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## Educational materials for Common Law

In this essay, James R. Stoner gives an introduction to natural law in the common law tradition. The common law is the body of customary, unwritten law of England, especially that which was derived over centuries from the rulings of court cases (not by legislative acts). Much of it was imported into the American legal system. The parts of common law that are most invoked in the United States are the procedural rules for administering justice, also called “due process”: trial by a jury of twelve peers, the right not to witness against oneself, and many others. Many of these procedures are required explicitly by the [U.S. Constitution](#).

The common law tradition reflects the natural law tradition in three ways: it privileges individual liberty and the assent of the community and minimizes the role of the central political authority; its appeals courts use reason to relate novel cases to historical precedent; and it can limit or void written positive law if the law contradicts reason outright. (In the United States this last aspect gave rise to the doctrine of “judicial review.”)

In the twentieth century, when skepticism grew about appeals to reason and natural law, American legal theorists began to view common law as simply “judge-made” positive law, little different from laws created by legislatures.



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### **WILLIAM BLACKSTONE**

William Blackstone was born in London on July 10, 1723. He studied at Pembroke College, Oxford, and afterwards practiced law, though his career was undistinguished until he began a lecture course on the history and principles of English common law in 1753. He was among the first thinkers to attempt a comprehensive understanding of the common law, and his [Commentaries on the Laws of England](#) became an essential text for lawyers both in England and in the American colonies, bringing their author fame and fortune, and laying the foundation for Blackstone’s successful political career as an MP and jurist. Blackstone died on February 14, 1780.

As the authoritative treatise on English common law, the *Commentaries* had a great influence on the [American Founders’](#) understanding of law, and continued to inform this country’s fledgling legal system for many years.

To read more about William Blackstone's life and works, click [here](#).

### **EDWARD COKE**

Sir Edward Coke (pronounced *cook*) was born in 1552 in Mileham, Norfolk. He attended Norwich Grammar School as a child and entered Trinity College in Cambridge in 1567. His academic excellence gained him acceptance to the Inner Temple, a distinguished college of the University of Law at Cambridge. Proceeding from student to barrister, he eventually became a senior member of the college.

Prior to the start of a long political career, Coke made two advantageous marriages: the first, to the wealthy Bridget Paston, with whom he had seven children; the second, shortly after Bridget’s death in 1589, to Elizabeth Hatton (though they later separated), the granddaughter of the chief minister to Elizabeth I. Though the second marriage ended in separation, the connection helped him become a member of Parliament. Three years later, in 1592, he was appointed Speaker of the House of Commons, and then promoted to the prestigious post of Attorney General of England. A loyal supporter of Elizabeth I, he spent his years as Attorney General prosecuting now-famous cases against Earls Henry Wriothesley

and Robert Devereaux, Walter Raleigh, and the Gunpowder Plot conspirators.

Things changed for Coke after the ascension of the Stuarts to the throne because of his continued defense, as Chief Justice of the Court of Common Pleas and Chief Justice of the King's Bench, of the English common law. In 1628, he played a key role in drafting the Petition of Right, which declared the supremacy of common law over older privileges for the aristocracy. The Petition of Right was a precursor to the [English Bill of Rights](#) and the [Bill of Rights](#) added to the [American Constitution](#). Coke also authored the first comprehensive body of law accessible to the public, *The Institutes of the Laws of England*. His work inspired a number of early American leaders, including [John Adams](#), [James Otis Jr.](#), and [Patrick Henry](#).

To read more about Coke's life and works, please click [here](#).



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### **courts of equity:**

separate courts established for circumstances where the operation of strict law was expected to bring about injustice.

### **due process:**

a set of legal procedures governing a state's administration of justice, considered especially as a means both to protect the rights of individuals and to promote fairness in civil and criminal proceedings. In American law, many of the settled requirements of due process are found in the Bills of Rights of the state and national constitutions.

### [English Bill of Rights:](#)

(1689) an Act of the British Parliament that asserted that the people of England have certain rights before the king, including the right to free parliamentary elections, the right to petition for redress of grievances, and the prohibition of cruel and unusual punishment. The act was passed shortly after the accession of the Protestants William and Mary, prince and princess of Orange, to the English throne after Mary's father, the Catholic King James II, fled England in the Glorious Revolution of 1688. The Act in great part responded to highly unpopular actions that James had taken during his reign. It is considered to be an important part of the common law tradition, and many of its elements were incorporated into the [Bill of Rights](#) of the American Constitution.

### ***habeas corpus:***

See [WRIT OF HABEAS CORPUS](#).

### [Magna Carta:](#)

the "great" English charter issued in 1215 to limit the powers of King John, and to protect certain privileges of some of his subjects (namely, the English feudal barons). The document, and the civil and political liberties granted therein, is recognized as an important part of the common law tradition.

### **judicial review:**

the authority of a court, in deciding a case properly before it, to declare void a legislative act or executive action if it is judged to be in conflict with the higher law of a constitution. In American jurisprudence, the opinion of Chief Justice John Marshall in the case of *Marbury v. Madison* famously affirmed judicial review as a necessary feature of the judicial power granted to federal courts in Article III of the [U.S. Constitution](#).

### **jurisdiction:**

the power of a court to hear and determine the subject matter in controversy between parties to a suit, that is, to adjudicate or exercise the judicial power over said parties.

### **positive legislation:**

laws that are the product of the will and reason of a legislator or legislature and are put in writing for promulgation to those who are subject to them; to be contrasted with common law and natural law, which are both unwritten forms of law. Positive law differs from natural law also in that the former is conventional or a product of human agreement, while the latter is understood to exist independently of human opinion, providing a standard for evaluating the justice of positive laws.

### **precedent:**

any ruling of a court, particularly when considered as a model that others courts should follow to decide similar cases in the future. Common law is in large part a body of such rulings that accumulated over time and gave rise to rules that have the force of law.

### **writ of *habeas corpus*:**

shorthand for several kinds of formal, written legal orders or prohibitions (“writs”), but especially the kind by which a court can demand access to a prisoner, if the prisoner so asks, in order to insure that he is imprisoned lawfully, that is, according to the requirements of due process. In such a proceeding, the court does not seek to determine whether the detainee is innocent or guilty of the crime for which he is in custody. Habeas corpus is Latin for “[in order that] you have the body.” See also [DUE PROCESS](#).



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### I. Introduction: Defining Common Law

- A. Common Law: The customary law of England as applied in the courts of law.
- B. Dates back to 1189 at the latest.
- C. When courts started to write down their decisions (the clearest statements of legal custom), these decisions were held to have the force of law based on the principle that similar (future) cases should be decided similarly.
- D. Some elements of common law trials (These elements are also known as “due process”):
  - 1. In criminal trials:
    - a. A formal accusation.
    - b. Rights of the defendant: to call witnesses; not to witness against oneself; to help choose the jurors; presumption of innocence until proven guilty “beyond a reasonable doubt;” etc.
    - c. A jury of “twelve good men and true” issues the verdict by a unanimous vote, based on the judge’s instructions on which laws govern the case.
  - 2. In civil trials:

- a. The standard of judgment is preponderance of evidence.
- b. Judgment awards monetary damages.

### II. The Three Ways in Which Common Law Reflects Natural Law

A. Due process minimizes the state's freedom to exercise its power, maximizes the community's input in a court decision, and maximizes respect for individuals' liberty.

1. Through checks and balances:

- a. Judge and jury are distinct.
- b. The prosecution and the defense are distinct.
- c. The losing side has a right to appeal to a higher court.

2. Through the centrality of the jury:

- a. Gives deference to common sense over elite theorizing and partisan will.

B. In the reasoning process of appellate courts:

- 1. Favors adherence to precedent over novel solutions.
- 2. But sometimes the natural law allows or even requires courts to create a novel solution if the circumstances for which a law was created no longer exist.
- 3. Various measures prevent arbitrariness in judges' decisions:
  - a. The court may focus on only a precise issue.
  - b. The court may settle only the case at hand.
  - c. etc.

C. If after a judge tries to reconcile apparent contradictions in a law the law still seems contrary to reason, he may limit or void it, because "Nothing that is against reason can be lawful."

- 1. Later English interpretation: Parliament is nevertheless supreme; no judge can override an act of Parliament on the basis of "reasonableness."
- 2. American interpretation: practice of "judicial review": courts may strike down statutes or executive actions that contradict written constitutions.
  - a. This practice is itself not prescribed in any constitution.
  - b. Supporters claim that the practice is simply implied in the very notion of a written constitution.
- 3. Serves to weed contradictions out of the law as a whole.

### III. Limitations on Common Law Judgments

- A. Judges can rule only on cases properly presented before them.
- B. The remedies that judges may impose are limited by law.
- C. Sometimes separate “courts of equity” have been established to deal with injustices created by law.
- D. Separate specialty courts diffuse the power of judges by assigning different kinds of cases to different courts (example: military court).
- E. Constitutional legal tradition.

- 1. Unwritten (especially in England).
- 2. Written (especially in the United States).

a. Examples: [Bill of Rights](#), [Magna Carta](#).

### IV. Change and Constancy in Common Law

A. Proponents of common law praise its ability to change as circumstances change while remaining constant in certain important respects:

- 1. Many of the substantive rules of law from the common law tradition have changed radically over time.
- 2. Analogy of the Argo: Greek mythical ship whose planks were replaced one-by-one while at sea.

B. In the 20th century, legal theorists like [Oliver Wendell Holmes](#) denied that there was any constancy in common law.

- 1. They called it “judge-made law,” that is, simply positive law made by judges instead of legislators.

C. The rejection of the traditional notion of common law accompanied a rejection of the notion of natural law, which had formed an important part of the common law tradition.



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### **I. Basic Interpretation**

As you study the primary sources, keep in mind the following questions:

- 1. What is the common law?
- 2. How does the common law differ from the natural law?
- 3. How do common-law judges use precedents, common sense, or natural law?

4. What natural-law ends does the common law achieve?
5. What role does the common law play in the American system?

## II. Connection to Other Thinkers

Keep in mind the following questions as you consider how the common law tradition was informed by other sources of legal thought in the natural law and natural rights traditions, and what impact it had on the American system of jurisprudence:

1. The common law requires judges to rely on established precedents. Is this a form of [legal positivism](#)? Or does it have a place within the natural law tradition? Compare to [Aquinas's](#) view about the written law and the role of judges (see Aquinas's [Question 95](#)).
2. Compare the common law with the [ius gentium](#). From where does each get its authority?
3. Given that the common law can change with time, is it appropriate to view it within a [progressivist](#) framework? How does common law develop?
4. [Locke](#) argues that sovereignty rests in the consent of those governed. Does the common law encourage consent by representing traditional wisdom and ensuring stability? Or does its age undermine its legitimacy, because it appeals to ancient tradition rather than to contemporary consent?
5. How did the [American Founders](#) legitimate their new system of government, if not by the common law? How did the [Supreme Court](#) continue the common law tradition even though America did not have its own established legal tradition? Did the Founding Fathers view their own efforts as legitimate within the English common law tradition, and thus think it possible to simply import the common law?

## III. Critical Interpretation

With a basic understanding of the common law, let us examine the tradition more critically. Use the questions below as a guide:

1. In the essay, Stoner writes: "There is much about common-law due process that is not strictly speaking a requirement of natural law: no one today would say that justice is impossible anywhere a jury is not composed of twelve, or if its verdicts are not unanimous, or even if some facts are found by a judge or a panel of judges rather than by a lay jury, and so on. Nevertheless, in at least three ways natural law seems particularly evident in common-law thinking." Do the mechanisms described by Stoner actually ensure justice? By insisting on them is there a danger of confusing what the natural law actually requires with a system whose elements happen to uphold it?

2. The common law proceeds on a basis of precedent, but sometimes a precedent is objectionable. What should judges do in such a case? Can they ignore it, on the grounds that an unjust law is no law at all? (Compare Aquinas quoting Augustine in [Question 95](#).) Or does this open the door to judicial activism?
3. Does a written constitution or a common law tradition better serve the natural law? Did the American founders successfully combine both?
4. What is the source of the common law's authority?
5. The [Magna Carta](#) justifies itself in part with an appeal to the Church's authority. If the Magna Carta received its authority from the Church, why did the Declaration of Independence, without recognizing the Church's authority, criticize the English Crown for violating English laws that rested on the Magna Carta? Is the Declaration's accusation a rhetorical one, or an accusation of hypocrisy? Does it matter from where the Magna Carta originally received its authority?

### IV. Connections to Contemporary Concerns

The common law still plays an important role in contemporary legal debates. Let us now turn to some contemporary issues that may shed light on the common law tradition and its legacy in our society:

1. There has recently been a movement towards more written international law. For instance, the European Union has its own laws (and courts), applicable to its member nations. To be effective, international laws require enforceability, which often relies on legitimacy. Does the absence of a shared common law tradition hinder the prospects of a legitimate international legal system? Is this a problem that the framers of the [United States Constitution](#) overcame?
2. A common law marriage is one where, though no civil or ecclesiastical ceremony has occurred, a heterosexual couple who live together consensually as a married couple and hold themselves out to the world as husband and wife are legally recognized as married. In the United States, common law marriage was held to be a traditional feature of the common law in most states at the time of the Founding, but after a later movement to abolish common law marriage, only 11 states and the District of Columbia now recognize it. Does the traditional legal recognition of marriage suggest that the common law treated marriage as a natural reality recognized but not defined by the state, or as a purely conventional arrangement that is redefinable according to varying social convention? Does the fact that common law marriage was abolished in most states (nearly always by statute) suggest that the abolition of common law marriage is a corruption of the tradition itself? Or is the abolition of common law marriage an unproblematic development of that tradition?
3. Today, there is increasing debate over how marriage should be defined, for instance, is marriage just a matter of whether two people, any two people, consent and intend to live together as married, or are there additional natural, biological requirements (e.g. sexual complementarity)? How does the history of common law marriage contribute to that debate? Should advocates of same-sex marriage embrace the common law for its ability

to evolve? Should defenders of traditional marriage invoke common law as proof that marriage is not a creation of the state? Should common law have a role in the debate over same-sex marriage? Why or why not?

4. Underlying the common law is a belief that stability serves justice and the common good. Is that still true today? Why or why not? People are increasingly able to relocate thanks to easier transportation. More generally, ways of life and forms of property are changing dramatically as technology progresses. Do these new realities disprove the value of common law?
5. In the essay, Stoner writes: "There is much about common-law due process that is not strictly speaking a requirement of natural law." How many of the established procedures in American "due process" do you think are required by the natural law? Discuss how this question might prove relevant in nation-building abroad. Which parts of our system could or should be added to other countries' constitutions? Which parts are helpful only for us?

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