

**“The Three Most Important Features of My Country’s Legal System
that Others Should Understand”**

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Of course there are many important features of the legal system in the United States that could be usefully explored in an international exchange. I have chosen to answer the question of which are the most important in terms of creating the distinctive nature of the U.S. legal system. As to that question, I nominate the following: 1) the fact that the United States is a common law system; 2) the primacy of the United States Constitution in our legal system; and 3) the abundance of lawyers in the United States. Other features that vie for most important include federalism and secularism. Although these features are determinative, they do not set the U.S. legal system apart in quite the same way.

I. A Common Law System

The United States adopted the common law tradition of England as the basis for its legal system.² The common law is a collection of judicial decisions, customs, and general principles that began centuries ago and continues to develop today. Under the common law system, legal principles are developed through the decisions of the courts. Though legislatures possess constitutional power to make law, in a common law system there is no presumption that legislation applies to every legal problem in the area addressed by the legislation. Therefore, cases play a very important part in the legal system of the United States, not only because courts adjudicate the claims of parties before them, but also because courts establish precedent that must be followed in future cases.

Courts in the United States follow the doctrine of *stare decisis*, or precedent, which was also adopted from the English common law system. Under this doctrine, courts not only adjudicate the claims of the parties before them, but also establish a precedent that must be followed in future cases. The ruling of a court binds not only itself for future cases, but also any courts under which the court has appellate jurisdiction. Though trial level courts make rulings of law that are binding on future cases, the doctrine of precedent is most important in the legal system at the appellate levels.

The doctrine of *stare decisis* is one of the basic underpinnings of the United States judicial system. Precedent must be followed unless there are factual or legal distinctions or until the precedent is overruled. This doctrine helps to ensure consistency and predictability.

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²The only state in the United States that does not consider itself a "common law state" is Louisiana, which adopted the civil law tradition based on its roots in French law.

Sometimes courts interpret the law differently. Higher-level courts often try to resolve these inconsistencies. The Supreme Court of the United States, for instance, often chooses to hear a case when its decision can resolve a division among the Circuit courts. The Supreme Court precedent will control, or apply to all the lower federal courts. Any federal court subsequently facing the issue will be bound by the high court ruling. Circuit court decisions similarly bind all the District Courts within that circuit. *Stare decisis* also applies in the various state court systems. In this way, precedent grows both in volume and explanatory reach.

Although in my research and teaching I do some limited exploration of comparative intellectual property law, my entire professional experience has been in a common law system. I am therefore not in a good position to extol the virtues of common law as compared with other systems. I will, however, offer that the common law enriches the practice and teaching of law in meaningful ways. The law is dynamic and often difficult to pin down. Creativity, rhetoric and policy analysis are instrumental dispute resolution. This aspect of U.S. law has a huge impact on how and what we then teach our students.

II. The United States Constitution

The United States legal system rests, first and foremost, on the Constitution of the United States as the supreme law of the land. The United States Constitution is a single document, but it is also the basis for a vast body of law, precedent, and practice that makes up the U.S. legal system.

The Constitution is the original basis of the law in the United States and provides the basis for the U.S. government. All authority of the federal government originates from the Constitution. The legal system of the United States is administered and carried on by the official branches of government and many other authorities acting within their official lawmaking capacity. The Constitution lays the framework under which each of the different branches of government operates. The Constitution grants to the federal government certain enumerated powers, and grants to the states any power not specifically delegated to a branch of the federal government. Under this system, states retain significant authority and autonomy. The constitutions in each of the fifty states contain many similar provisions to those in the U.S. Constitution in terms of the basic structure of government. Under the federal and state constitutions, the United States legal system consists of a system of powers separated among branches of government, with a system of checks and balances among these branches.

The United States Constitution contains a “supremacy clause,” found in Article VI. It states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” This paragraph established the first principle of U.S. law: Where the federal Constitution speaks, no federal or state law may contradict it. The federal courts have the sole authority to interpret the Constitution and to evaluate the constitutionality of federal and state laws.

The Constitution also guarantees the freedom and rights of all citizens of the United States. A chief purpose of government, enshrined in the Bill of Rights and other amendments to the Constitution, is the protection of rights and freedoms of individuals. Among them: freedom of speech and of the press; freedom of religion; freedom of association; right to equal protection of the law; and right to due process and a fair trial. These principles thus enshrined in the Constitution, become implemented by the laws of Congress and interpreted by the rulings of judges. guarantees the basic civil rights of the U.S. citizens

The United States Constitution, adopted in 1787 and ratified in 1788, was the world's first democratic national constitution. It is also the world's longest-surviving national constitution. Over the years, twenty-seven amendments have been added, but the basic structure and the basic text have withstood the test of time—both times of crisis and peace. It is difficult to overestimate the importance of the Constitution or the pride that U.S. citizens take in it. The Constitution is the ultimate source of legal and political authority in the U.S. Some even believe that the only proper analysis of the document consists of discerning the “original intent” of its framers. This viewpoint is countered by the “living” constitution theory, which suggests that societal progress must be taken into account when interpreting key constitutional phrases. All agree that the framers’ goal of creating a deliberative democracy was certainly achieved.

II. Many Lawyers, Many Rights

The United States legal system has numerous lawyers, more than in any other nation. It is estimated that there are over one million lawyers in the United States today. There are more law school graduates today than at any time in history.

Some would argue that this “proliferation” of lawyers has had a negative impact on the U.S. legal system. Others point out that the increased number of lawyers has enhanced the availability of legal counsel to a wider population than ever before. Unlike the past, when lawyers represented an entrenched and homogeneous bar that perpetuated itself by excluding new entrants, the last thirty years have seen a major change in the population of those attending law school. Today, as many as fifty percent of the students enrolled in law school are women, and as many as twenty-five percent are minorities. Where law school years ago was the province of primarily the rich and privileged, today a much broader cross-section of the public can find its way into law school. Correspondingly, more people are gaining access to legal counsel.

There are a number of reasons why the United States has so many lawyers. A person's ability to practice law in the United States typically requires only graduating from law school and passing a state licensing examination. This model is in contrast to many other countries that require a significant articling experience beyond graduation from an undergraduate law program. And these graduates find gainful employment in the United States. The large majority are employed in private firms, but the government employs large numbers of lawyers as well.

Related to the abundance of lawyers in the United States is the public's access to justice. Many have noted the ease with which complainants in the United States, including those with grievances against the government, get their day in court. Provisions for private rights of action are a hallmark of the U.S. legal system. For this reason, for centuries, foreign observers have marveled at the frequency with which Americans turn to the courts to rectify virtually any of life's inevitable conflicts. "There is hardly a political question in the United States which does not sooner or later turn into a judicial one," wrote Alexis de Tocqueville in 1835.

The high number of employed lawyers might be evidence of a very positive aspect of the U.S. legal system: By and large, people have faith that the legal system is fair and that lawyers are well-trained. Rule number 1.1 of the American Bar Association's Model Rules of Professional Conduct is: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Hopefully this training and service to the public justifies the more than 150 billion dollars spent on legal fees in the United States annually.