

The Common Law in the Federal System

Professor Sachs
Reading Group
Fall 2015

Course 277I

Th 3–5 p.m.
WCC 406I
<http://goo.gl/Lg1n51>

Office Hours:

M/W 2–3 p.m.
Areeda 129
ssachs@law.harvard.edu

WARNING: This course is misleadingly listed as a “reading group.” In fact, it’s an ungraded, paperless graduate-level seminar, involving hundreds of pages of advanced reading per week, for which you will receive no grade and only one credit. I fully expect that everyone will have to pick, choose, and skim. My hope, though, is that many of you will read most of the assignments before each session. I’m including all this material simply because I want to learn the subject along with you, and the best way I’ve come up with is for us to read as much as we can and to discuss it together. So, before continuing with the course, please consider whether it’ll be worth it to you—and whether it’s compatible with your other classwork and outside commitments, as I wouldn’t want your grades to suffer on my account. The reward for mastering all this reading will be purely intellectual, but I do think it will be real.

Summary

The United States is known as a “common-law country.” But what does it mean to have a common law? Where does the common law come from? How does it interact with our system of government? And is our common law state law, federal law, or something else?

This reading group discusses the place of the common law in America’s federal system. Topics will include the philosophy and jurisprudence of the common law, its Founding-era history and post-Founding controversies, the general common law in the era of *Swift v. Tyson*, the development of federal common law after *Erie Railroad Co. v. Tompkins*, and the modern relationship between the common law and the law of nations.

Meetings

This course meets on occasional Thursdays in **WCC 406I**. (Exact dates are noted on the schedule below.) We’ll start promptly at **3 p.m.** Note that there are readings assigned for the first day’s discussion.

Each student is expected to attend each session and to participate actively in class discussion. In case of illness, emergency, or other special circumstances, please just email me at ssachs@law.harvard.edu before class begins.

Laptops

Laptops may not be used without special permission. Please bring the relevant portions of the coursepack to each session.

Office Hours

This semester, my office hours are on Mondays and Wednesdays, 2 to 3 p.m. A sign-up sheet with twenty-minute blocks is posted outside my door (Areeda 129). If no one has signed up, feel free to write your name in. If you'd like to arrange an appointment at another time, please email me. You should also feel free to sign up in groups, invite in other students during your reserved block, and so on.

Schedule and Materials

Meeting times and readings are listed below. The materials are all posted on the course website, both individually and as a single zipfile. They are also included in a separate coursepack to save you printing costs.

- I. **Sept. 10.** The Theory of the Common Law. (147 pp.)
- 1 William Blackstone, Commentaries on the Law of England *63–64, *67–71, *74–75, *79–80. (11 pp.)
 - Morris Cohen, *The Process of Judicial Legislation*, 48 Am. L. Rev. 161, 161–87 (1914). (27 pp.)
 - H.L.A. Hart, The Concept of Law 44–49, 91–99, 124–54 (1961) (3d ed. 2012). (48 pp.)
 - A.W.B. Simpson, *The Common Law and Legal Theory, in Legal Theory and Legal History: Essays on the Common Law* 15 (1987). (25 pp.)
 - Frederick Schauer, *The Jurisprudence of Custom*, 48 Tex. Int'l L.J. 523 (2013). (12 pp.)
 - Allan Beever, *The Declaratory Theory of Law*, 33 Oxford J. Legal Stud. 421 (2013). (24 pp.)

[Sept. 17. No class.]

2. **Sept. 24.** The Common Law in the Early Republic. (106 pp.)
- Declaration and Resolves of the First Continental Congress (Oct. 14, 1774). (2 pp.)
 - Reception Statutes. (2 pp.)
 - Rules of Decision Act. (1 p.)
 - *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411). (5 pp.)
 - *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). (5 pp.)
 - William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513 (1984). (68 pp.)
 - Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503, 503–25 (2006). (23 pp.)

[Oct. 1. No class.]

3. **Oct. 8.** The Assault on the “Brooding Omnipresence.” (155 pp.)
- *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928). (7 pp.)
 - *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). (6 pp.)
 - Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 1, 5–11 (1995). (8 pp.)
 - Steven Walt, *Why Jurisprudence Doesn’t Matter for Customary International Law*, 54 Wm. & Mary L. Rev. 1023, 1023–36 (2013). (14 pp.)
 - Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 Wm. & Mary L. Rev. 921 (2013). (66 pp.)
 - Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10:1 J.L. Econ. & Pol’y 17, 17–21, 25–38, 57–76, 100–12, 122–23 (2013). (54 pp.)

[Oct. 15. No class.]

[Oct. 22. No class.]

4. Oct. 29. “Federal” Common Law. (207 pp.)

- *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). (2 pp.)
- *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). (4 pp.)
- *New Jersey v. New York*, 523 U.S. 767 (1998). (2 pp.)
- Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805, 805–09, 819–21, 832–42, 851–52 (1989). (21 pp.)
- Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 Colum. L. Rev. 731, 731–42, 756–81 (2010). (38 pp.)
- Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813 (2012). (76 pp.)
- Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1 (2015). (64 pp.)

[Nov. 5. No class.]

5. Nov. 12. The Common Law of Crimes. (229 pp.)

- Sources of Federal Criminal Jurisdiction. (2 pp.)
- *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). (3 pp.)
- *United States v. Coolidge*, 1 Gall. 488, 25 F. Cas. 488 (C.C.D. Mass. 1813) (No. 14,857). (6 pp.)
- *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816). (1 p.)
- Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. Pa. L. Rev. 1003 (1985). (114 pp.)
- Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231 (1985). (103 pp.)

[Nov. 19. No class.]

[Nov. 26. Thanksgiving.]

6. Dec. 3. The Common Law and the Law of Nations. (192 pp.)

- Sources on the Law of Nations. (2 pp.)
- Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). (62 pp.)
- Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998). (38 pp.)
- Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998). (16 pp.)
- Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 Va. J. Int'l L. 365, 365-72, 467-74, 510-11 (2002). (18 pp.)
- Carlos Manuel Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 Notre Dame L. Rev. 1495, 1495-1538 (2011). (44 pp.)
- Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 Va. L. Rev. 729, 729-40 (2012). (12 pp.)