

Appalachian Institute
August 22-26, 2011
Lake Logan, NC

The Majesty of the Law

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In this colloquium, we will examine the origin and sources of law, with particular reference to the American legal tradition. Part of America's English heritage was a six-hundred-year-old legal system based primarily on decisions made by judges, applying "the common law." A compound of ancient custom, sporadic legislation, and occasional reform, this system was transported to the English colonies in North America. Confronting the challenges, not just of a new environment, but eventually of a new political system based on written constitutions, the common law proved remarkably adaptable. Over the course of two and a half centuries, a growing number of statutes led to the complex interaction between common law, constitutions, and legislation that has created the dynamic system in operation today.

I. Introduction – Session 1

Law is as old as human society and is compounded out of many materials. Positioning ourselves on the eve of American independence, we will take the work of the English lawyer Sir William Blackstone as our starting point. American historian Daniel Boorstin entitled his classic study of Blackstone, *The Mysterious Science of the Law*, and subtitled it, *Showing How Blackstone, Employing Eighteenth Century Ideas of Science, Religion, History, Aesthetics, and Philosophy, Made of the Law at once a Conservative and a Mysterious Science*. A brief look at some of these ingredients will allow us to look back to the beginnings and prepare us for a closer look at the momentous changes that were to come.

II. The English Heritage: The Common Law at Home – Sessions 2 & 3

To understand the law in America, one must first understand the common law tradition. For this, Sir William Blackstone's magisterial four-volume *Commentaries on the Laws of England*, originally published in 1765-69, provides a convenient starting place. While not without a creative element of its own, Blackstone's book offers a handy summary of the common law as it was on the eve of American Independence. What was lacking in traditional law was supplied by Blackstone's great contemporary, Lord Mansfield, the prototypical "activist judge," who as Chief Justice of the Court of King's Bench from 1756 to 1788 strikingly demonstrated the power of courts in a common law system. While Blackstone restated the tradition for posterity and Mansfield labored to adapt it to the modern world, a younger contemporary of both, the outsider Jeremy Bentham, spent his long life subjecting the entire operation to a searching, one is tempted to say a scorching, criticism. Together, this trio of Blackstone, Mansfield, and Bentham – representing the scholar, the innovator, and the critic – help to explain the common law's extraordinary ability to adapt to the most unsettling changes.

Blackstone's *Commentaries*, vol. 1, pp. 123-36 (1765) (on "the absolute rights of Englishmen")

III. The Common Law in America

A. *Foundations: Constitutions – Sessions 4 & 5.* Perhaps the most momentous change of conditions faced by the common law in America was a profound innovation in basic political organization. Promptly on Independence in 1776, colonies became states, most with freshly minted constitutions. Written constitutions were novelties in the common law tradition, and created new and unexpected tensions. No sooner were the newly constituted states independent than they confederated into a new nation, the United States of America. After a brief and unhappy experience under the Articles of Confederation, the people of the United States famously constituted themselves anew by adopting the still operational Federal Constitution, adding yet another layer of fundamental law.

Declaration of Independence (1776)
Constitution of North Carolina (1776)
North Carolina General Statutes § 4-1 (Common law declared to be in force)

B. *The Crisis of the Republic: Slavery & Civil War – Sessions 6 & 7.* The existence of slavery in the new Republic created tensions from the beginning. The drafters of the U.S. Constitution, at their historic meeting in Philadelphia in 1787, avoided the word but compromised on the reality, leading to the division between slave states and free states. The tension was not just at the constitutional level, it also proved a challenge to the common law, which had no experience with ownership rights in human beings. Despite heroic efforts, lawyers and politicians ultimately proved unable to resolve the tension peacefully and it was finally settled on the great battlefields of the Civil War. Northern victory was incorporated in the Constitution with three powerful amendments: Thirteen, Fourteen, and Fifteen.

State v. Mann, 9 N.C. (2 Hawks) 582 (1823) (Ruffin, J.)
U.S. Constitution, Amendments 13 to 15 (1865-70)

C. *The Growth of Legislation – Session 8.* The common law was long familiar with statutes, but they were few and far between, usually concerned with the law of property. For centuries, English lawyers worked to assimilate statutes to the common law. Most statutes, they said, merely declared what was already the common law or, at most, cleared up doubtful points. In a sense, the legislature was just another court, albeit “the high court,” discovering and declaring the law, just as the ordinary judges did. In time, with the rise of positivism and the ascendance of the legislative function, the two would part company – the legislature making law and the courts supposedly limited to applying it. The common law expressed “reason,” the statutes “will.”

North Carolina Constitution, art. 1, § 6 (1971)

D. *Legal Education & the Legal Profession – Session 9.* The final element that would shape the common law in America was the new model law school, and the latest arrival in the legal cast of characters – after judges, lawyers, and legislators – were law professors. Freed from the daily demands of constituents, clients, and litigators, academic lawyers brought a new perspective on the law. Some, particularly at first, chose the Blackstonian role of preserver of tradition, while others, particularly later, incited judicial activism or emulated Bentham’s role as constant critic.

Professor C.C. Langdell, “Teaching Law as a Science,” *American Law Review*, vol. 21, pages 123-25 (1887)
Professor J.C. Gray, “Methods of Legal Education,” *Yale Law Journal*, vol. 1, pages 159-61 (1892)

IV. Theme & Variations – Sessions 10 & 11

Law in America remains what it has always been, a mixture of old rules and modern improvements. The common law remains the foundation and continues to shape developments in many ways, some obvious and some obscure. Above all it lends to our law an unmistakable air of majesty, a tradition derived from a remote past that has never lost touch with its origins.

V. Legal Future – Session 12

I hope we can conclude our survey of America’s legal past by reflecting together about where we go from here. What trends will likely shape our legal future? What do we fear? What do we want? What do we expect?