

NOTE

THE IRRELEVANCE OF BLACKSTONE: RETHINKING THE EIGHTEENTH-CENTURY IMPORTANCE OF THE COMMENTARIES

*Martin Jordan Minot**

This Note challenges William Blackstone’s modern position as the “oracle of the law” in the eighteenth century. In a time when the status of legal doctrines at the Founding is of renewed significance in interpreting the Constitution, it is especially important to ensure that the sources of these doctrines comport with historical practices. This Note looks beyond the usual story of Blackstone’s influence, as told by the significant circulation of his work. It turns instead to the work’s practical significance for legal education in the decades preceding the Constitutional Convention. By using curricula and student notes—referred to as commonplace books—to discover what was actually considered influential in the legal profession of the period, a more comprehensive perspective of eighteenth-century legal thought is uncovered. While Blackstone was apparently known to these late colonists, his work was far from “the most widely read law book in eighteenth-century America.” Instead, more traditional treatises and English reporters dominated legal learning until at least 1787. It is these admittedly more impenetrable works which should inform our understanding of the common law as it existed at the Founding.

I. INTRODUCTION..... 1360
 II. BLACKSTONE AND THE COURT..... 1365
 III. BLACKSTONE: BACKGROUND, INTRODUCTION TO AMERICA..... 1368
 A. Blackstone and His Commentaries 1368

* J.D., University of Virginia School of Law, expected 2019. M.A., University of Virginia, expected 2018. M.P.P., University of Virginia, 2014. B.A., University of Virginia, 2013. For their tireless efforts and endless patience in helping with this Note at every step, I would like to thank Professors Cynthia Nicoletti and Molly Brady, the indispensable research librarians at the University of Virginia Law Library, and Olivia Vaden and the rest of the *Virginia Law Review*. But I reserve my warmest gratitude for the late Professor J. Gordon Hylton. I will truly miss his mentorship, warmth, and infectious passion for the study of legal history.

1360	<i>Virginia Law Review</i>	[Vol. 104:1359]
	<i>B. The Commentaries and Their Transatlantic Journey</i>	1373
IV.	LEGAL EDUCATION AND COMMONPLACING IN THE LATE COLONIAL/EARLY REPUBLIC	1376
	<i>A. Pedagogy</i>	1376
	<i>B. The Prescribed Course of Study</i>	1381
V.	COMPARISON OF FOUNDING-ERA COMMONPLACE BOOKS	1384
	<i>A. An Example: Husband and Wife, or, Baron and Femme</i>	1388
	<i>B. Variations in Coverage</i>	1390
VI.	IF NOT BLACKSTONE, WHAT THEN?	1392
	<i>A. Influential treatises</i>	1393
	<i>B. Reporters</i>	1396
VII.	CONCLUSION	1397

I. INTRODUCTION

One could be forgiven for thinking that Blackstone was always on the minds and lips of early American lawyers.¹ Many modern lawyers and law students only gain exposure to founding era legal thought, outside the Constitution or perhaps the Federalist Papers, through Blackstone. Even so, this exposure more likely stems from the Supreme Court's frequent citation to Blackstone's work than from the *Commentaries of the Laws of England* directly. Blackstone is quite popular with the Court: since 1990, the Supreme Court has referenced Blackstone in eight percent of its signed opinions, the highest rate since 1810.² After dwindling to obscurity in Supreme Court opinions by the early twentieth century, Blackstone again ascended to prominence in the latter half of

¹ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (stating that Blackstone “constituted the preeminent authority on English law for the founding generation” (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 381 n.14 (1974) (White, J., dissenting) (referring to Blackstone as “the oracle of the common law in the mind of the American Framers”); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 2 (1996) (urging Blackstone’s “*Commentaries* should be regarded as the baseline, or shared starting-point, of American legal thought”); Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 Yale L.J. 601, 601–02 (1998) (using Blackstone’s *Commentaries* as a foundational text for early conceptions of property law).

² Jessie Allen, *Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone*, in *Reinterpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts* 215, 218 (Wilfrid Prest ed., 2014).

the century. Perhaps surprisingly, this rise cannot be entirely attributed to modern originalism or its subscribers on the Court.³

The Court has reached for Blackstone in some of its most contentious decisions. In *District of Columbia v. Heller*, the Court relied on Blackstone's conception of self-defense to find an individual right to keep handguns in the home.⁴ Justice Scalia likewise cited Blackstone's conception of corporations under the common law in his concurrence in *Citizens United*.⁵ In the last century, Justice Blackmun relied on Blackstone's contention that abortion had been permitted before "quickenings" in *Roe v. Wade*.⁶

As a matter of legal precedent, the Court has decreed that Blackstone "constituted the preeminent authority on English law for the founding generation."⁷ At least in the eyes of the Court, Blackstone is a quasi-mythical being, "the oracle of the common law in the mind of the American Framers."⁸ Such exalted status of a single eighteenth-century legal work and its author is remarkable. At least one commentator has concluded that "the Court sometimes proceeds as if the United States founders understood the Constitution to silently enact Blackstone's *Commentaries* in between or underneath the constitutional text."⁹

This emphasis has significant ramifications in the modern era of constitutional interpretation. While originalists do not have a monopoly on Blackstone citations,¹⁰ the rise of originalist methods of interpretation

³ *Id.* at 219–20. While Justice Scalia made the most use of the *Commentaries*, leading the modern Court in citations to the work, he is far from solely responsible for Blackstone's recent popularity. For example, in the 2012–2013 term, Scalia cited Blackstone at a rate of one in six opinions, Chief Justice Roberts and Justice Thomas at a rate of one in eight, Alito at one in ten, and Breyer at one in eighteen. *Id.* at 220 n.7.

⁴ *Heller*, 554 U.S. at 594–95.

⁵ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 388 (2010) (Scalia, J., concurring).

⁶ *Roe v. Wade*, 410 U.S. 113, 135 (1973). To his credit, Justice Blackmun also cites Lord Coke as authority. *Id.*

⁷ *Heller*, 554 U.S. at 593–94 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)) (internal quotations omitted).

⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 381 n.14 (1974).

⁹ Allen, *supra* note 2, at 215; see also Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. Rev. 731, 768 (1976) ("[Blackstone] powerfully affected the men who drafted laws and issued legal opinions.").

¹⁰ See, e.g., *Roe*, 410 U.S. at 135 (discussing Blackstone in what is hardly considered an "originalist" opinion); *Heller*, 554 U.S. at 662, 665 (Stevens, J., dissenting) (rebutting the

has almost certainly influenced how the Court uses historical sources and which sources are considered most influential. The appeal of Blackstone's *Commentaries* is the ease with which the work can serve as a proxy for the status of legal doctrines and principles at the time the Constitution was ratified. To put it in more familiar originalist terms, Blackstone's *Commentaries* serves as evidence of "public meaning" at the Founding.¹¹ Blackstone's work seems ideally suited for this purpose: published before the Founding, it was certainly influential in America by at least the early nineteenth century,¹² and its scope is such that it can serve as a convenient one-stop-shop for eighteenth-century common law.¹³

There are two intertwined problems with this reliance. First, the "unchallenged historical consensus that the *Commentaries* was the most widely read law book in late eighteenth-century America"¹⁴ is predicated on tenuous assumptions. The first of these assumptions is temporal: Blackstone first gave his lectures in 1753; he was named England's first professor of the common law at Oxford at 1758,¹⁵ and his *Commentaries* were first published in England in 1765, then in America in 1772.¹⁶ The distance between these publications and 1787 must surely mean familiarity, or so the argument goes. Blackstone's publication and circulation in the colonies is likewise equated to influence in legal thought.¹⁷ If so many copies were available, the work must have been influential. The final assumption traces Blackstone's influence in the nineteenth century back to the original date of

majority's interpretation with a different reading of Blackstone); Allen, *supra* note 2, at 220 n.7 (discussing how each of the Justices uses Blackstone).

¹¹ See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 130 (1997) (indicating, for example, that Blackstone's description of parliamentary supremacy was the more commonly accepted view at the Founding than the familiar scheme of judicial review and independence often traced to Coke's opinion in *Dr. Bonham's Case*); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *San Diego L. Rev.* 575, 585 (2011) (discussing how Blackstone's *Commentaries* might be part of a hypothetical "Joe the Ploughman's literary identity").

¹² See *infra* notes 34–37 and accompanying text.

¹³ See *infra* notes 65–73 and accompanying text.

¹⁴ Allen, *supra* note 2, at 226.

¹⁵ Lewis C. Warden, *The Life of Blackstone* 159 (1938).

¹⁶ Alschuler, *supra* note 1, at 5.

¹⁷ See *infra* notes 74–87 and accompanying text.

publication. But time of publication, or even circulation, does not necessarily equate to influence. What is needed instead is a way to measure the degree to which Blackstone was a regular reference for lawyers of the period, shaping foundational ideas on subjects as disparate as sovereignty and the fee tail.

A second problem with a widespread reliance on Blackstone is that his work did far more than summarize the law as it existed during the Founding. The *Commentaries* precipitated a radical change in the conception of law, condensing the “common law” into a unified body. By the eighteenth century, legal thought and learning focused on law that was “particularistic” and “untheoretical,” dealing with discrete problems and, supposedly, providing logical solutions for those particular problems.¹⁸ Budding lawyers learned the law by “jumping in at the deep end and learning by experience and practice without first seeking principle.”¹⁹ There was no alternative, as no text seemed to offer such a perspective. Blackstone changed this by being the first to effectively elucidate a top-down theory of English law, a perspective it had hitherto lacked. While he was not the first to attempt to reduce the law of England to a coherent framework, those who had tried before him were largely unsuccessful. Blackstone’s novel method, borrowing from Roman law, allowed the easiest digestion of the common law to date.²⁰ But ascribing Blackstone’s innovations to legal thought in the eighteenth century presupposes that his ideas were widely read and adopted, an assumption which this Note challenges.

This Note challenges Blackstone’s influence in light of both of these problems by focusing on the legal education of the founding generation. While a work’s role in legal education represents only a portion of its influence, the traditional narrative of Blackstone’s work as “the most widely read law book in late eighteenth-century America”²¹ would seem to indicate that the work would rapidly be put to use in teaching the law.

¹⁸ Michael Lobban, *Blackstone and the Science of the Law*, 30 *The Hist. J.* 311, 315 (1987). This view of the law seems to have been in large part the result of the work of Lord Coke, a theorist who, as discussed in Parts V–VI, was especially influential to the late colonists. *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 318–21. For a fuller discussion of Blackstone’s organization, see *infra* Section IV.B.

²¹ Allen, *supra* note 2, at 226.

In addition, if the work was truly influential among lawyers who participated in ratification, it would logically have been widely read by students who, under the eighteenth-century model of legal education, most commonly studied under the tutelage of practitioners. More specifically, to have influenced the founding generation's conception of law, Blackstone would have needed to rise to prominence in legal education in the period between his first lecture in 1753 and the early 1780's, when the youngest of those to participate in the Convention or ratification debates were educated. Legal education thus provides a lens through which to view the work's true influence by providing a measure of its actual use, rather than simply its ownership and subsequent popularity.

To evaluate this system, and Blackstone's role within it, this Note focuses on both the general pedagogy of the period as well as the concrete experiences of students. To begin, Part II provides background on Blackstone's modern importance. Part III then discusses Blackstone, the *Commentaries*, and the introduction of the work to colonial North America. With this foundation, Part IV then describes the pedagogy of the period and the prescribed course of study. Part V then shifts the focus to the students themselves to search for Blackstone's influence, evaluating a selection of student "commonplace books." Finally, Part VI analyzes the question naturally raised by the earlier sections: if Blackstone was not influential, what should originalists and other constitutional theorists use to more accurately understand the law as understood by the founders?

The resulting legal landscape of the decades preceding 1787 is unsurprisingly muddy. Despite the differences in emphasis, sources, and styles, one conclusion is clear: Blackstone was far from the primary exponent of the common law, even years after 1772 and even among those with access to his work. The practical implications of this observation are equally clear. Blackstone was not "the oracle of the common law in the mind of the American Framers,"²² and the legal community risks unrealistic distortions by continuing to rely on his work for understanding the Founding.

²² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 381 n.14 (1974) (White, J., dissenting).

II. BLACKSTONE AND THE COURT

Blackstone is a behemoth on the modern Court. One of the most controversial cases of this century, *District of Columbia v. Heller*, provides an excellent example of Blackstone's primacy among the Justices. In striking down the District of Columbia's ban on handgun ownership, Justice Scalia's majority opinion leans heavily on Blackstone's *Commentaries*. Indeed, Justice Scalia cites the work as "the preeminent authority on English law for the founding generation."²³ But the majority makes use of St. George Tucker's 1803 edition—published well after ratification—which contains a number of notes elaborating on Blackstone's original work, including one on the right of self-defense.²⁴ Justice Stevens' dissent does not attack this temporal discrepancy; in fact, he also makes heavy use of the work. While finding the majority's reading of the *Commentaries* "unpersuasive," Justice Stevens quibbles only with the interpretation, not the source.²⁵ Justice Stevens then offers his own reading of the work to contradict the Court's conception of self-defense.²⁶ As a whole, the Court seems unconcerned by this anachronistic evidence, though subsequent scholars have noticed the issue, albeit by focusing on the other nineteenth-century evidence used in the opinion.²⁷

²³ *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

²⁴ *Id.* at 595 (citing 1 William Blackstone, *Commentaries* *145–46 n.42 (St. George Tucker ed., 1803)).

²⁵ *Heller*, 554 U.S. at 665 (Stevens, J., dissenting). Justice Stevens does quibble with the majority's use of "postenactment commentary" but does not place Blackstone among these sources, despite the majority's use of Tucker's 1803 edition. *Id.* at 662, 662 n.28.

²⁶ *Id.*

²⁷ See Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 *Nw. U. L. Rev. Colloquy* 406, 409–10 (2009) ("Scalia and other new originalists seem unaware of, or unconcerned with, the profound changes that transformed American law in the period between the Founding era and the Jacksonian period."); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *Harv. L. Rev.* 191, 196–98 (2008) (highlighting the "temporal oddities" of the opinion). It should be noted that this is not a new phenomenon on the Court. In *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), for example, Justice Sutherland's majority opinion used a highly anachronistic and unsubstantiated account of land use regulation to justify upholding zoning schemes. Nicole Stelle Garnett, "No Taking Without a Touching?" Questions from an Armchair Originalist, 45 *San Diego L. Rev.* 761, 767–68 (2008).

While *Heller* is a particularly famous example of Blackstone's influence on the Court, it is hardly unusual. *Alden v. Maine*, which interpreted the Eleventh Amendment as protecting state sovereign immunity from abrogation by Congress, was cited in *Heller*. In *Alden*, the Court used the *Commentaries* as evidence for the foundational nature of sovereign immunity in the American constitutional system.²⁸ Justice Kennedy, citing Blackstone to place sovereignty in an eighteenth-century context, declared—without citation—his works to be “the preeminent authority on English law for the founding generation.”²⁹ Here again, the dissent did not challenge the usefulness of the source, choosing instead to present a conflicting interpretation of Blackstone's view on sovereignty.³⁰

Why does the Court rely so heavily on Blackstone? From an originalist perspective, the work is uniquely appealing, regardless of where original meaning is located. The *Commentaries* can convincingly be argued to shed light on either the concrete intent of the founders themselves,³¹ or as part of the corpus of works which shed light on the Constitution's original public meaning.³² Furthermore, on cursory examination, Blackstone seems to have been pervasive in the founding generation. Edmund Burke famously stated that the *Commentaries* were as widely purchased in America as in Britain.³³ The work is even directly discussed by the founders themselves, as when Thomas Jefferson derided the *Commentaries* as dangerous for its pervasive

²⁸ 527 U.S. 706, 715 (1999).

²⁹ *Id.*

³⁰ *Id.* at 767–71 (Souter, J., dissenting).

³¹ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (“What kinds of alien tort actions, then, might the Congress of 1789 have meant to bring into federal courts? According to Blackstone, a writer certainly familiar to colonial lawyers”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 896 (1985) (citing Blackstone's emphasis on intent for the canon of will construction to justify original intent for constitutional interpretation).

³² See, e.g., David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. Rev. 1295, 1313–16 (2009) (discussing Blackstone's influence on the founders and potential conflicting viewpoints); Rakove, *supra* note 11, at 585 (discussing Blackstone in the context of public meaning).

³³ Edmund Burke, *On Moving His Resolutions for Conciliation with the Colonies* (Mar. 22, 1775), in 1 *The Works of Edmund Burke, with a Memoir* 222, 230 (New York, Harper & Brothers 1855). For more discussion, see *infra* notes 84–89.

influence and over-simplified view of law, albeit decades after the Constitution's ratification.³⁴

Jefferson's critique is telling. While sharply critical of Blackstone and his *Commentaries*, his criticism dates from the nineteenth century.³⁵ Indeed, the first full century after ratification was Blackstone's true golden age in the colonies. St. George Tucker's 1803 edition of the *Commentaries*, with extensive notes to make the text more relevant for the American legal system, spurred a century of Americanized editions of the work.³⁶ Evidence of Blackstone's prominence can also be found in student notebooks from the period. In an 1827 student "commonplace book"—a type of student notebook discussed at length in Part IV—Blackstone features prominently and heads an inventory of law books kept by the student in the back cover.³⁷ But even by this fairly late date, and despite Blackstone's prominence, much older books, like Coke's seventeenth-century *Institutes*, maintain at least some importance and are listed below Blackstone in the works used by the student.³⁸

This evidence indicates strong Blackstonian influence in the nineteenth century, but less evidence supports the "unchallenged historical consensus that the *Commentaries* was the most widely read law book in late eighteenth-century America."³⁹ As the following sections demonstrate, Blackstone's influence was more limited in this earlier period. His ideas perhaps intrigued those in the colonies who purchased his work, but it would not be until the establishment of the Republic that the *Commentaries* would become a primary resource for students and teachers of law.

³⁴ Letter from Thomas Jefferson to Judge John Tyler (June 17, 1812), in 13 *The Writings of Thomas Jefferson* 165, 165–67 (Andrew A. Lipscomb ed., 1903).

³⁵ *Id.*

³⁶ Michael Hoeflich, *American Blackstones*, in *Blackstone and his Commentaries: Biography, Law, History* 171, 172, 174 (Wilfrid Prest ed., 2009). Despite this surge in popularity, Dennis Nolan observed that Blackstone was cited in only about 6.6% of federal and state cases in the period up to 1829, and only had "significant influence" in 1–2% of reported cases. Nolan, *supra* note 9, at 752–54.

³⁷ Thomas Fauntleroy, *A List of My Law Books*, on 1 Day Jany. 1828 (written in 1827) (unpublished manuscript) (on file with the University of Virginia Law Library).

³⁸ *Id.*

³⁹ Allen, *supra* note 2, at 226.

III. BLACKSTONE: BACKGROUND, INTRODUCTION TO AMERICA

A. *Blackstone and His Commentaries*

William Blackstone's path to prominence as a legal commentator was highly unusual. Perplexingly by modern standards, England had never had a traditional university professorship in the common law despite centuries of sophisticated legal practice.⁴⁰ Legal education in the common law had instead been the domain of the Inns at Court and Chancery in London, a university-style system through which students read law, observed court proceedings, and mingled with members of the bar.⁴¹ Blackstone, through happenstance and his unique relationship to Oxford, was to become England's first true common law professor, and perhaps the first university common law professor in the world.⁴²

Before Blackstone published his work in the middle of the eighteenth century, the lionized abridgements of the common law had primarily been authored by former jurists. Edward Coke had been Queen Elizabeth's Attorney General before taking, first, the Chief Justiceship of the Court of Common Pleas and then the King's Bench, ultimately publishing his famous works late in his career.⁴³ Matthew Hale, who wrote *The History of the Common Law*, an analysis of the authority of the king, and a number of shorter works, had been Chief Baron of the

⁴⁰ One notable exception was Oxford's Chair of Civil Law, maintained due to its historical role in educating clerics who would administer justice in ecclesiastical courts. Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* 52–53 (2008). Specifically, All Souls College, where Blackstone was a fellow and where he would later be the Vinerian Chair of Common Law, was established in the fifteenth century to “furnish the Church of England with learned lawyers and theologians” and as such had little to do with the secular courts for the first few centuries of its existence. *Id.*

⁴¹ W.C. Richardson, *A History of the Inns of Court: With Special Reference to the Period of the Renaissance* 2–3 (1975). Unlike students in the university system, lawyers did not necessarily leave the Inns upon attaining the bar; rather, they remained, continuing their education, building their professional networks and advancing in seniority. *Id.* at 15–16. The Inns are discussed in more detail in Part III.B. See *infra* notes 93–99 and accompanying text.

⁴² Blackstone would become a formal professor at Oxford in 1758, Warden, *supra* note 15, at 159, but North America would be without its own formal instructors for another twenty years. George Wythe would become America's first formal law professor, assuming a professorship at William & Mary in 1779. Daniel R. Coquillette, *Introduction to 2 Portrait of a Patriot: The Major Political and Legal Papers of Josiah Quincy Junior* 20 (Daniel R. Coquillette & Neil Longley York eds., 2007) [hereinafter *Portrait of a Patriot II*].

⁴³ William Holdsworth, *Sir Edward Coke*, 5 *Cambridge L.J.* 332, 333–35 (1935).

Exchequer and Chief Justice of the King's Bench.⁴⁴ Even Bracton and Glanvill, purported authors of the earliest common law treatises, had been judges in royal courts.⁴⁵ Only Matthew Bacon, a near contemporary of Blackstone who began his *New Abridgement* in 1736 and published volumes until his death in 1759, had not been a jurist first.⁴⁶

Blackstone never took the bench.⁴⁷ Indeed, he initially even failed to find success in the practice of law. His education was divided between All Souls College at Oxford, where he learned Roman law, and the Middle Temple, one of the Inns of Court in London, where he studied the common law.⁴⁸ After his education, Blackstone sought work in a stagnant and overcrowded legal market in London.⁴⁹ By 1753, seven years after his bar admission, he had argued only three cases.⁵⁰ Still, he maintained close ties to Oxford: he took administrative positions and fellowships immediately following his graduation and ultimately was elected to a formal office in 1749.⁵¹ His range of jobs was impressive, occupying positions such as bursar, printer, and fellow; it seemed “if

⁴⁴ Alan Cromartie, *Sir Matthew Hale 1609–1676: Law, Religion and Natural Philosophy* 4 (1995). For a complete list of works attributed to Hale, see 24 *The Dictionary of National Biography* 18–24 (Leslie Stephen & Sidney Lee eds., 1890).

⁴⁵ G.D.G. Hall, *Introduction to Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvilla Vocatur* [The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill], at xxxi (G.D.G. Hall ed., London, Thomas Nelson & Sons 1965) (1187–89); David J. Seipp, *Introduction to Henrici de Bracton, De Legibus et Consuetudinibus Angliæ* [On the Laws and Customs of England], at v (The Lawbook Exchange, Ltd. 2009) (1569). Rannulf Glanville was a justiciar of the court of Henry II but is unlikely to have authored the treatise that bears his name. Even so, more likely authors had similar, if perhaps less prominent, experience with the royal court. Hall, *supra*, at xxxiii. Bracton may primarily have been written earlier than Henry de Bracton's tenure as a justice, by William of Raleigh, also a justice of the king's law courts. Seipp, *supra*, at v. Bracton likely inherited the manuscript by Raleigh and added to it, with later circulations of the manuscript attributed to its last editor. *Id.*

⁴⁶ John D. Cowley, *A Bibliography of Abridgments, Digests Dictionaries and Indexes of English Law to the Year 1800*, at lx, lxi n.1, lxiii n.1 (1932).

⁴⁷ He had the opportunity to become Chief Justice of Court of Common Pleas of Ireland between 1760–61, after his lectures had gained him notoriety, but he declined, opting instead to pursue a seat in Parliament. Prest, *supra* note 40, at 180–81; Warden, *supra* note 15, at 175.

⁴⁸ Prest, *supra* note 40, at 52–53, 61–65.

⁴⁹ *Id.* at 71–72.

⁵⁰ Warden, *supra* note 15, at 64–65.

⁵¹ *Id.* at 94–95.

Oxford offered to make Blackstone janitor the latter would fall all over himself to fill the position.”⁵²

Blackstone nearly became another of Oxford’s civil law chairs, rather than its first common law professor. He decided to put himself forward for a professorship in 1753, setting aside his ambitions of practice at Westminster.⁵³ Despite this shift in focus, Blackstone was again unsuccessful and was passed over for the position.⁵⁴ Blackstone was sensitive, irritable, and prone to fits of bad temper,⁵⁵ and the loss affected him deeply.⁵⁶ Rejected but not defeated, Blackstone decided to deliver lectures on law anyway, but on the common law.⁵⁷ In 1753, after arduous preparation, he began delivering his lectures, charging each student a fee in lieu of a formal, compensated professorship—a practice which had become common in eighteenth-century universities.⁵⁸ He continued in this manner for roughly five years, until Charles Viner, himself the author of a treatise on the common law, died in 1756 and bequeathed his estate to provide for a chair of law at Oxford.⁵⁹ Uniquely qualified and conveniently tied to Oxford, an unopposed Blackstone was

⁵² *Id.* at 94–95, 119–20, 135.

⁵³ Prest, *supra* note 40, at 107–09.

⁵⁴ *Id.* Prest surmises that the rejection was due to Blackstone’s staunch Tory political leanings, a theory which has credence given Blackstone’s deep roots to law teaching at All Souls College by this date. *Id.*

⁵⁵ Warden tells a perhaps apocryphal story of how Blackstone, out of insecurity about his failure at practice, despised the honorific “Doctor,” despite his having earned the degree. Warden, *supra* note 15, at 145–46. Once a bookseller made the inadvertent mistake of greeting him as “Doctor,” which “put [Blackstone] in such a passion and had such an instantaneous and violent effect, and operated upon him to such an alarming degree, that the poor bookseller really thought he should have been obliged to have sent for another doctor, and from Saint Luke’s (hospital) too.” *Id.* (quoting D. Douglas, *The Biographical History of Sir William Blackstone, Late One of the Justices of Both Benches* 96 (London, J. Bew 1782)).

⁵⁶ Warden, *supra* note 15, at 144. But see Prest, *supra* note 40, at 108 (stating that Blackstone abandoned his hope for the position “without, so he claimed, either disappointment or resentment”).

⁵⁷ Warden, *supra* note 15, at 146.

⁵⁸ Prest, *supra* note 40, at 111–12. Such courses became more popular after formal methods of instruction had broken down. *Id.* at 112. Fortunately for Blackstone, these earnings were not insubstantial, outstripping his fellowship compensation through All Souls College. *Id.*

⁵⁹ Warden, *supra* note 15, at 159; Prest, *supra* note 40, at 139, 141, 149; see also Cowley, *supra* note 46, at lix–lx (discussing Viner’s *Abridgement*).

named the first “Vinerian Professor of the English Common Law” in 1758.⁶⁰

His conception of the common law was first disseminated in printed form in 1753 in a short work distributed to his students entitled *An Analysis of the Laws of England*.⁶¹ The *Commentaries* would not follow, however, until more than a decade later, for his dream of practice intervened. With his reputation buoyed by the success of his lectures, Blackstone tried his hand at practice again in 1759, dividing his time between London and Oxford.⁶² Thus, by the time the *Commentaries* was published, Blackstone had supplemented his academic conception of the law, as well as his income and reputation, with successful experience at the bar in London.⁶³ The first edition of the first volume of the *Commentaries on the Laws of England* was finally published in November 1765 by Blackstone’s former employer, Oxford’s Clarendon Press, and was followed over the next four years by the remaining three volumes.⁶⁴

Exceptionally well written, Blackstone’s work not only summarized the common law but imposed on it a revolutionary structure and logical organization.⁶⁵ The four volumes of the work apparently mirror the basic four-part structure of Blackstone’s lectures at Oxford.⁶⁶ Book I covers the “rights of persons” and Blackstone’s conception of the nature and

⁶⁰ Warden, *supra* note 15, at 159.

⁶¹ Prest, *supra* note 40, at 142.

⁶² *Id.* at 164; Warden, *supra* note 15, at 174.

⁶³ Warden, *supra* note 15, at 256.

⁶⁴ *Id.* at 257–58; see also Wilfrid Prest, Introduction to 1 William Blackstone, *Commentaries*, at xii (David Lemmings ed., Oxford Univ. Press 2016) (1765) (detailing the dates of publication for all four volumes of Blackstone’s *Commentaries*).

⁶⁵ Warden, *supra* note 15, at 261–62.

⁶⁶ Prest, *supra* note 64, at xi. There is a scholarly debate as to why Blackstone settled on this four-part structure. Compare Duncan Kennedy, The Structure of Blackstone’s *Commentaries*, 28 *Buff. L. Rev.* 205, 211 (1979) (contending Blackstone organized the work in an attempt to fit a conception of natural law), with Alan Watson, The Structure of Blackstone’s *Commentaries*, 97 *Yale L.J.* 795, 810–11 (1988) (arguing the structure was derived largely from Justinian’s *Institutes* on the civil law and Hale’s *Analysis*). Most convincingly, Michael Lobban argues for the latter view, claiming the structure was modeled on Roman treatises, most notably Justinian’s *Institutes*. These treatises similarly attempted to holistically taxonomize the law, and Blackstone, through his unique exposure to civil law, would have been well placed to draw lessons from these works. Lobban, *supra* note 18, at 316, 321.

study of the law.⁶⁷ Book II discusses “the rights of things,” namely property, while Book III covers “private wrongs” and Book IV deals with crimes and public wrongs.⁶⁸ Aspects of the structure may have echoed prior works, but the comprehensive coverage and clear language created a summary of the law far more accessible to the average reader than Coke or his ilk.⁶⁹

Blackstone’s method made his work revolutionary. His organization mirrors that of civil law works by cataloging a system of law into subgroups.⁷⁰ Given his civil law training at Oxford, this influence of Roman treatises was unsurprising, despite the impossible task of fitting the confused English law extant in the middle of the eighteenth century into a completely coherent whole.⁷¹ But Blackstone had long held a vision for this jumbled and peculiar body of law. Writing as a new student of the common law in 1746, Blackstone had already developed an unusually coherent theory:

I have sometimes thought that the Common Law, as it stood in Littleton’s Days, resembled a regular Edifice . . . all uniting in one beautiful Symmetry: & every Room had its distinct Office allotted to it. But as it is now, swoln, shrunk, curtailed, enlarged, altered & mangled by various contradictory Statutes &c; it resembles the same Edifice, with many of its most useful Parts pulled down, with preposterous Additions in other Places . . . & now it remains a huge, irregular Pile, with many noble Apartments, though awkwardly put together, & some of them of no visible Use at present. But if one desires to know why they were built . . . he must necessarily carry in his Head the Model of the old House, which will be the only Clue to guide him through this new Labyrinth.⁷²

⁶⁷ Watson, *supra* note 66, at 802, 813.

⁶⁸ *Id.*

⁶⁹ Warden, *supra* note 15, at 260–62. Warden, not one to shy away from purple descriptions, gushed accordingly: “Like a bee among the flowers, Blackstone has abstracted the sweet essence of all former writers and left their grosser matter.” *Id.* at 261.

⁷⁰ Lobban, *supra* note 18, at 322.

⁷¹ *Id.* at 332.

⁷² Letter from William Blackstone to Seymour Richmond (Jan. 28, 1746), *in* *The Letters of Sir William Blackstone: 1744–1780*, at 3, 4 (W.R. Prest ed., 2006).

Blackstone's metaphor seems to have been of his own conception and would shine through in his seminal work.⁷³ Prior to Blackstone's reinterpretation, no treatise writer had conveyed any sense of a "regular Edifice" underlying the common law. This change in conception represents a foundational shift in how the law was perceived. The "huge, irregular Pile" described by Coke and his contemporaries was not only impenetrable, but also did not lend itself to broad, normative conceptions or precise study. Indeed, their common law would have contained elements unknown to any practicing lawyer at the time, as the amorphous system grew and contracted according to changing custom and practices. Blackstone, however, gave corporeal definiteness to the law, fixing it within a bounded structure of component parts. Such a coherent whole was worthy of study, reorganization, and reform, laying the foundation for the nineteenth-century law-as-science and codification movements. But crucially, this new conception does not appear to have gained the requisite traction or popularity in the eighteenth century to accurately describe how the founding generation conceived of the law in the first years of the Republic.

B. The Commentaries and Their Transatlantic Journey

The first American edition of the *Commentaries* appeared in 1771.⁷⁴ Robert Bell of Philadelphia solicited subscribers throughout British North America, advertising the work for eight dollars for all four volumes, a bargain compared to the twenty-six dollars commanded by the English edition.⁷⁵ Bell promised to print the work "on a fine Royal Paper . . . with a handsome large margin . . . [a]s soon as the names and residence of Two Hundred Subscribers are collected."⁷⁶ He attached to his advertisement the preface to the work, a transcript of Blackstone's

⁷³ Prest, *supra* note 40, at 67–68.

⁷⁴ Paul M. Hamlin, *Legal Education in Colonial New York* 64 (1939).

⁷⁵ Robert Bell, *Conditions for Printing for 1 William Blackstone, Commentaries* preceding p. 1 (Philadelphia, Robert Bell, 1771) [hereinafter *Conditions for Printing*]. It appears he actually sold the work for four dollars per volume, or sixteen dollars for the set. Hamlin, *supra* note 74, at 64. A second printing in 1774 was offered at a discount: only three dollars per volume. *Id.* at 69 n.17.

⁷⁶ *Conditions for Printing*, *supra* note 75, preceding p. 1. Perhaps more importantly, Bell was also careful to point out that "[n]o money [was] expected but on the periodical delivery of each Volume in neat Calf Law-Binding, Two Dollars." *Id.*

inaugural lecture at Oxford.⁷⁷ Bell found strong interest, securing over 840 subscribers for a total of 1,557 sets.⁷⁸ Among the subscribers were a number of recognizable names: John Adams, John Jay, Gouverneur Morris, and Nathaniel Green, among others.⁷⁹ Bell's printings were supplemented by imported volumes of the British edition, which, notwithstanding the outlandish cost,⁸⁰ seem to have found considerable circulation.⁸¹ Indeed, John Marshall used a British edition in his law studies in 1780,⁸² despite his father's inclusion among the subscribers to Bell's printing.⁸³

Bell's success in selling the work led Edmund Burke, in a 1775 speech advocating conciliation with the colonies, to state that "I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England."⁸⁴ Burke's statement has been the definitive

⁷⁷ 1 William Blackstone, *Commentaries* 2 (Philadelphia, Robert Bell, 1771).

⁷⁸ Hamlin, *supra* note 74, at 64. Hamlin helpfully undertook the painstaking work of breaking down many of the subscribers by colony: "131 sets were ordered by 51 residents of Massachusetts; New York with 114 subscribers took 342 sets; 184 Pennsylvanians ordered 308 sets; Virginia's 75 subscribers took 138 sets; 50 South Carolinians contracted for 70 sets, . . . and in New Hampshire 53 sets were taken by 25 subscribers . . ." *Id.* at 65.

⁷⁹ Robert Bell, *Names of the Subscribers in* 4 William Blackstone, *Commentaries* (Philadelphia, Robert Bell 1772) (listing the subscribers to the first printing of Bell's edition).

⁸⁰ For reference, Bell in 1773 advertised a catalogue of books for sale. Robert Bell, *Robert Bell's Sale Catalogue of a Collection of New and Old Books* (1773), *Readex: America's Historical Imprints*, Series 1, no. 12670. Among the more expensive works available were an annotated family bible for two dollars (though the currency could also be pound sterling) and sixteen shillings and a two-volume set of Latin and English dictionaries for eight dollars, ten shillings. *Id.* at 2. By this time, the English edition of the *Commentaries* had fallen in price to ten dollars new or five dollars and ten shillings second-hand. *Id.* at 5. A volume of Coke's reports appears to have been listed for the bargain price of ten shillings. *Id.* at 3.

⁸¹ Marshall, for instance, cited to the London edition in his commonplace. Editorial Note *to* 1 *The Papers of John Marshall* [37], [39] (Herbert A. Johnson ed., 1974) [hereinafter Editorial Note]. Furthermore, Bell's advertisement indicates that the London edition was available in North America, if at a significant premium over his printing. Bell, *supra* note 80, at 5.

⁸² Editorial Note, *supra* note 81, at 37–39. Marshall would later come into possession of at least a portion of Bell's edition, presumably his father's copies, as the volumes contained both the elder and junior Marshalls' signatures. *Id.*

⁸³ Robert Bell, *Names of the Subscribers in* 4 William Blackstone, *Commentaries* (Philadelphia, Robert Bell 1772) (listing Captain Thomas Marshall of Virginia among the subscribers).

⁸⁴ Burke, *supra* note 33, at 250.

citation for Blackstone's influence in America, dutifully referenced whenever Blackstone and the American colonists are discussed together.⁸⁵ Burke's praise of the work is unsurprising as "there is scarcely one of Blackstone's thoughts on politics and government which may not be paralleled pretty well in the writings and speeches of Burke . . . [and] Burke was one of the first to read and admire the *Commentaries*."⁸⁶

Such reliance on Burke is misplaced. As an initial matter, his point is a rhetorical aside within a much larger speech. In this section of the speech, Burke attempted to link the colonists' respect for the rule of law with their political rambunctiousness: "[i]n no country perhaps in the world is the law so general a study" which rendered the colonists "acute, inquisitive, dexterous, prompt in attack, ready in defen[s]e, full of resources . . . and [they] snuff the approach of tyranny in every tainted breeze."⁸⁷ Burke's anecdotal point about Blackstone's work was not the focus of this particular argument, let alone the speech as a whole.⁸⁸ In context, then, Burke's rhetorical flourish seems to be inadequate evidence of Blackstone's true influence in colonial legal thought. As the circulation of Bell's American edition shows, the colonists viewed the *Commentaries* as having *some* importance.⁸⁹ The work, however, may have simply been intriguing, but not yet an especially useful distillation of existing law. Investigating how the work was used provides a better understanding of how the work fit into colonial legal practice. As a survey of the entirety of English law, the *Commentaries* would be a natural teaching tool, as its nineteenth-century use demonstrates. First,

⁸⁵ See, e.g., Horst Dippel, Blackstone's *Commentaries* and the Origins of Modern Constitutionalism, in *Reinterpreting Blackstone's Commentaries*, supra note 2, at 199, 199 ("To begin with, it is well known that Edmund Burke drew Parliament's attention to the strong American sales of the first English and colonial editions of the *Commentaries*."); Nolan, supra note 9, at 731 ("Sir William Blackstone and his *Commentaries* . . . exercised a dominant and pervasive influence on America's political thought and legal development. We have, for example, Edmund Burke's 1775 assurance that 'they have sold nearly as many of Blackstone's *Commentaries* in America as in England[.]'").

⁸⁶ Warden, supra note 15, at 308.

⁸⁷ Burke, supra note 33, at 230. This quotation, as with other primary source quotations throughout this Note, has been lightly modified to reflect modern conventions of spelling and capitalization.

⁸⁸ *Id.*

⁸⁹ See supra note 78 and accompanying text.

however, it is necessary to understand the methods by which colonial lawyers learned and conceived of the law.

IV. LEGAL EDUCATION AND COMMONPLACING IN THE LATE COLONIAL/EARLY REPUBLIC

A. Pedagogy

Legal study in America for much of the eighteenth and nineteenth centuries was informal, outside the more recognizable modern system of universities and professional instruction. Only nine colleges existed in British America from the time of the Jamestown settlement to the American Revolution.⁹⁰ None established a law professorship until Governor Thomas Jefferson appointed George Wythe to the faculty of William & Mary in 1779.⁹¹ Wythe would be followed by Tapping Reeve at the Litchfield School in Connecticut in 1784, James Wilson at the University of Pennsylvania in 1789, and James Kent at Columbia in 1794.⁹² With the exception of George Wythe's teaching, these efforts all occurred either after the drafting of the Constitution or too shortly before to have realistically had a wide effect on the law at ratification.

How, then, did founding era lawyers learn the law? Some wealthy colonists instead sought a formal education in the English Inns of Court or Inns of Chancery in London.⁹³ These ancient institutions had, for centuries, provided both a robust education in the law and, more importantly, an excellent social network for personal and professional advancement.⁹⁴ But by the end of the seventeenth century, the Inns were a shadow of their former selves.⁹⁵ The formalized instruction and examination which had been central to instruction in the Inns

⁹⁰ Althea Stoeckel, Presidents, Professors, and Politics: The Colonial College and the American Revolution, *in* 1 *Conspectus of History* 45, 45 (Dwight W. Hoover & John T.A. Koumoulides eds., 1976).

⁹¹ Daniel R. Coquillette, Introduction *to* Portrait of a Patriot II, *supra* note 42, at 20.

⁹² *Id.*

⁹³ The Inns were most usefully distinguished by the degrees they conferred: a student at an Inn of Chancery would graduate as an attorney or solicitor while a student at the more prestigious—and more expensive—Inns at Court became a Barrister-at-Law. Hamlin, *supra* note 74, at 12.

⁹⁴ 12 William S. Holdsworth, *A History of English Law* 15–16 (1938).

⁹⁵ *Id.* at 16.

disappeared by the eighteenth century, leaving students to “shift for themselves.”⁹⁶ Like their less well-heeled American counterparts, students at the Inns were “forced to learn the law as [they] could from the Reports, inadequate textbooks, and technical treatises.”⁹⁷ Still, the resources available at the Inns and in London were more than sufficient for the motivated student,⁹⁸ and many American-born students who could afford the time and expense took the opportunity.⁹⁹ Indeed, five Middle Temple lawyers were signatories of the Declaration of Independence, and seven contributed to the drafting of the Constitution.¹⁰⁰

Facing the high costs to attend an Inn, the time away from home, and the lackluster education to be gained, many prospective lawyers opted instead to pursue an education in the law at home in the colonies.¹⁰¹ Some of these domestic students opted to work in administrative positions in colonial courts, studying when time arose.¹⁰² Others entered into agreements to study as clerks under practicing attorneys.¹⁰³ Whether busy or apathetic, few of these attorneys made time for their pupils. Most instead enlisted the neophyte in petty drafting, copying, and transcribing, providing little guidance for the hard work of actual studying.¹⁰⁴

⁹⁶ Richardson, *supra* note 41, at 312–13.

⁹⁷ *Id.* at 315. Counterintuitively, it seems that many of these students in London pursued courses of study less rigorous than their American counterparts, as reading was deemphasized over simple attendance at court, and apprenticeships were considered relatively new. 2 James Boswell, *The Life of Samuel Johnson 1072* (Roger Ingpen ed., 1907) (advising Boswell that the best way to qualify for the bar was to “take care to attend constantly in Westminster Hall; both to mind your business, as it is almost all learnt there (for nobody reads now), and to show that you want to have business.”); Richardson, *supra* note 41, at 312–13.

⁹⁸ Richardson, *supra* note 41, at 313; Eric Stockdale & Randy J. Holland, *Middle Temple Lawyers and the American Revolution* 39–40 (2007).

⁹⁹ Hamlin, *supra* note 74, at 17–18. Before 1815, 236 American students had been admitted to an Inn at Court. *Id.* An especially eighteenth-century phenomenon, only seven attended in the seventeenth century. *Id.* at 18.

¹⁰⁰ Stockdale & Holland, *supra* note 98, at xvii.

¹⁰¹ Hamlin, *supra* note 74 at 22–23.

¹⁰² Charles Warren, *A History of the American Bar* 164–65 (1913).

¹⁰³ *Id.* at 166.

¹⁰⁴ Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 *J. Legal Educ.* 124, 128 (1976).

Historians have differed on the efficacy of this training, with some unequivocally deriding the method.¹⁰⁵ Others, most notably Charles Warren, have agreed with this general critique but contend that the process nonetheless forged effective lawyers by forcing students to learn law the hard way.¹⁰⁶ More recently, the practice has been defended as providing a “pedagogy and a curricular structure that was far from random.”¹⁰⁷ If the method was not effective, it would be difficult to “explain the strong sense of legal professionalism to be found in America before the Revolution.”¹⁰⁸

These informal methods were usually followed by an examination to be admitted to the bar. This process varied in thoroughness, depending on the rigor demanded by particular examiners, often colonial judges or royal legal officers.¹⁰⁹ Patrick Henry, for example, in one of his four required examinations for a law license in Virginia, was quizzed for several hours by royal attorney general John Randolph, not on the specifics of practical law, but “on the laws of nature and of nations, on the policy of the feudal system, and on general history.”¹¹⁰ By the Revolution, Virginia’s examination procedures and their irregularity had produced a questionable baseline competency in the profession.¹¹¹ Writing in the *Virginia Gazette*, an anonymous “Country Justice” opined that the prospective lawyer “applies to some attorney for his advice, assists him in copying a few declarations, reads the first book of Coke upon Lyttleton, and the Virginia laws, and then applies for a license, and begins to practice a profession . . . which he is perhaps utterly

¹⁰⁵ For a survey of these critiques and a rebuttal, see Daniel R. Coquillette, Introduction to *Portrait of a Patriot II*, supra note 42, at 4 n.4.

¹⁰⁶ See Warren, supra note 102, at 187 (“When all is said, however, as to the meagreness of a lawyer’s education, one fact must be strongly emphasized—that this very meagreness was a source of strength.”).

¹⁰⁷ Daniel R. Coquillette, Introduction to *Portrait of a Patriot II*, supra note 42, at 6.

¹⁰⁸ *Id.*

¹⁰⁹ Robert B. Kirtland, *George Wythe: Lawyer, Revolutionary, Judge* 179 (1986). Those who had studied at an Inn of Court or those who were members of the bar of the General Court, however, were often exempt from licensing requirements, though these exemptions were not consistent over time. *Id.*

¹¹⁰ Jon Kukla, *Patrick Henry: Champion of Liberty* 36 (2017) (quoting letter from John Tyler to William Wirt, 1 William Wirt Henry, *Patrick Henry: Life, Correspondence and Speeches* 21 (New York, Charles Scribner’s Sons, 1891)).

¹¹¹ Kirtland, supra note 109, at 178.

unacquainted with.”¹¹² Henry’s education did not differ much from this account.¹¹³

In addition to his own experience, Henry may have had in mind the process in other colonies. John Adams, for example, appears to have encountered even fewer questions of law than Henry had in Williamsburg. Presented to the Court of Common Pleas for his license, he was asked no substantive questions, the court instead requesting the testimony of witnesses to attest to his knowledge.¹¹⁴ He was prepared for this, having spent the previous days visiting prominent attorneys in the area and answering their questions. One such lawyer presented Adams to the court, attesting to his “great Proficiency in the Principles of the Law.”¹¹⁵ Satisfied, the court administered the oath.¹¹⁶

Though the quality of learning and examining may have been inconsistent, the overall method was largely uniform. Whether at the Inns of Court or clerking in a colonial court or law office, the eighteenth-century law student pored over seminal texts, read, reread, and took notes. In Adam’s words: “What Books have [I] read? Many more I fear than have done me any good. I have read too fast, much faster than I understood or remembered as I ought.”¹¹⁷

This task of dry, often repetitive, reading was supplemented by the more practical task of “commonplacing,” essentially creating a sort of personal legal encyclopedia with entries for various doctrines and concepts. John Locke, perhaps more famous for his other works, outlined the method of commonplacing as a guide to the practice “necessary for all gentleman, especially students of divinity, physic[s], and law.”¹¹⁸ Locke counseled students to take a blank book, divide it into sections, and assign each section to a letter in an index in the first

¹¹² Kukla, *supra* note 110, at 32 (quoting a letter by “A Country Justice” to the Virginia Gazette).

¹¹³ *Id.*

¹¹⁴ John Adams, *Autobiography of John Adams, Part One: “John Adams,” to October 1776 (1804)* in 3 *Diary and Autobiography of John Adams* 273 (L. H. Butterfield ed., 1961) [hereinafter *Adams Autobiography*].

¹¹⁵ *Id.* His actual tutor, Mr. Putnam, had failed to accompany Adams, though the student is generously deferential, writing that the “[e]rror was committed at this time by Mr. Putnam or me or both . . .” *Id.* at 270.

¹¹⁶ *Id.* at 273.

¹¹⁷ *Id.* at 271.

¹¹⁸ John Locke, Title page to *A New Method of Making Common-Place-Books* (1706).

few pages.¹¹⁹ After dividing the book and creating the index, Locke directed the student to “mark out, in the other pages of the book, the margin with black lead . . . about the bigness of an inch” in which the heading for each concept to be recorded would be written.¹²⁰ With the book thus prepared, Locke outlined how the commonplace was to be used: “If I would put any thing in my common place book, I look a head[ing] to which I may refer it, that I may be able to find it when I have occasion.”¹²¹ The result provided the student with a useful reference of concepts, maxims, and definitions which, by virtue of the index and headings, allowed quick location.

Around the same time, Lord Matthew Hale, in his preface to the 1668 edition of Rolle’s *Abridgement*, outlined a substantially similar method specifically for law students.¹²² He believed that, generally, “the Common-Law is reducible into a competent method, as to the general heads thereof.”¹²³ His method, which he conceded should vary “according to every mans [sic] particular fancy,” was for a student to “get him a large Common-place Book, divide it into alphabetical-titles” and place the “abstract or substance” of cases and points “under their proper titles.”¹²⁴

This method, though generations old by the middle of the eighteenth century, still constituted the primary method of legal learning. Josiah Quincy, for example, carefully transcribed the entirety of Hale’s instructions into his commonplace.¹²⁵ John Adams, in his diary, likewise

¹¹⁹ *Id.* at 4.

¹²⁰ *Id.*

¹²¹ *Id.* at 4–5.

¹²² Matthew Hale, The Publisher’s Preface Directed to the Young Students of the Common-Law, in Henry Rolle, *Un Abridgment Des Plusieurs Cases et Resolutions del Common Ley* preceding p. 1 (1668); see also Hamlin, *supra* note 74, at 58 (referencing Matthew Hale as the author of the preface).

¹²³ Hale, *supra* note 122, preceding p. 1.

¹²⁴ *Id.*

¹²⁵ *Portrait of a Patriot II*, *supra* note 42, at 16. Quincy likewise copied the similar, if more general, advice of Lord Chief Justice Thomas Reeve published in a letter to his nephew. Josiah Quincy Junior, *Josiah Quincy’s Law Common-Place (1763) in 2 Portrait of a Patriot*, *supra* note 42, at 89 [hereinafter Quincy Commonplace].

spoke approvingly of a youth using “Locks Modell” in studying law, having met the young man while himself immersed in similar study.¹²⁶

B. The Prescribed Course of Study

An understanding of eighteenth-century law-study methodology necessarily raises a second question: if the commonplace served to organize and capture the essence of what a student read, what then, were they reading? While the sources of law were not as ubiquitous as the method of study prescribed by Hale and Locke, the guidance offered by tutors and relatives to younger students belies common themes.¹²⁷

Sir Thomas Reeve, Chief Justice of Common Pleas, provided an especially detailed course of study which served as a guide for at least some colonists.¹²⁸ Indeed, it would be the course of study that Blackstone pursued in his education at the Middle Temple.¹²⁹ Written in the 1730s as a letter to his nephew,¹³⁰ Reeve’s published letter conceptualized a broad strategy of study:

First, obtain precise ideas of the terms and general meaning of the law. Secondly learn the general reason whereupon the law is founded. Thirdly, from some authentic system collect the great leading points of the law in their natural order, as the first heads and division of your future enquiry. Fourthly, collect the several particular points, and range them under their generals, as they occur, and as you find you can best digest them.¹³¹

¹²⁶ John Adams, *Diary of John Adams* (Oct. 11, 1758), in 1 *Diary and Autobiography of John Adams* 47 (L. H. Butterfield ed., 1961) [hereinafter *Adams Diary*].

¹²⁷ McKirdy, *supra* note 104, at 129.

¹²⁸ See 1 *Adams Diary*, *supra* note 126, at 54–55. John Adams, for example, was given Reeve’s advice by a Boston lawyer who had recorded the letter in his commonplace. *Id.*

¹²⁹ Prest, *supra* note 40, at 68.

¹³⁰ The letter received a wide following primarily through the practice of manuscript circulation, which was common in the legal community at the time. Discussing Reeve’s letter, Prest observes, “Numerous documents of this kind were in circulation, recommending what to read and in what order, a natural response to the lack both of formal instruction and satisfactory textbooks.” *Id.* at 68. A 1791 collection would publish the letter in full, declaring the letter was “[n]ow first published from a MS. in the Possession of the Editor.” 1 *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England* 79 (1791).

¹³¹ Hamlin, *supra* note 74, at 61.

To accomplish this, Reeve advised the student to first read Thomas Wood's *Institute of the Laws of England*, a work written to provide a student with an overview of English law.¹³² Wood's work was to be supplemented with materials to consult along the way, like Jacob's *Law Dictionary*.¹³³ He then advised his nephew to read Littleton's *Tenures* before progressing to Coke's commentaries on the *Tenures*.¹³⁴ A second review of Wood would follow before the student moved to Salkeld's reports, Matthew Hale's *History of the Common Law*, and Rolle's *Abridgement*.¹³⁵

This ambitious curriculum, especially the reading of archaic works like Littleton's *Tenures*, would prove of little use to a prospective practical lawyer in the colonies. Despite his dissatisfaction with his education,¹³⁶ John Adams nonetheless recommended a similar course of study to his own to prospective students. His curriculum apparently consisted of "Wood. Coke. 2 Vols. Lillies Ab[ridgemen]t. 2 Vols. Salk[eld's] Rep[orts]. Swinburne. Hawkins Pleas of the Crown &c."¹³⁷ He would later prescribe a substantially similar course of study to a prospective student in 1776. Adams advised the student to study Coke, "justly styled the oracle of the law," as well as ancient works of Bracton, Fleta, and Glanvill and civil law sources, particularly Justinian's *Institutes*.¹³⁸ Notably, Adams had expressed a desire in 1760 to have "Blackstones [sic] Analysis, that I might compare, and see what improvements he has made upon Hale's."¹³⁹ Despite being an original

¹³² Holdsworth, *supra* note 94, at 418.

¹³³ Hamlin, *supra* note 74, at 59. While his dictionary was very popular in the colonies, Jacob also published a "Collection of Heads for Commonplaces," which was available in at least one library in colonial Virginia. William Hamilton Bryson, *Law Books in the Libraries of Colonial Virginians*, in "Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia 33 (Warren M. Billings & Brent Tarter eds., 2017); William Hamilton Bryson, *Census of Law Books in Colonial Virginia* 56 (1978).

¹³⁴ Hamlin, *supra* note 74, at 60.

¹³⁵ *Id.*

¹³⁶ See Adams Diary, *supra* note 126, at 62–63 (lamenting his poor preparation for the day-to-day practice of law).

¹³⁷ *Id.* at 173.

¹³⁸ Letter from John Adams to Jonathan Mason Jr. (Aug. 21, 1776), in *4 Papers of John Adams* 479, 480 (Robert J. Taylor & Gregg L. Lint eds., 1979).

¹³⁹ Adams Diary, *supra* note 126, at 169.

subscriber to the 1772 edition of the *Commentaries*,¹⁴⁰ Adams did not recommend or even mention the work to the student.¹⁴¹

Chief Justice Edward Coke's *First Part of the Institutes of the Laws of England or, a Commentary Upon Littleton* (often simply referred to as *Coke On Littleton*), was the work most commonly found on these reading lists.¹⁴² Even "[i]f a lawyer had no other books, he inevitably had a worn copy of Coke on Littleton" which could be used to train apprentices, often by reading the work two or three times.¹⁴³ Patrick Henry, unusually studying on his own and without the guidance of a practicing attorney, "focused his studies chiefly on Edward Coke's classic *First Part of the Institutes* . . . and the Virginia Laws adopted by the General Assembly."¹⁴⁴

This mix of Coke, various secondary treatises, and English reporters was fairly standard fare for the eighteenth-century law student, subject to the availability of law books for study.¹⁴⁵ Jefferson, writing to a prospective student in 1790, proposed a much longer list likewise headed by Coke, progressing to various English reporters and then to other subject-specific treatises.¹⁴⁶ Despite his hostility to Blackstone,¹⁴⁷ Jefferson referred the student to conclude his legal study with the *Commentaries*, followed by the "Virginia laws."¹⁴⁸ Jefferson divided the student's day into three parts, with works assigned in columns according to the part of the day.¹⁴⁹ The student was directed to "read those in the

¹⁴⁰ Robert Bell, Names of the Subscribers in 4 William Blackstone, *Commentaries* (Philadelphia, Robert Bell 1772) (listing Adams as a subscriber on the first page of the volume).

¹⁴¹ Letter from John Adams to Jonathan Mason Jr., supra note 138.

¹⁴² McKirdy, supra note 104, at 131.

¹⁴³ Id.

¹⁴⁴ Kukla, supra note 110, at 33.

¹⁴⁵ McKirdy, supra note 104, at 129–30.

¹⁴⁶ Letter from Thomas Jefferson to John Garland Jefferson (June 11, 1790), in 5 *The Writings of Thomas Jefferson* 181 (P.L. Ford ed., 1895). Jefferson proposed the student read all four of Coke's *Institutes* as well as Coke's reports—no mean feat considering each of the *Institutes* consists of multiple volumes spanning hundreds of pages. Id.

¹⁴⁷ In 1826, he caustically remarked that when "the honied Mansfieldism of Blackstone became the student's hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism." 12 *Thomas Jefferson, The Works of Thomas Jefferson* 456 (P.L. Ford ed., 1905).

¹⁴⁸ Letter from Thomas Jefferson to John Garland Jefferson, supra note 146.

¹⁴⁹ Id. at 180–81.

first column till 12 : those in the 2d. from 12 to 2. those in the 3d after candlelight, leaving all the afternoon for exercise and recreation, which are as necessary as reading: I will rather say more necessary.”¹⁵⁰ The first third of the day was to be spent on the core of the law—Coke, reporters, Blackstone.¹⁵¹ The second was spent on legal history, like Hale’s *History of the Common Law* and subject-specific treatises, and the final third spent on general readings in history.¹⁵²

Some observations are apparent from these courses of study. Most directly, these curricula provide an insight into what instructors—themselves practicing lawyers—believed necessary to understanding the law. These sources and methods also appear, despite their faults, to have been similarly esteemed by the students themselves, as indicated by Adams’ and Jefferson’s willingness to prescribe the curriculum to later students. Blackstone is relatively absent from these lists. While one could not expect the work to appear on Reeve’s curriculum circulated before the *Commentaries* were published, it is remarkable that the work does not appear on Adams’ list. Even where the work was recommended, as in Jefferson’s curriculum, the work does not occupy a position of vaunted importance and instead appears as a supplement to the more established works of Coke and Hale. This demonstrates not only the hesitancy of legal instruction to move away from centuries-old works, but also the profession’s slow adoption of Blackstone. While instructors may have embraced his works by 1800, he seems not to have occupied any privileged position in the minds of instructors in the decades preceding the Constitutional Convention.

V. COMPARISON OF FOUNDING-ERA COMMONPLACE BOOKS

The modern observer need not rely solely on the suggested reading lists for what students *should* study. Instead, a more complete understanding of legal learning requires understanding what students *did* study and what, among these readings, they found important. Fortunately, a few surviving commonplace books provide insight into this process of study and note-taking by the students themselves. Their

¹⁵⁰ Id.

¹⁵¹ Id. at 181.

¹⁵² Id.

limited numbers present a less than complete picture, but these commonplaces still tell the modern observer two things. First, they record what the student found important enough to document in his notebook, and second, they show what resources actually came before the student.

Three relatively-complete commonplaces were chosen to provide an adequate cross section across educational methods, geography, and time.¹⁵³ The earliest commonplace is that of Josiah Quincy, a youth studying as an apprentice in Boston in 1763.¹⁵⁴ Quincy was born in Massachusetts in 1744, second son of Colonel Josiah Quincy, another in a line of wealthy colonists.¹⁵⁵ He would play an active part in the early revolutionary efforts in Boston, including joining John Adams as counsel for the defense in the Boston Massacre trial.¹⁵⁶ Though he contributed substantially to political life in Boston at an early age, he suffered an untimely death at age thirty-one on a return voyage from London, where he had traveled to argue on behalf of the colonies.¹⁵⁷ His study in law apparently began immediately after graduation from Harvard College, which he attended between 1759 and 1763, attaining a bachelor's degree.¹⁵⁸ Though Quincy came from a family of means, his education followed the apprenticeship model, studying under Oxenbridge Thacher, a prominent Boston attorney, from 1763 until his tutor's death in 1765.¹⁵⁹ While this commonplace is too early to have

¹⁵³ While three commonplaces may seem a relatively small survey, these particular examples were chosen for their completeness, geographic spread, and temporal proximity to the legal education of the founding generation.

¹⁵⁴ Daniel R. Coquillette, Introduction *to* Portrait of a Patriot II, *supra* note 42, at 17–18.

¹⁵⁵ Daniel R. Coquillette, Preface *to* 1 Portrait of a Patriot: The Major Political and Legal Papers of Josiah Quincy Junior xii (Daniel R. Coquillette & Neil Longley York eds., 2005) [hereinafter Portrait of a Patriot I]; Daniel R. Coquillette, Introduction *to* Portrait of a Patriot II, *supra* note 42, at 17–18.

¹⁵⁶ Daniel R. Coquillette, A Life Cut Short, *in* Portrait of a Patriot I, *supra* note 155, at 22.

¹⁵⁷ Edmund Quincy, Life of Josiah Quincy of Massachusetts 11–12 (1867).

¹⁵⁸ Daniel R. Coquillette, A Life Cut Short, *in* Portrait of a Patriot I, *supra* note 155, at 16–17. He would go on to receive his master's degree three years later. *Id.* at 17.

¹⁵⁹ Daniel R. Coquillette, Introduction *to* Portrait of a Patriot II, *supra* note 42, at 21 n.42.

made use of Blackstone's *Commentaries*,¹⁶⁰ it serves as a useful baseline for colonial legal education of the period.

The second commonplace is from Joseph Read, a New Jersey native who, like Blackstone, studied in the Middle Temple in London.¹⁶¹ Little is known about Read, besides that he was the eldest son of another attorney, Andrew Read. His education at the Middle Temple coincided with that of other prominent Americans, including future Constitutional Convention delegate Charles Cotesworth Pinckney.¹⁶² Read's education at the Inns coincided with the nadir of their educational rigor. A fellow American student wrote in 1763 that the "absurd" system then in place at the Inn led students to "take chambers in the Temple, read Coke [On] Little[ton] . . . , frequent the courts whose practice they are ignorant of; they are soon disgusted with the difficulties and dryness of the study, [and] the law books are thrown aside."¹⁶³ Read's commonplace, while likely begun before the publication of the *Commentaries*, plausibly continued after their publication. In any case, it was written after the

¹⁶⁰ It is possible that Blackstone's *Analysis* may have been available to Quincy, however. By this time the work was known in the colonies, as fellow Bostonian John Adam's reference to the work in 1760 demonstrates. See *supra* note 139.

¹⁶¹ 1 Register of Admissions to the Honorable Society of the Middle Temple 361 (Henry F. Macgeagh & H.A.C. Sturgess eds., 1949). In his commonplace, he spells his name "Read," whereas the Middle Temple register lists him as "Reed." *Id.* Despite this difference, there is strong evidence that Reed and Read are the same person. First, the register lists Reed as from Trenton, New Jersey, *id.*, while the commonplace, on the first page, indicates that was a "Gift of Charles Read Esq. to Jos. Read of Mount Holly," a town just outside Trenton. Joseph Read, [Commonplace Book] (1763) (unpublished manuscript) (on file with the University of Virginia Law Library) [hereinafter Read Commonplace]. Second, subsequent material on the first page, in another hand (the entire book is mostly in one hand with some additional annotations by this second author), is dated 1767 and 1765, indicating that the majority of the book, presumably in Read's hand, predates this additional annotation. *Id.* This plausibly places the book in 1763. Finally, but less substantially, the book is rather elaborately bound and the front cover is embossed with a gold leaf crown seal, a detail that would seem overly formal in a colonial apprenticeship setting and would likely have been prohibitively expensive for most colonists. *Id.* Operating on the assumption that Reed and Read are in fact the same individual, this Note will use the author's own spelling.

¹⁶² 1 Register of Admissions to the Honorable Society of the Middle Temple, *supra* note 161. Read was admitted to the Middle Temple in December of 1763, and Pinckney followed in January of 1764. *Id.* Unlike Read, Pinckney would matriculate ("called" in Inn terminology) in 1769. *Id.*

¹⁶³ Hamlin, *supra* note 74, at 16 (quoting Letter from Charles Carroll to His Father (Jan. 7, 1763) in 1 *The Life of Charles Carroll of Carrollton, 1737–1832*, at 50, 53–54 (New York, G. P. Putnam's Sons 1898)).

publication of Blackstone's *Analysis* and after his lectures had gained notoriety. Perhaps the most comprehensive of the three commonplaces, it indicates that Read may have represented one of the more studious pupils at the Middle Temple.

The final commonplace author, John Marshall, needs less introduction. While his later life certainly makes his education noteworthy, his experience is also highly relevant as a snapshot of legal learning in the period between independence and 1787. First, he is the latest of the three students, starting his study while awaiting orders from the Continental Army in 1780.¹⁶⁴ Second, he undertook a unique avenue of study, as he briefly attended the lectures of George Wythe at the College of William & Mary.¹⁶⁵ Despite this semi-formal education, Marshall's commonplace may have been prepared largely on his own, without the supervision of either Wythe or a practicing attorney.¹⁶⁶

Each of these commonplaces provides distinct insights. Marshall's later prominence makes his noteworthy, but so does his timeframe. His study in 1780 places him at the edge of the generation old enough to have participated in the ratification of the Constitution. At the same time, this period was late enough that the *Commentaries* had wide circulation, including into the possession of his father.¹⁶⁷ If Blackstone was to have influence in American law before ratification, Marshall was the ideal pupil. Still, Marshall relies primarily on other sources, namely Bacon's *Abridgement* and a copy of Virginia colonial statutes.¹⁶⁸ Quincy provides what is likely the most common experience of prospective lawyers of age at ratification. Read, studying at the Inns of Court, exemplifies the more patrician path.

Looking at a few subjects in more granular detail provides a sense of how each author built his commonplace and what sources of law he found especially important. This comparison illustrates that the students did not necessarily follow the aspirational reading lists described above, and that they placed different weight on various treatises. While

¹⁶⁴ Editorial Note, *supra* note 81, 37–38.

¹⁶⁵ *Id.* at 37.

¹⁶⁶ *Id.* at 38 (“It is inconceivable that such precision [in the commonplace] could be obtained in notes from George Wythe’s oral lecture . . .”).

¹⁶⁷ *Id.* at 38–39.

¹⁶⁸ *Id.*

Blackstone lacked a prominent role in their learning, the choice of treatises, varying from tutor to tutor, resulted in significant differences in coverage among the commonplaces. This variation in content is especially remarkable in light of the strikingly similar approaches in commonplace methods and the common themes of the pedagogy described above.

A. An Example: Husband and Wife, or, Baron and Femme

An illustrative example is the subject of marital relations. Blackstone, ever the organizer of the law, grouped together the “three [sic] great relations in private life,” each representing varying degrees by which one person controls another: master and servant, husband and wife, parent and child, and guardian and ward.¹⁶⁹ Blackstone’s discussion of marriage is methodical and clear. It progresses from what happens to property under coverture, to the individual rights of each spouse to enter into independent transactions, and it concludes with a discussion of how property is disposed upon divorce or death.¹⁷⁰ This progression has clear transitions, precise outlines, and directly-stated rules.

Coke, by contrast, is a disaster. The subject of Baron and Femme, like most subjects in the work, lies scattered across other segments, buried in discussions of feoffment and restitution.¹⁷¹ The haphazard organization sharply contrasts with Blackstone’s neat progression. Coke did not bother to guide the reader through any organized theory of personal relationships, though much of this is due to the nature of the work as an interpretation of Littleton’s fifteenth-century work.¹⁷² Still, Coke places “the most esoteric technicalities sharing the same page with basic legal principles . . . [with] no index to light the way, no abstract to ease the pain.”¹⁷³

¹⁶⁹ 1 William Blackstone, Commentaries *410.

¹⁷⁰ Id. at *421, *428–29, *430–32.

¹⁷¹ 1 Edward Coke, *The First Part of the Institutes of the Laws of England; or a Commentary Upon Littleton* 151(a) (Birmingham, Legal Classics Library 1985) (1628) [hereinafter *Coke On Littleton*]; 2 *Coke On Littleton*, supra, at 351(a). For an illustration of the dispersed nature of the subject in Coke’s work, which is addressed sporadically across two volumes, see *Index to Coke On Littleton*, supra, at lxxii.

¹⁷² McKirdy, supra note 104, at 132–33.

¹⁷³ Id. at 133. Fortunately for your author, an index would appear by 1825.

Marshall's commonplace demonstrates that a student could circumvent Coke by turning instead to Matthew Bacon's *A New Abridgement of the Law*. Written between 1736 and 1766 by a young Middle Templar, the *New Abridgement* spans numerous volumes and is particularly comprehensive.¹⁷⁴ Its organization is especially unique. Much like the commonplaces themselves, it begins with an alphabetical index with each heading further subdivided into its component principles.¹⁷⁵ Helpfully for the commonplacer, Bacon's concise descriptions of each principle are cross-referenced to other principal works, including Coke.¹⁷⁶ Less of a narrative than either Coke or Blackstone, the work remains an excellent reference for summarizing points of law more comprehensively. This trait in particular likely led to the work's success compared to more traditionally structured works whose organization provided less help to commonplacers.¹⁷⁷ Likely due to this unique utility for the practice of commonplacing, Marshall heavily used Bacon's work, though he did not often cite directly to Bacon. Rather, Marshall recognized that the work served as a sort of guidebook and, even when clearly copying Bacon's summaries, cited to more foundational texts like Coke.¹⁷⁸

Among the students, the solitary reference to the *Commentaries* is in Marshall's commonplace. He observed that "choses [sic] in action do not survive to the husbd. on the death of the wife nor has he any right to them but as Admir."¹⁷⁹

Despite Blackstone's clear structure and his apparent familiarity with the *Commentaries*, Marshall instead leaned far more heavily on Bacon. In most cases, Marshall simply copied Bacon's maxims and borrowed

¹⁷⁴ Cowley, *supra* note 46, at lv–lvi.

¹⁷⁵ For a version that likely would have been available to a commonplacer of the era, see 1 Matthew Bacon, *A New Abridgement of the Law by a Gentleman of the Middle Temple* (3d ed. 1768).

¹⁷⁶ See, e.g., *id.* at 283 (discussing the age of consent for marriage and citing to Coke *On Littleton*, Coke's *Reports*, Rolle's *Abridgement*, and others).

¹⁷⁷ Cowley, *supra* note 46, at lx ("Viner's *Abridgement* never became widely popular because it followed too closely the analytical method first used by Rolle; such a method did not of course fit in with the principle of common-placing . . .").

¹⁷⁸ See, e.g., *infra* note 180 and accompanying text.

¹⁷⁹ John Marshall, *Law Notes* (1780), in 1 *The Papers of John Marshall* 74 (Herbert A. Johnson ed., 1974) [hereinafter *Marshall Commonplace*]. Even this reference cites Bacon. *Id.* at 74 n.61.

his citations. For example, Marshall copies Bacon verbatim: “If a man marries a woman seised in fee he gains a freehold.” (citing only “Co[ke] L[ittleton] 351”).¹⁸⁰

Quincy and Read, beginning their commonplaces in 1763 and likely adding to them in subsequent years,¹⁸¹ did not mirror Marshall’s reliance on Bacon. Quincy relied directly on Coke, using his more archaic language to describe the wife’s property under coverture: “H gaineth by the Mar[raige] a Freehold in Right of his W, if he taketh a Woman to W that is seised in Fee.”¹⁸² Read is less clear on this particular maxim, making more of a reference than a summation of the doctrine: “See what Estate Husband gains in the Lands of his wife[.] Co Lit 351[.]”¹⁸³ Curiously, Read relies less on Coke than on Knightley D’Anvers’ *General Abridgement of the Common Law*, an English translation of Rolle’s *Abridgement* (originally in law French), published between 1705 and 1737.¹⁸⁴ Apart from his occasional reference to Coke, most of Read’s non-reporter citations in the Barron and Femme section are to D’Anvers.¹⁸⁵

B. Variations in Coverage

While Baron and Femme is covered in considerable depth by all three commonplace books, each student—or teacher—found different aspects of the subject important. This may be partially due to the loss of

¹⁸⁰ Marshall Commonplace, *supra* note 179, at 73. Compare Bacon, *supra* note 175, at 286 (“If a Man marries a Woman seised in Fee, he gains a Freehold.”) (citing “Co. Lit. 351. a.”).

¹⁸¹ This date is assumed for Read, based on the date of his study and the later dates listed in his commonplace. See discussion *supra* note 161.

¹⁸² Quincy Commonplace, *supra* note 125, at 119 (citing “Co. Lit. 351. a.”); cf. Coke On Littleton, *supra* note 171, at 351. a. (“[I]f a man taketh to wife a woman seised in fee, he gaineth by the intermarriage an estate of freehold in her right.”).

¹⁸³ Read Commonplace, *supra* note 161, at 59.

¹⁸⁴ Julia Rudolph, *Common Law and Enlightenment in England, 1689–1750*, at 58–59 (2013). Read may have used D’Anvers’s edition consciously due to the author’s admitted “connection between his own methods of note-taking and commonplacing and the publication of his abridgement.” *Id.* at 59.

¹⁸⁵ For example, Read writes, “Baron shall have Trespass alone for Trespass on Land of his wife[.]” Read Commonplace, *supra* note 161, at 59. D’Anvers is close but less specific: “The Baron may have an Action alone, upon [a trespasser] for entring [sic] into the Land of the Feme[.]” Knightley D’Anvers, *A General Abridgement of the Common Law* 709 (J. Walthoe ed., 1725).

notebooks over time. For example, the spine of Read's commonplace is marked "Vol 3." Thus, despite its coverage of subjects from A to Z, it may have been followed by subsequent books which filled in the gaps. Likewise, Quincy's commonplace appears to have been compiled at different points in time. It resembles a series of notebooks, with an initial portion covering a number of areas of the law followed by scattered notes indexed retroactively.¹⁸⁶

What the authors found important varies significantly between the commonplacers. For example, Marshall devotes considerable attention to a discussion of battery (which includes one of his few citations to Blackstone).¹⁸⁷ Read ignores the subject completely, while Quincy offers a solitary observation: "Spitting in the face is Battery."¹⁸⁸ In another example, Marshall and Read both discuss the subjects of bargain and sale for a real estate contract and attachment of property after judgement, but Quincy makes no mention whatsoever of this process.¹⁸⁹

These discrepancies seem at least partially attributable to the sources each student read and what was included in them. Marshall apparently worked through Bacon's *New Abridgement* alphabetically and his coverage seems dictated by its contents.¹⁹⁰ Quincy, by contrast, appears to have made his observation on battery while working through a set of reporters.¹⁹¹ Each commonplace's coverage does not clearly correlate with the resources available to the student. Read's commonplace is by far the most comprehensive and he likely had the largest variety of law books at his disposal given his access to the Middle Temple and Westminster. Quincy appears better equipped than Marshall, referencing a wide variety of treatises and reporters. Yet, Marshall's notes are more comprehensive in their coverage. The most likely explanation for this discrepancy is Bacon's simplicity and the way the work's organization mirrors that of the commonplace. Where Marshall's task was essentially transcribing and further abridging Bacon's *New Abridgement*, Quincy,

¹⁸⁶ Daniel R. Coquillette, Introduction to Portrait of a Patriot II, supra note 42, at 21.

¹⁸⁷ Marshall Commonplace, supra note 179, at 64.

¹⁸⁸ Quincy Commonplace, supra note 125, at 297.

¹⁸⁹ Marshall Commonplace, supra note 179, at 67, 72; Quincy Commonplace, supra note 125, at 297; Read Commonplace, supra note 161, at 46, 56.

¹⁹⁰ In his section on "Assault and Battery," all the citations are to Bacon, except his one citation to Blackstone. Marshall Commonplace, supra note 179, at 64.

¹⁹¹ Quincy Commonplace, supra note 125, at 282 n.1.

apparently without access to the work, faced the more difficult task of distilling principles from dispersed treatises.

Each student, or perhaps teacher, had a different preferred source for the law. All still relied on Coke to some degree, even if indirectly through Bacon, and none relied in any significant way on Blackstone. This result might be expected based on the reading lists discussed above, which favored Coke over Blackstone, even after publication of the *Commentaries*.¹⁹² But Marshall's reliance on Bacon, a work missing from the reading lists, suggests some students or teachers were willing to deviate from the older, canonical treatises in favor of newer, more accessible works. Tellingly, Blackstone was not among these newer works incorporated into the curricula.

VI. IF NOT BLACKSTONE, WHAT THEN?

If Blackstone is not the canonical orator of the common law in the eighteenth century, what should those looking to understand the law of the period use instead? The answer, of course, is not simple. Blackstone's utility stems from his role as shorthand for law of the period. If his works are of limited use, can another source more nearly approximate this effect? This Section explores possible answers to that question.

In discerning an answer, this Section primarily draws on the process and sources of legal learning discussed above. Another useful factor is the simple availability of particular legal texts, principally through their existence in colonial libraries. While this factor should not subsume the entire inquiry, circulation provides insight into accessibility and perceived value. The relative popularity of various works aids in understanding what curators of colonial legal libraries—almost exclusively private collections held by practicing attorneys¹⁹³—believed to be of value.

¹⁹² See *supra* notes 127–147 and accompanying text.

¹⁹³ The colonies faced a dearth of law books generally in the period before the Revolution. Aware of this shortage, the Virginia legislature mandated in 1666 that county courts maintain law libraries and specifically enumerated those “esteemed Bookes of Lawe” that should ordinarily be kept. Brent Tarter, *The Library of the Council of Colonial Virginia, in “Esteemed Bookes of Lawe” and the Legal Culture of Early Virginia*, *supra* note 133, at 20, 42.

A. Influential treatises

While Blackstone's work crossed the Atlantic even before the publication of the American edition in 1772, the work did not especially influence the education of elite lawyers in the late eighteenth century. Instead, Blackstone followed a long tradition of attempts by prominent common law thinkers to abridge the law into a form that struck a balance between overall coverage and ease of use. Before the latter-half of the seventeenth century, legal writers had instead channeled their efforts into summarizing the contents of the Year Books.¹⁹⁴ Henry Rolle, a contemporary of Coke, changed this pattern with his *Abridgement*, a work which sought to describe and teach the law, more than simply summarize it. This approach may have been necessary as students became more self-reliant in the wake of instructional breakdown at the Inns of Court.¹⁹⁵ It was in this new era of legal writing that Coke authored his treatise and most of the material used by American law students in the late colonial period emerged.¹⁹⁶

Matthew Bacon's *New Abridgement* presents somewhat of a puzzle, as it does not fit well in this tradition. Less of an abridgement in the tradition of Rolle and Coke, the work dispenses with their editorializing to deliver principles of law in a neat, distilled form. Yet, the work enjoyed significant success in England, and for Marshall individually, as his commonplace is built primarily on Bacon. Bacon's clarity and comprehensiveness likely appealed to Marshall. The directness of the work, especially in comparison to Coke's endless asides, is refreshing even to the twenty-first century reader.¹⁹⁷ Covering seven ponderous volumes, the *New Abridgement* is far more comprehensive than even Blackstone. Better still, Bacon dispenses with much of the commentary

¹⁹⁴ Holdsworth, *supra* note 94, at 376.

¹⁹⁵ *Id.* at 376–78.

¹⁹⁶ *Id.* at 377–78. Coke, however, did not much care for Rolle's method, preferring instead to have students engage with sources directly, in a methodical manner. *Id.* at 377 n.10. To Coke, "the tumultuary reading of Abridgements doth cause a confused Judgement, and a broken and troubled Kind of Delivery *or* Utterance." *Id.* (quoting Preface to 4 Edward Coke, *The Reports of Sir Edward Coke*, In Thirteen Parts xi (John H. Thomas & John F. Fraser eds., 1826)).

¹⁹⁷ Marshall was not the only one to place unique value on the work, nor the only future Chief Justice, as Oliver Ellsworth appears to have had at his disposal only a copy of the *Abridgement* and a law dictionary in his law studies. Warren, *supra* note 102, at 169–70.

of Blackstone and Coke altogether, instead providing points of law crisply, cleanly, and quickly, thanks to the index in the front of each volume and the beginning of each section.¹⁹⁸

While at least some of the volumes of Bacon's *New Abridgement* were in circulation well before 1760, only Marshall used the work extensively.¹⁹⁹ Indeed, Blackstone knew of and apparently thought highly of the work by the time he wrote the second book of his *Commentaries*. In a footnote in a section discussing leases, he conceded that he "must refer the student to 3 Bac. Abridg. . . . where the subject is treated in a perspicuous and masterly manner."²⁰⁰ Perhaps Marshall's unique reliance was a consequence of availability as his instructor, George Wythe, with his extensive library, possessed the *New Abridgement*.²⁰¹ Yet Wythe does not appear to have been particularly unique: Jefferson would also own the book, as would Patrick Henry and William Franklin (son of Benjamin Franklin). John Quincy Adams was also at least familiar with it.²⁰² With its simplicity and directness, perhaps the work was seen as less useful in obtaining an overall understanding of the structure of the law. It could have made the reader more of a "matter-of-fact lawyer[]" than someone truly learned in the law.²⁰³

Whatever the reason for Bacon's relative unpopularity, Coke *On Littleton* remained the primary treatise reference for the commonplacers. Given its popularity among students and on reading lists, its wide

¹⁹⁸ See, e.g., Bacon, *supra* note 175 (providing a table of titles listing subjects—abatement, account, accord and satisfaction, actions in general, etc.—and page numbers); *id.* at 1 (listing, after a general definition of abatement, the subheadings of the chapter: "(A) Of Pleas in Abatement to the Jurisdiction of the Court (B) To the Person of the Plaintiff 1. Outlawry. . . . 2. Excommunication").

¹⁹⁹ Matthew Bacon published his *New Abridgement* starting in 1736, and new volumes continued until 1766, despite his death in 1759. Holdsworth, *supra* note 94, at 169.

²⁰⁰ 2 William Blackstone, *Commentaries* *323.

²⁰¹ Linda K. Tesar, *The Library Reveals the Man: George Wythe, Legal and Classical Scholar*, in "Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia, *supra* note 133, at 121.

²⁰² Kevin J. Hayes, *The Law Library of a Working Attorney: The Example of Patrick Henry* in "Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia, *supra* note 133, at 142–43. Modern casebook authors might be interested to know that the work apparently sparked one of Andrew Jackson's duels after he was criticized for relying on Bacon's work too heavily. *Id.* at 143.

²⁰³ *Id.* at 143.

ownership is hardly surprising. Virginia libraries contained no fewer than twenty-seven copies of the work before 1800, making it the most widely owned individual work in the commonwealth.²⁰⁴

Decades into the nineteenth century, a much later commonplace, prepared by Thomas Fauntleroy in 1827, demonstrates the persistence of these sorts of abridgements, supplemented with reporters. On the inside of the back cover, Fauntleroy provided “[a] list of my law books, on 1 Day Jany. 1828.”²⁰⁵ The list seems to be arranged roughly in order of importance, rather than alphabetically. The treatises of which Fauntleroy had complete sets head the list, with odd volumes of reporters further down. As might be expected by 1828, Blackstone is at the top, but Bacon’s *Abridgement* and Coke *On Littleton* closely follow.²⁰⁶ Such a list would seem to give the nineteenth-century student the best of all worlds. From Blackstone, a commonplacer would gain a clear picture of the overall shape of the common law. From Coke, a deeper understanding of its twists and turns would follow. Finally, in Bacon, the student would find a clear announcement of the rules and doctrines he would need in practice. The luxury of these various sources was unavailable to those of the founding generation, and their choices indicate that perhaps Coke’s narrative, despite its frustrating opacity, was preferable to Bacon’s clarity devoid of context.

Notably, less ambitious, practical manuals frequently supplemented these grand, multivolume tracts on the common law. These tracts served as guides to the practicing lawyer, often containing essential forms for pleading and land transactions.²⁰⁷ In Virginia at least, these titles were the most popular legal books to own before 1800, often residing in the libraries of lawyers and laymen alike.²⁰⁸ Apart from law dictionaries, Giles Duncombe’s *Trials per Pais; or, The Law Concerning Juries by Nisi Prius*, a manual for trying a case at the trial level, was the most popular of these titles.²⁰⁹ A related subset of works, manuals for justices

²⁰⁴ W. Hamilton Bryson, *Law Books in the Libraries of Colonial Virginians*, in “Esteemed Bookes of Lawe” and the Legal Culture of Early Virginia, *supra* note 133, at 33.

²⁰⁵ Fauntleroy, *supra* note 37.

²⁰⁶ *Id.*

²⁰⁷ Bryson, *supra* note 204, at 33.

²⁰⁸ *Id.*

²⁰⁹ *Id.* (Bryson notes that Jacob’s *Law Dictionary* surpassed Duncome in circulation with twenty-three copies in Virginia to Duncombe’s fifteen); Hayes, *supra* note 202, at 144.

of the peace, were likewise extremely influential, approaching the popularity of the treatises on substantive law in number.²¹⁰ Michael Dalton's *Country Justice* was second only to Coke in rates of ownership, excluding general reference books.²¹¹ Especially in an era where access to reporters was scarce, these straightforward practical guides and plea manuals significantly eased practice and were far more useful than attempting to navigate and apply Coke's more abstract theory.

B. Reporters

Authors heavily cited and relied upon reporters in the commonplace books, often rivaling or surpassing treatises in many sections. This may provide a clue as to when in the course of study a commonplace was prepared. By the time the student began his index and divided his blank book, he may have already read Coke, and perhaps others. From this, the commonplacer would have gained, in Reeve's words, "the great leading points of the law in their natural order, as the first heads and division of [the student's] future enquiry."²¹² A commonplace, then, might occur after preliminary study, when a student knew enough to place his reading in context and could turn his focus to the finer points of law. The commonplace books show what these students and their tutors relied on as the preeminent sources for these finer points. With few exceptions, Blackstone does not appear among them before 1800.

Fauntleroy's commonplace illustrates both the importance of reporters to a student as well as the shift to state reporters. As state reporters became available, they displaced their old English counterparts. Fauntleroy, for example, possessed more than ten reporters, none of which appear to have been used by previous generations.²¹³ Instead, Fauntleroy had at his disposal a number of Virginia state reporters, doubtless of more practical use to the everyday

²¹⁰ Bryson, *supra* note 204, at 32–33.

²¹¹ *Id.* at 32. General reference books were naturally very popular, with Jacob's *Law Dictionary* leading the field with twenty-three copies in Virginia. *Id.* at 33.

²¹² Hamlin, *supra* note 74, at 61 (citing Thomas Reeve, Letter from Lord Chief Justice Reeve to his Nephew, in 1 *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England* 81 (1791)).

²¹³ Fauntleroy, *supra* note 37.

life of a Virginia lawyer.²¹⁴ Most importantly, Fauntleroy's commonplace demonstrates the importance of these reporters to the student vis-à-vis the more memorable treatises. By number of works, reporters at least equal the number of treatises used. If one excludes subject-specific treatises, the reporters far outnumber the general works for Blackstone, Bacon, and Coke.²¹⁵

Two sets of reports figure most prominently into the commonplaces. The first is Coke's *Reports*, a thirteen-volume behemoth which his treatise work often references, though it is unclear to what degree some students actually referenced the work. Many of the citations to the work, such as in Marshall's commonplace, are simply citations recorded in some secondary source.

William Salkeld's *Reports of Cases Adjudged in the Court of the King's Bench, 1689–1712* is another frequently cited work. Salkeld studied at the Middle Temple, becoming a barrister before an appointment to a judgeship and as a serjeant-at-law.²¹⁶ His reports, published after his death in two volumes, were considered the preeminent authority for the business of the King's Bench for the period.²¹⁷ Teachers and students likely found the work valuable less for Salkeld's accomplishments or the work's authority than for its organization. Where Coke's work struggles to maintain a sense of order, Salkeld arranged his according to the relevant area of law.²¹⁸ In this way, the work, despite its limited temporal scope, could serve as a useful analog to the modern casebook. Students could look to the relevant area of the law and find applications of the principle either to aid understanding of some treatise or to add to a commonplace.

VII. CONCLUSION

The late eighteenth century was a period of transition in the legal field, particularly in legal education. Blackstone's *Commentaries* migrated to the colonies a number of years before 1787, but the legal

²¹⁴ Id.

²¹⁵ Id.

²¹⁶ 17 The Dictionary of National Biography 691 (Sidney Lee ed., 1973).

²¹⁷ Id.

²¹⁸ 1 William Salkeld, *Reports of Cases Adjudged in the Court of the King's Bench* 1, 1–8 (1795) (dedicating eight pages to abatement before moving to “account”).

field, ever suspicious of change, clung to teaching methods of decades and centuries past. The scope of the work, its clear organization, and its departure from the older methods of legal abridgement made Blackstone's work revolutionary as a teaching tool and for underlying conceptions of the law. When he first gave his lectures in 1753, no one had attempted to teach the common law comprehensively in a university environment. Indeed, with the breakdown of instruction at the Inns of Court, no one in the common law world even attempted formal instruction in the law. Before Blackstone's lectures, the establishment of the Litchfield Law School, or William & Mary's professorship of Law and Police, the English-speaking world essentially lacked formal education in the common law. As if the task of learning the law was not sufficiently daunting, the legal landscape presented by these sources was a "huge, irregular Pile . . . awkwardly put together" and nearly impossible to understand.²¹⁹

Blackstone broke open this world by conceiving of a system of law far more orderly than previously envisioned. While Jefferson blamed Blackstone for what he saw as a retreat from the ideals of the Revolution,²²⁰ the structure of the work, its accessibility, and its foundation in practical teaching of the law democratized the profession far more than Jefferson's beloved Coke. But, contrary to the modern consensus, the widespread influence of Blackstone that resulted from the accessibility of the *Commentaries* was not instantaneous. The founding generation was educated on the cusp of this new era. While they may have read the work and viewed it favorably, the full force of the *Commentaries'* influence would not be felt until subsequent generations.

Beyond furthering our understanding of foundational events in American history, a more nuanced understanding of Blackstone's journey to America is especially important with the renewed interest in eighteenth-century legal thought in modern constitutional theory. The temperamental yet tenacious professor from Oxford has certainly been key to the development of American law. The Supreme Court, and the modern legal field more generally, should nonetheless hesitate to elevate

²¹⁹ Letter from William Blackstone to Seymour Richmond, *supra* note 72, at 4.

²²⁰ Jefferson, *supra* note 147, at 456.

2018]

The Irrelevance of Blackstone

1399

his influence above the more ancient yet prevalent exponents of the law, like Coke, Hale, and Rolle.