

Fall 2014 History & Heritage -- #3

A Government of Laws, Not of Men --- (Kirk; *Roots*, pp. 183-192)

This principle of public order, governmental restraint, and civil liberty traces its Anglo-American roots to medieval common law? England's magisterial legal commentators, like Henry de Bracton (d. 1268), were fond of observing that all officials were subject to the laws, which themselves expressed the customs and traditions of the people. As Bracton put it, "let the king render back to the Law what the Law gives to him, namely dominion and power; for there is no king where will, and not Law, wields dominion."

Common Law --- (Kirk; *Roots of American Order*, pp. 183-192)

This legal tradition of post-Norman medieval Britain, writes Russell Kirk, may be called "customary law," "prescriptive law," "case law," even "the people's law"? Characteristic features include *stare decisis* (standing on decided matters), *trial by jury* (peer verdict), and *adversarial advocacy* (plaintiff and defendant accorded equality before the court). Justice prevails when the time-honored traditions of the people are upheld, rather than the mere will of the state (government prosecution) or of interested parties.

Common Law and Equity --- (Kirk; *Roots*, pp. 183-192)

These two legal systems, administered by the king's judges in two different courts, grounded the post-Norman English practice of law later passed on to colonial America? The primary one was customary or experiential, based on precedents in many cases; the second, reserved for matters missed by the first, supposedly represented "fairness" or universal justice. All in all, the legal tradition stood for the supremacy and impartiality of law (even kings had to obey it) based on old customs and the way of human nature.

Roman Law --- (Kirk; *Roots of American Order*, pp. 183-192)

This old legal order—unlike national customs, biblical law, and Christian morals—was an unacknowledged source of guidance for English courts of common law and equity? The ancient order was nevertheless known to many judges (often monks, sometimes bishops) through Church or canon law, Justinian's imperial code, and Italian scholarship. Deemed foreign by most Englishmen, however, such legal counsel openly avowed by any medieval judge would nearly have disqualified him from office.

The Fathers of English Law --- (Kirk; *Roots*, pp. 183-192)

These legal authorities, beginning with Ranulf de Glanville (d. 1190), shepherded the development of English common law in their written commentaries? From the late Middle Ages to the Reformation and beyond, the commentators included, besides Glanville, Henry de Bracton, Edward Coke, Matthew Hale, and William Blackstone. Our own Founders, many of them lawyers, were well-versed in their predecessors, Blackstone's *Commentaries* being even more influential in America than in England.