tonight I sang for the President of the United States—and then he asked me to dance with him. It's just more than I can handle."

²⁷⁷Justice Sandra Day O'Connor.

²⁷⁸Hank Aaron (autographed B&W photo).

²⁷⁹Sarah Vaughan.

So, we have made progress, whether we realize it or not, and we have some cause for pride. In my concluding paragraph, I used to tell students that "lawyers are the trustees of a proud legacy of constitutional freedoms." And, "you will be amazed at the power accorded to you to, in effect, change and control the lives of others, in a routine private practice. Unless it's unusual, you will handle some of the most serious problems that people face in their lives...divorce, bankruptcy, getting fired, even buying a home can be a traumatic experience. Thus, it is not surprising that, of you, our society, our state, this school and its faculty—of you much is expected. Good luck, and I hope you enjoy your stay." But then I gave them a final P.S.:²⁸⁰ One of my purposes, you'll recall, was to provide some "perspective." Well, speaking of that, in the midst of your studies (and attorneys, in the midst of our busy lives) when it seems like the "law" is getting a bit oppressive, don't forget²⁸¹ that there's still a big bright world out there which does exist, and which includes your family and friends, who ought not to be neglected. KEEP some perspective. Grades are not everything (and success is not everything). Other things count. John Adams wrote many affectionate letters to his son, John Quincy. As his son entered school, he wrote: "God preserve you and keep you, my dear son....Preserve, my son, at every risk and every loss, even to extreme poverty and obscurity, your HONOR and INTEGRITY, your generosity and...your enlarged views....CANDOR and HONOR are of more importance in your profession even than eloquence, learning or genius. You will be miserable

²⁸⁰Cartoon showing students coming into big law building, looking normal, and coming out with "mental thoughts" over their heads filled with "Law, law, law".

²⁸¹Color cartoon-like drawing showing corner of room filled with law books, but with arched window in the corner, and outside are beautiful trees and flowers and blue sky, and a lone lawyer is climbing a ladder for a book, and suddenly takes a rather pensive look outside.

without them, whatever might be your success." And with that, I concluded the student presentation.

But I'm not quite ready to conclude yours. For one thing, I've found a new quote from John Adams (in the recent biography) which I rather like. He was writing his wife Abigail on Christmas morning, 1798, from the White House where he was facing the biggest crisis of his presidency (a possible war with France). He writes: "I sleep well, appetite is good, work hard, CONSCIENCE IS NEAT AND EASY. Content to live and willing to die....HOPING TO DO A LITTLE GOOD." Historians (and his brilliant wife) knew what he meant by this. He was facing immense public pressure to go to war. But instead he did a "little good," avoiding war with France, and probably guaranteeing his losing the election.

So, to finally conclude:²⁸² As we try to contemplate our future, constitutional and otherwise, indeed, as we are increasingly forced to contemplate whether we HAVE a future, I think it is reasonably clear that we are at a critical juncture not only in U.S. history but (inevitably) in world history. And the Constitution is not some kind of "machine" which we can rely upon to just keep going by itself. No, as Mortimer Adler points out, our Constitution is rather explicitly premised upon an active and involved citizenry. He says, in fact: "citizenship is the primary political office under a constitutional government." It is true, of course, that as everything in our country has gotten bigger and more impersonal, there has been a tendency to forget that this is still OUR country, and it will be only as great as WE THE PEOPLE choose to make it. We face enormous challenges. Are we up to them? Can we do it? I don't know. But I believe we can

²⁸²Unusual slide showing couple standing on edge of Earth, contemplating the stars and Universe.

and we will if we have what our ancestors had: the plain determination, and what is a necessary prerequisite, HOPE.

Now is not the time to give up. As we try to envision what the future holds for us and our children and their progeny, it is intriguing to imagine the truth of what H.G. Wells once said: "All that is and has been is merely the twilight of the dawn." And America, historically, always has been a nation of hope.²⁸³ And we still are²⁸⁴...perhaps even, as Lincoln once wrote,²⁸⁵ humanity's "last best hope on earth."

Thank you.

[OPTIONAL INSERT SOMEWHERE ABOVE: Will we ever be able to move to a world beyond war? We either will, or we shall perish. And there are only two ways to resolve conflict at the international level: one is by war (no longer tenable in the nuclear age) and the other is by "law" (whatever that may mean). So, again, lawyers may have a key role in how this all comes out—the very future of humanity.]

²⁸³Color painting of shipboard immigrants passing Statue of Liberty.

²⁸⁴Beautiful low-angle shot of Statue of Liberty, with blue sky in background.

²⁸⁵Gorgeous sunset shot (side view) of Statue of Liberty, with New York skyline in background (still showing WTC towers).