

American Legal History: A Very Short Introduction

By G. Edward White

Questions for Thought and Discussion

- When the early European settlers arrived in North America, they were far outnumbered by the indigenous tribes. Yet over the course of the eighteenth century settlers increasingly occupied tribal lands and tribes retreated westward. Why did this occur?
- During the interval between the first European settlements and the middle of the nineteenth century, settler occupation of tribal lands, and the withdrawal of tribes from eastern regions to areas west of the Mississippi, largely took place without armed conflicts between settlers and tribes. But after the Civil War efforts on the part of settlers to encroach upon tribal lands in the trans-Mississippi West met with fierce resistance, and the U.S. Army eventually mounted campaigns against tribes. Why did tribes begin to engage in military resistance to settler encroachments in the late nineteenth century?
- When slavery was instituted on the American continent, it was from the beginning primarily limited to southern colonies and primarily centered on slave populations drawn from Africa. Why did slavery not emerge in the northern colonies, and why were few slaves drawn from Indian or white European populations?
- The generation of Americans who drafted the Constitution of the United States acknowledged the existence of slavery, but expected that it would gradually die out in America. Nearly 75 years after the framing of the Constitution, the westward extension of slavery became the principal issue dividing northern from southern states and precipitating secession and the Civil War. Why did the framing generation's expectations about slavery not come to pass?
- Why did early Americans, either as British colonists or members of a new independent nation, place such a value on the ownership and use of property? In England the number of persons owning land in fee simple, as opposed to the remainder of the population, was limited, and laws functioned to retain property ownership in a relatively few families and individuals. In America far more members of the population were able to own land on their own, and restrictions on the ownership and transfer of property were notably fewer than in England. Why did this occur?
- The first American settlements featured communal uses of land, with colonies and townships doling out land to settlers and restricting its use. By the opening of the eighteenth century these practices had been replaced with ones that made it comparatively easy for settlers to acquire unrestricted land. How did this occur, and why?
- In what way were the early large-scale entrepreneurial ventures undertaken by Americans, such as the building of turnpikes, canals, and railroads, dependent on law? Could those ventures have been undertaken without the support of states and the federal government? If not, why not?
- When the creation of mass media enterprises, including newspapers, magazines, radio and television, and digital communications, became a dominant feature of the American economy in the late nineteenth, twentieth, and early twenty-first centuries, why did the regulatory frameworks for each of those enterprises develop differently, with the newspaper and magazine industries being comparatively free from regulation, network radio and television broadcasting being heavily regulated, and the internet largely unregulated?
- Although the formation of colonies in America was quickly accompanied by the promulgation of criminal codes, some of them reaching a

large number of offenses, colonial settlements were slow to develop their own police forces. As late as the middle of the nineteenth century few cities employed police officials, continuing to rely upon volunteer members of the public to perform law enforcement functions. Since governing officials had been long aware of the need to identify and police criminal conduct, why were professional police forces so late to develop?

- Like official police forces, state-supported prisons were late to emerge in American history. What explains this phenomenon? Now, in contrast, the United States leads the world in the members of its population incarcerated in state-supported prisons. In your view, what factors best explain this shift from an attitude where prisons were regarded as something of a luxury to one where the standard response to criminal activity is now incarceration, increasingly for lengthy sentences?
- When the first American treatise on domestic relations was published in 1816, the author, Tapping Reeve, followed William Blackstone's earlier classification of relationships in a household being a species of relations between masters and servants, with the male heads of households being "masters" and every other member of a family being one or another type of servant. Reeve organized what he called the "law of Baron and Femme" around master-servant relations, and his organization was a largely accurate reflection of state domestic relations law at the time. What factors might have led early nineteenth-century Americans to think of domestic households being composed of husbands and fathers who were "masters" and wives and children who were "servants"?
- For most of American history the definition of a legitimate American "household" has been a limited one. Couples of different races and same-sex couples have not been treated as the equivalent of married persons; children born outside wedlock have been afforded lesser rights than those born to married couples; adopted children have also been afforded lesser rights than "natural" ones. In the twentieth and twenty-first centuries, however, these limitations have been successively swept away, with the result that no state can forbid couples of different races from marrying or "natural" children to be preferred over adopted children or children born outside wedlock. Meanwhile, states are increasingly allowing same-sex couples to marry and receive comparable benefits to those of heterosexual couples. What explains this apparently radical expansion in the definition of "legitimate" American households?
- The current curriculum at American law schools treats six subjects as "basic" courses: Civil Procedure, Constitutional Law, Contracts, Criminal Law, Property, and Torts. Of those subjects, all appear in the offerings of early American law schools, and in the subject matter indexes of reports of early state and federal court decisions, with the exception of Torts. The first casebook on Torts did not appear until 1859, and Torts was not taught as a separate subject in law schools until the late nineteenth century. Yet civil injuries not arising out of contractual relations—assaults, batteries, collisions on highways, actions in libel and slander—are as ancient as actions in any of the other subjects and predate those raising constitutional issues. Why weren't those actions grouped together in the legal field of Torts until the late nineteenth century?
- In the 1960s many Torts scholars expected that some form of government-administered compensation system, possibly modeled on the New Zealand no-fault administrative accident compensation scheme, would replace tort law for several categories of accidents, including automobile accidents. But although several states adopted no-fault insurance coverage for automobile accidents in the 1970s, the momentum for no-fault plans has slowed, and no-fault coverage has not expanded to other areas of tort law. Negligence law, mainly administered by juries and featuring extensive litigation with unpredictable outcomes and damage awards, still governs most accident claims, despite frequent attacks on the inefficiency and unfairness of the negligence system. Why has this occurred?
- Until the late nineteenth century most law schools in America were not affiliated with universities, being for-profit "proprietary" institutions taught by local members of bars. During the same time period many people were admitted to the practice of law who had not received any formal legal education, but instead had attached themselves to a law office until they presented themselves for a bar examination. Today only a few states permit persons to be admitted to a bar without formal legal training, the vast number of law schools are affiliated with universities, law schools are formally accredited by professional organizations, and admission to law school is a highly

competitive process. Why might the American legal profession have resisted formal training for law schools for over two centuries, and then embraced it so extensively?

- The market for legal services in the United States has been adversely affected by the fiscal crisis of 2008-09, with the result that law firms, which expanded dramatically in size in the two preceding decades, have found a reduced demand for their services. This had had two ancillary effects: law firms have hired fewer law school graduates since 2008 and the number of applicants to law schools has declined, to the point where some law schools have significantly reduced their class sizes. At the same time tuition rates at law schools have continued to rise. Some current critics of American legal education have claimed that this combination of factors should deter people from applying to law schools, since going to law school now involves paying large amounts of tuition without a clear guarantee of employment. If you believe that criticism to be plausible, what can, and should, American law schools do in response?

Other Books G. Edward White

Law in American History: Volume One, From the Colonial Years Through the Civil War (Oxford University Press, 2012)

The American Judicial Tradition 3rd ed. (Oxford University Press, 2007)

Tort Law in America: An Intellectual History 2nd ed. (Oxford University Press, 2003)

Justice Oliver Wendell Holmes: Law and the Inner Self (Oxford University Press, 1993)

The Marshall Court and Cultural Change 2nd ed. (Oxford University Press, 1991)

Further Reading

John M. Scheb, *An Introduction to the American Legal System* 2nd ed. (Aspen Publishers, 2009)

Kermit L. Hall and Peter Karsten, *The Magic Mirror: Law in America History* 2nd ed. (Oxford University Press, 2008)

Lawrence M. Friedman, *A History of American Law* 3rd ed. (Touchstone Books, 2005)