The 'law of the land' clause, when used as a restriction against government, means the same as 'due process of law' —that is, those laws and procedures that government must follow when dealing with the rights of the people. In this sense, the Law of the Land would mean to include a trial by jury. However, it principally meant substantive law —that relating to legal rights and principles as distinguished from remedial law. But in a larger sense, the phrase includes the whole organic law of the land—that which forms the legal and political structure of government. Due process of law does not include this whole area of "organic law," but rather just the area of "substantive law" and rules of procedure.

AMERICAN LAW OF THE LAND

The basics of law and government in America were primarily derived from the English system. But the English Common Law had, over the course of several centuries, deviated from many fundamental principles and original precepts of the law. In the founding of America, certain concepts of English law were not established, and new ones were added. All of these events form the American Common Law or Fundamental Law. This principle was recognized by Chief Justice Tilghman of Pennsylvania:

> Every country has its common law. Ours is composed partly of the common law of England, and partly of our own usages. When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the revolution, we had formed a system of our own.[10]

10 *The Guardians of the Poor v. Greene,* 5 Binney (Pa.) 554, 558 (1813).

The collection of the common law, the colonial statute law and principles of government that were originally established and followed in early America, became the *Law of the Land* in America. In other words, the events of our history had in effect formed the Law of the Land. So when inquiring into what was the "Law of the Land," the Supreme Court of Tennessee in 1829 stated:

> The clause "LAW OF THE LAND," means a general and public law, equally binding upon every member of the community. Our colonial history will best teach its meaning. Our ancestors were taught it by being transported across the Atlantic for trial; by the Boston port-bill, and other British legislation. * * * The right to life, liberty and property, of every individual must stand or fall by the same rule or law.[11]

There is considerable evidence that the colonists considered the "law of the land" as a reference to the common law. From the beginning the colonists in America claimed the right to the protection of the great body of common law rights as their birthright as Englishmen. Their claims were supported by the various royal charters and patents granted by the British Crown throughout the colonial period. But to better protect liberty and exact justice, they did not adopt all measures of the English law, as Judge Cooley has said:

> From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law as then existing in England was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them.[12]

Cooley then cites numerous cases in support of this proposition, including the U.S. Supreme Court case of *Van Ness v. Pacard,* which states:

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11 *Vanzant v. Waddel,* 2 Yerger's Rep. (10 Tenn.) 259, 270 (1829).

12 Thomas M. Cooley, *Constitutional Limitations,* 23.

> The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition.[13]

It is thus is a mistake to say that some concept, law or principle is not part of the Common Law because it was not so in England. In this land we must look to the law which the early settlers adopted, that which they rejected, and that which they fought for in the Revolution. This is the *"Law of the Land"* in America! It is that law which is legally attached to the land by claim, adoption, usage and application by our ancestors. However, the basis of this law was clearly the English common law, as stated by Justice Story:

> We take it to be a clear principle that the common law in force at the emigration of our ancestors is deemed the birthright of the colonies, unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges.[14]

Although our Anglo-American legal tradition, which we term the common law, is primarily an English institution, the differences between the two legal systems are obvious. In England the common law was undergoing change, disuse and distortion by the crown and Parliament. But by the genius of Lord Coke and other jurists, the truer aspects of the Common Law were revived and remolded into vital pulsating principles, and were passed on to the English Colonies in this country. Coke's works were among the most prominently read literature in early America.

It is clear that prior to the Revolutionary War the common law was in force in all the colonies.[15] But while the colonists

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13 *Van Ness v. Pacard,* 2 Peters (27 U.S.) 137, 144.

14 *Town of Pawlet v. Clark,* 9 Cranch (13 U.S.) 292, 333 (1815).

15 *Gatton v. Chicago, R.I. & P. Ry. Co.,* 63 N.W. 589, 590, 95 Iowa 112 (1895).

adopted the bulk of the revived English common law, they rejected that which was deemed "repugnant to their rights." They also adopted other laws and principles which would foster free enterprise and private rights, and which were more pursuant to the law of God. At the Revolution many of the laws regarding the crown and feudal lords were abandoned. Thus the English common law was purified in America, plus it was fortified with other good and godly precepts. This is the American Common Law—*The Law of the Land*. Due to this historical development of our common law, it has been said: "We are therefore more essentially a common law country than England herself."[16]

Thus that body of laws, customs, religion, rights, justice, and legal principles sanctioned and followed in America up to its official independence,[17] is the common law in force generally throughout the United States.

THE UNWRITTEN CONSTITUTION OF THE UNITED STATES

The concept of the organic law of the nation, or Law of the Land, is in effect the unwritten constitution of the nation. It is the *"lex non scripta"* or unwritten law, sometimes called the common law of the nation or state. The English Constitution included the *Magna Carta,* the *Petition of Right,* the *Habeas Corpus Act,* the *Bill of Rights,* some of the statute law of Parliament, and the numerous principles and maxims of the ancient common law. This unwritten constitution had been formed and developed over many centuries. It was this constitution which the American colonists claimed and

16 *Quinn v. Phipps,* 93 Fla. 805, 113 So. 419, 425 (1927).

17 This actually occurred with the Treaty of Paris—September 3, 1783—when Great Britain recognized the independence of the United States.

appealed to in their charges against the British government. By doing so they asserted that acts of Parliament were "unconstitutional." In 1765, James Otis said the Stamp Act was not "allowed by the Constitution." In the *Declaration of Independence* it said the king had "combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws." The term "constitution" had been used many times by the colonists before 1776, before there was any written constitution. This "constitution" consisted of the general fundamental law and maxims which have anciently existed in England, and which had been established in America. It is this constitution that the colonists objected to being violated and fought to preserve.

If those who had written and endorsed the U.S. Constitution and the original State Constitutions had changed this fundamental law (unwritten constitution), they would have been hypocrites, since their whole basis for revolt was that this fundamental law could not be violated. Judge Cooley expresses this concept as follows:

> It is true that the colonists in the incipient period planted themselves upon established rights, instead of seeking or desiring a revolution. Their purpose, therefore, was to maintain old established principles of the Constitution, instead of overturning them; and they occupied a conservative position, resisting innovations which the imperial government was attempting to force . . . In America only a change in the general sovereignty [governmental rule] was intended; in respect to the general laws, the revolution was strictly preservative.[18]

This general law, the unwritten constitution, cannot be altered either by government or even by the people. The people are limited in their act of drafting of a constitution,

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18 Thomas M. Cooley, *Principles of Constitutional Law,* 2d ed., (1891), pp. 24-25.

as that constitution cannot violate, but must conform to, the unwritten constitution—the Law of the Land.

An important principle is thus revealed here, that being when an original law is established in a land, future political events cannot change that Law of the Land. The freedom fighters that wrought American independence did not have the authority to alter, change or abrogate the Law of the Land, and neither do the people today by way of amendments or constitutions. The people cannot take away fundamental concepts of due process, give courts legislative powers, or allow an inequality for taxation. The supreme law of the land is the unwritten constitution of the land which controls both constitutions and statutes. It thus is possible for a written constitution to be "unconstitutional!"

When the U.S. Constitution says that it shall be "the supreme law of the land" (Art. VI, Sec. 2), the words are spoken of in the same way that a statute is said to be the law of the land. In this context, the words mean positive law which prevail in the land. The U.S. Constitution was to give the national government a few specific powers, such as to coin money or declare war, and when exercised these powers were to prevail over (be supreme to) any State or municipal laws or constitutions in these areas. This was to avoid conflict and confusion. No written constitution can be the Law of the Land in its true sense, but must in fact conform to it.

The Law of the Land thus cannot be lawfully or rightfully changed by forms of government that are established in the land. In the time of the Bible when the government changed from a republic governed by judges to a monarchy, the Law of God continued to be the Law of the Land.

In the American nation, there was at first a government under British rule, then a government under the Continental Congress, which was followed by the government under the

Articles of Confederation, after which came the government under the U.S. Constitution. Some States had six or more different constitutions. Through all these changes in the form of government, the basic law of the land remained the same, in fact, the law dictates the form of government. The law is legally attached to the land and not to some political entity called a "state" or "government" or even a constitution.

The Law of the Land is also not altered by the subsequent division of the land into political subdivisions or colonies. The Common Law established by the white race in America was the Law of the Land in every part of it since all the land was English, and later American. The division of the land into colonies and later states did not have any effect on what constitutes the Law of the Land in any of the divisions or colonies. Even if the states became completely separate nations, which they never really were, the Law of the Land is still the predominant factor in determining the legal and religious foundations. Thus State boundaries can be changed, but as they do the Law of the Land stays the same. In England, the Law of the Land was regarded the same in Wales as it was in London.

The land is the controlling factor, not the divisions of the land or prevailing governments. Thus when the Israelites divided Palestine into different tribal regions and later into different kingdoms, that did not in any way nullify the Law of God from being the Law of the Land. The same race of people that planted the Law in that land were still inhabiting that land and thus the Law remained.

A nation's Law of the Land is also said to prevail in those lands which are afterwards taken over by that nation. Thus the American Common Law also exists in those lands which were later added to the nation, thereby superseding whatever law that may have previously existed there. This means the French law which existed in Louisiana, and the Spanish law

that existed in Alabama, Arizona or California, no longer prevail in those lands. The American Common Law was extended to those lands, to the exclusion of the Spanish and French law.[19] Likewise, when King David enlarged the borders of the Israel Nation, the Law of God became the Law of the Land in those territories.

A political coup or revolution may set aside the Law of the Land, but does not really remove it. There is only one way the Law of the Land can be completely removed in a legal sense. That is by the removal from the land of the race of people which established the Law on the Land. Thus when Israel was deported in the Assyrian and Babylonian captivities, and other peoples where brought into the land, the Law of God ceased to be the Law of the Land in Palestine.

The history of the land ultimately dictates the Law of the Land, its unwritten constitution. A land which has an established history for a given people has an established Law of the Land. Any law is termed "the Law of the Land" which was originally established and practiced in the land by the ancestors of the people that possess the land. It is not to include new laws, but old laws, concepts and principles. As Judge Cooley said: "When the law of the land is spoken of, undoubted a pre-existing rule of conduct is intended."[20]

It is this body of law, along with the modifications and additions it received up to the time of national independence, which makes up America's "unwritten constitution." This Constitution is the *law of the land,* and by its nature is immutable and unalterable by any governmental act, just as the colonists claimed it to be unchangeable by the British government. In fact, this law is of such a high order that it prevails above any written constitution.

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19 *Pollard v. Hagan,* 44 U.S. 212, 11 L.Ed. 565 (1845).

20 T. M. Cooley, *Constitutional Limitations,* vol. II, p. 738.