

## SIR WILLIAM BLACKSTONE AND THE NEW REPUBLIC: A STUDY OF INTELLECTUAL IMPACT

It is part of the accepted wisdom of American history that Sir William Blackstone and his *Commentaries on the Laws of England* have exercised a signal influence on America's political and legal thought. Most commonly, we have Edmund Burke's 1775 assurance that "they have sold nearly as many of Blackstone's *Commentaries* in America as in England,"<sup>1</sup> and the image of young Abe Lincoln studying the *Commentaries* by the light of the hearth.<sup>2</sup> More particularly, Blackstone has been acclaimed as the prime influence for the Declaration of Independence,<sup>3</sup> the United States Constitution,<sup>4</sup> the reception of the common law in America,<sup>5</sup> and the development of American legal education.<sup>6</sup>

All of this might be true, but it seems a bit much to expect of a single human being. One's skepticism is enhanced by the fact that such praise is based on a few oft-cited bits of evidence and that to date there has not been a single exhaustive study of Blackstone's influence in this country. The purpose of this paper is to fill a portion of that gap by examining the nature and extent of the impact of Blackstone and his *Commentaries* on American politics, on the judiciary and on legal education up to the Jacksonian era. Those categories are not always distinct—the same individuals frequently will appear at various times as law students, political figures, and judges—but they do nonetheless provide a framework for assessing the importance of the man and the book. The time period from 1765 to 1828 was selected to include the years of greatest opportunity for Blackstone's influence to manifest itself and to exclude the effects of

\* The author would like to thank George Hundley, Robert Phifer and David Rosenblum of the University of South Carolina Law School Class of 1977 for their assistance with the research for this article.

1 "Speech on Moving His Resolutions for Conciliation with the Colonies," address by Edmund Burke, March 22, 1775, in 2 *The Works of the Right Honorable Edmund Burke* 19, 37 (1807).

2 Ogden, "Lincoln's Early Impressions of the Law in Indiana," 7 *Notre Dame Lawyer* 325 (1931-32).

3 Address of George Wickersham, reported in "Presentation of Blackstone Memorial," 10 *A.B.A.J.* 571 (1924).

4 C. Stevens, *Source of the Constitution of the United States* 48 (1894).

5 Holdsworth, "Some Aspects of Blackstone and His Commentaries," 4 *Camb. L.J.* 261, 285 (1932).

6 Dicey, "Blackstone's Commentaries," 4 *Camb. L.J.* 286, 300-301 (1932).

the populist upsurge after the election of General Jackson to the presidency.

## I

### A. *Sir William Blackstone*

Such an investigation must begin with an introduction to the man himself and to his chief work. Fortunately the primary facts are not in dispute.<sup>7</sup> Blackstone was born in 1723, the posthumous son of a respectable London silk merchant. He was educated initially on scholarship at the Charterhouse in London, where he distinguished himself in oratory and poetry. In 1738 he was admitted to Pembroke College, Oxford, and there read widely in the classics and maintained his interest in poetry. Three years later Blackstone withdrew from Oxford to begin legal studies at the Middle Temple, an event which brought forth the best of his poems, "The Lawyer's Farewell to his Muse."<sup>8</sup> Between terms at the courts he managed to continue his Oxford studies, taking his degree of B.C.L. in June of 1745, and being chosen a fellow of All Souls College. He was called

<sup>7</sup> Blackstone is the subject of two competent though unsatisfying biographies, L. Warden, *The Life of Blackstone* (1938) [hereinafter cited as *Warden*], and D. Lockmiller, *Sir William Blackstone* (1938) [hereinafter cited as *Lockmiller*]. Substantial biographical information can also be found in Odgers, "Sir William Blackstone, Part I," 27 *Yale L.J.* 599 (1917-18) and Odgers, "Sir William Blackstone, Part II," 28 *Yale L.J.* 542 (1918-19). The primary source for all subsequent biographical treatment is the brief study by Blackstone's brother-in-law in Clitherow, "Preface" to W. Blackstone, *Reports of Cases Determined in the Several Courts of Westminster-Hall From 1746 to 1779* (1781) [hereinafter cited as *Clitherow's Preface*]. Since these sources are in general agreement, specific citation to them is usually omitted in the following discussion.

<sup>8</sup> The "Farewell" strikes a familiar chord in law students with a bent toward the humanities since now as then it is difficult to pursue both disciplines at once. The interested reader can find the complete text reprinted in *Lockmiller*, 191-94, but the following will provide a brief sample:

*Shakespeare*, no more thy silvan son,  
Nor all the art of *Addison*;  
*Pope's* heav'n-strung lyre, nor *Waller's* ease,  
Nor *Milton's* mighty self must please:  
Instead of these, a formal band  
In furs and coifs around me stand  
With sounds uncouth, and accents dry,  
That grate the soul of Harmony.  
Each Pedant Sage unlocks his store  
Of mystic, dark, discordant lore;  
And points with tott' ring hand the ways  
That lead me to the thorny maze.

to the Bar in 1746 but decided to serve his college as bursar rather than practice law full time. While at All Souls he straightened out the college's accounts and helped to complete its Codrington Library. In 1750 the University awarded him the degree of Doctor of Civil Law, and in the same year he published his first professional work, "An Essay on Collateral Consanguinity," which was prompted by preferences awarded by the College to relatives of the founder of All Souls.

In one of the many ironies of his life, Blackstone's career was in a very real sense launched by a defeat. In 1753 the Regius Professorship of Civil Law at Oxford became vacant and he applied for the position. He was strongly supported by his friend William Murray, then Solicitor General and later Chief Justice of King's Bench (where he was better known as Lord Mansfield). The professorship was then within the control of the Duke of Newcastle, who first promised Murray to appoint Blackstone but reneged when he determined that Blackstone's political beliefs were not sufficiently reliable.

Murray and others who recognized Blackstone's abilities urged him to offer lectures on the law without a formal connection with the University to those students who would attend, a not uncommon arrangement in those times. Blackstone agreed but with an uncharacteristic burst of originality determined to lecture upon the common law rather than civil or canon law. No one had previously taught the subject in a British university, but the lectures were an immediate success. While part of the reason for this was that the quality of Blackstone's lectures was considerably above the Oxford norm, a more significant factor was that he deliberately aimed at a broad audience. As his printed announcement explained,

This course is calculated not only for the Use of such Gentlemen of the University, as are more immediately designed for the Profession of the Common Law; but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Polity of their own Country.<sup>9</sup>

In 1756, Blackstone prepared a syllabus of his lectures under the title *An Analysis of the Laws of England*, which later provided the basis for the *Commentaries*. That same year another Middle Templar, Charles Viner, died and bequeathed to Oxford the copyright of a work that had taken fifty years of his life to complete,

<sup>9</sup> Lockmiller quotes the entire notice at 39-40.

*A General Abridgment of Law and Equity, Alphabetically Digested Under Proper Titles with Notes and References*,<sup>10</sup> with instructions that the proceeds be used to establish a professorship of the laws of England and fellowships and scholarships in the same subject." Just two years after Viner's death, Blackstone was named the first Vinerian Professor. His inaugural lecture, subsequently published as "A Discourse on the Study of the Law,"<sup>12</sup> gives a clear statement of his educational objective, which was to teach the common law of England *as a science* to those who need it most, "our gentlemen of independent estates and fortune."

Armed with this evidence of his legal knowledge, Blackstone again tried to establish a practice at the bar, spending progressively more time in London and less at Oxford. Upon occasion he even appointed a deputy to read his lectures rather than miss a term of court." While Blackstone's practice was more prosperous than before, even his biographers recognize that his career as a practicing lawyer was not particularly distinguished."

From 1765 to 1769 Blackstone was primarily engaged with the publication of his four-volume treatise, *Commentaries on the Laws of England*, about which more is said below. Despite the effort involved in that work, he still found time to serve in Parliament, where he became known as a loyal supporter of the Administration." His career was no more distinguished in Parliament than at the bar. As one noted historian observed, even his "most fervent admirers were forced to admit that, 'while he had the gift of writing like a classic, he had not the gift of speaking like an orator,' and he himself shrank from the crudities of political controversy."<sup>16</sup> One particularly embarrassing moment came in 1769 when during the

10 Published in 23 volumes between 1742 and 1753, this poorly arranged legal encyclopedia is a distant ancestor of the modern *Corpus Juris* and *American Jurisprudence*.

11 It was generally believed that Blackstone's lectures induced Viner to make his bequest, but there is no clear evidence to that effect.

12 Reprinted in *Lockmiller* 199-229.

13 This was permitted under the terms of Viner's bequest but nevertheless provoked some complaints. Blackstone responded in 1761 with a pamphlet entitled *State of a Case, in Regard to Putting a Restraint on the Power given the Professor of Common Law, in the University of Oxford, by the Vinerian Statutes, to Nominate a Deputy to Read the Lectures*. Blackstone won the argument but thereafter delivered most of his lectures in person.

14 *Clitherow's Preface* xi; *Lockmiller* 70.

15 He first entered Parliament in 1761 as member from Hinton through the efforts of Henry Fox and was returned in 1768 as member from Westbury.

16 Fifoot, "Blackstone—Outside the Commentaries" 147 *Fortnightly* 716 (June, 1937).

debate over the admission of John Wilkes, who had been reelected to Parliament from his Middlesex constituency notwithstanding an earlier expulsion, Blackstone asserted that as a matter of law a man once expelled from the House of Commons was incapable of re-entering it. No sooner had he sat down than an opposition member rose to quote from the *Commentaries* the list of matters which disqualified a man from membership—and the list did not include prior expulsion! Perhaps Blackstone had the last word in the matter, for in the next edition of the *Commentaries* he added previous expulsion to the list of the causes of disqualification."

Blackstone's last years were spent on the bench, briefly on King's Bench under Lord Mansfield in 1770 and then on Common Pleas from 1770 to his death in 1780. Once again his performance did not fulfill the promise shown by his *Commentaries*. While he used his judicial position to promote prison reform,<sup>18</sup> he earned the reputation of a bad and frequently-reversed trial judge.<sup>19</sup> His health gradually declined during his years on the bench, according to one writer, as a result of

the bad effects of the studious habits in which he had injudiciously indulged in his early life, and of his neglect to take the necessary amount of exercise, to which he was specifically averse. His corpulence increased, and his strength failed, and, after two or three attacks of distressing illness, he expired on February 14, 1780.<sup>20</sup>

This then is the subject of our study—an intelligent man, to be sure, a gifted writer and a talented teacher, but hardly the sort to set the course of a continent. Rather than to any personal qualities of the man himself, Blackstone's influence can more properly be traced to the "emergent legal institution" represented by his *Commentaries*.<sup>21</sup> The *Commentaries* thus deserve a few words in their own right.

## B. *The Commentaries*

The origin of the *Commentaries* in Blackstone's Oxford lectures explains much about them. The purpose of the book, for example,

<sup>17</sup> See Odgers, "Sir William Blackstone, Part I," 27 *Yale L.J.* 599, 615-16 (1917-18).

<sup>18</sup> Odgers, "Sir William Blackstone, Part II," 28 *Yale L.J.* 554-56 (1918-19).

<sup>19</sup> Jones, "Introduction" to G. Jones, *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England* xxi (1973).

<sup>20</sup> E. Foss, *Biographica Juridica: A Biographical Dictionary of the Judges of England* 99 (1870).

<sup>21</sup> Hamilton, Book Review, 39 *Colum. L. Rev.* 724 n.5 (1939).

is the same as that of the lectures, to introduce the English gentleman to the science of the law. Indeed, Blackstone even placed his inaugural lecture at the head of the book to signify the identity of aim.<sup>22</sup> Given Blackstone's modest objective of publishing an introductory text for general use, it is a credit to his thoroughness that modern readers view the *Commentaries* as a detailed, carefully documented analysis of the common law of his day. The organization of the work is also attributable to his lectures. If the book seems carefully put together and highly polished, it may well be because Blackstone had been revising his manuscript annually for twelve years before publication. As Holdsworth comments, "anybody who has ever lectured on law knows that there is nothing like lecturing from manuscript in order to show up its deficiencies."<sup>23</sup>

To lend order to his discussion of the common law (and order was essential since he conceived the study as a "science"), Blackstone somewhat arbitrarily divided the law into two categories, "rights" and "wrongs." These categories he further divided and thus came to four separate books which dealt, after certain introductory chapters, with the rights of persons, the rights of things, private wrongs and public wrongs. Within each book he treats a number of generally related topics. The first book, for example, discusses what would now be called constitutional law and the fourth discusses criminal law. With a few exceptions, subtopics are discussed chronologically, beginning with Anglo-Saxon traditions and moving carefully through Norman changes and later judicial and legislative glosses. Throughout, Blackstone introduces comparative examples drawn from Latin and Greek classics and from both early and late works of continental law. From time to time he ventures a bit afield to introduce theological or philosophical concepts, but by and large he adheres closely to his outline.

One can easily appreciate why the *Commentaries* were so widely read. In complete contrast to Coke, Bracton and other writers on the common law, Blackstone's work required no previous legal study and could thus be appreciated by the layman and student as well as

<sup>22</sup> W. Blackstone, *Commentaries on the Laws of England* § 1 [hereinafter cited as *Commentaries*]. All quotations to the *Commentaries* are from St. George Tucker's 1803 edition, which was by far the most popular American edition in the period before 1828. However, the pagination remains the same as in the original edition.

<sup>23</sup> Holdsworth's remarks are reprinted in "Bar Welcomes Historian of English Law," 13 *A.B.A.J.* 183, 185 (1927).

the scholar and the practicing lawyer. Secondly, the reader was led gently from the general to the specific, from past to present, and from easy to difficult. The *Commentaries* were not jumbles of discrete subjects, as Viner's *Abridgment* was, but formed a course of study. Third, the book was comprehensive, a complete "Cook's tour" of the English law of the period. The general reader would thus have a well-earned feeling of accomplishment by the end of the fourth volume, and would have learned as much as he could care to know about most aspects of the common law. Finally, the reader could hardly fail to appreciate the style in which the book is written. Blackstone was an accomplished man of letters and he applied his talents to a subject which had previously been and which remains today chiefly the preserve of writers whose style could most charitably be described as functional. By contrast the *Commentaries* were elegant.

Whatever the reasons, the *Commentaries* became an instant best seller. The number of editions that have appeared has not been recently calculated, but would include at least twenty-one in England, twelve in the United States, three in Ireland, plus French, Russian, German, Spanish, and Italian translations and innumerable abridgments, abstracts, and summaries." At least a thousand sets of the English edition were sold in the United States by 1771, which prompted printer Robert Bell of Philadelphia to propose a domestic edition. Bell's solicitation was a curious mixture of appeals to the pocketbook and patriotism. He noted that individual subscribers would save seven pounds per set by buying his American edition rather than the English, that the money so saved would remain in local commerce, and "Therefore the EDITOR hopeth, Patriotism to encourage native FABRICATIONS."<sup>25</sup> The response must have astounded him. Over 1400 sets were ordered, from New Hampshire (53 sets) to South Carolina (70 sets), from lawyers, judges, public officers, and interested laymen." In time the English Blackstone was Americanized, his British precedents supplemented by American ones, his monarchist tendencies challenged by republican annotations. With the appearance of St. George Tucker's monumental

<sup>24</sup> Lockmiller 157, 171 n.7; Fifoot, "Blackstone—Outside the Commentaries," 147 *Fortnightly* 723 (June, 1937); C. Ellis, *The William Blackstone Collection in the Yale Law Library* (1938).

<sup>25</sup> Bell's solicitation appeared in the first volume of his edition together with a list of subscribers. It is reprinted in F. Hicks, *Men and Books Famous in the Law* 128 (1921).

<sup>28</sup> P. Hamlin, *Legal Education in Colonial New York* 65 (1939).

edition of 1803, the Blackstone tradition was firmly fixed in all parts of the new land.

## II

### A. *American Politics to 1776*

Inasmuch as Blackstone served in Parliament from 1761 to 1770, and the *Commentaries* were published in 1765, it is not inconceivable that he had some impact on American politics before the Declaration of Independence. It is hardly likely, though, that he played as great a role as has been claimed for him. If one is to believe the historians, Blackstone first helped to cause the Revolution by his opposition to the claims of the colonies and then provided the theoretical justification for it. Professor Chroust has claimed that Blackstone "was very extreme in his anti-American bias, and he appeared among the most vociferous advocates of a harsh and uncompromising attitude. . . . It was this narrow and uncompromising outlook which led to the break with the American colonies."<sup>27</sup> On the other hand, former Attorney General Wickersham would have us believe that Jefferson copied the Declaration of Independence from the pages of the *Commentaries*:

The philosophy of the Declaration of Independence usually is ascribed to Locke and Paine. But it appears to me that one may clearly trace the influence of Blackstone's *Commentaries* on the mind of Jefferson, in the affirmations of the Declaration that all men are born with inalienable rights among which are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.<sup>28</sup>

In point of fact, there is little support for either of these extremes. To be sure, Blackstone had little sympathy for the legal positions taken by the rebellious colonists. He voted against repeal of the Stamp Act in 1766 on the ground that the colonies were subordinate to England and that if they were allowed "to refuse any laws they [would be] sovereign," and he even proposed an amendment that any repeal should apply only to those colonies "who expunge out of their Assembly the resolutions . . . derogatory from

<sup>27</sup> Chroust, "Blackstone Revisited," 17 *U. Kansas City L. Rev.* 24, 28-29 (1948-49).

<sup>28</sup> Wickersham, "Presentation of Blackstone Memorial," 10 *A.B.A.J.* 571, 576-78 (1924); accord, Cooper, "An Unwritten Biography" 23 *A.B.A.J.* 9, 14 (1937).



the honour and dignity of the Crown and Parliament." <sup>29</sup> This attitude continued to his last days; in a letter to William Eden, the first Lord Auckland, just a few months before his death, Blackstone wrote: "I rejoice at the fair prospect of Success in America, which the last Accounts from thence have opened to Us."<sup>29</sup>

Then, too, Blackstone's position on the applicability of the common law in the colonies could hardly have been calculated to win rebel applause. In the first book of the *Commentaries* he divided colonies into two groups, those claimed by the right of occupancy alone, i.e., "where the lands are claimed . . . by finding them desert and uncultivated and peopling them from the mother country," and those claimed by conquest. There is a difference, he went on to say, between these two species of colonies with respect to the laws by which they are bound:

For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. . . . But in conquered or ceded countries, they have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain. . . .<sup>31</sup>

From the colonies' perspective the distinction was a crucial one. If they were of the former type, they could claim the liberties of Englishmen against a tyrannical king or parliament, but if the latter, they would be subject to the "ancient laws of the country" as modified by the king himself, with no legal basis for complaint. And Blackstone, as luck would have it, placed them in the second category:

Our American plantations are principally of the latter sort, being obtained in the last century either by right of conquest and driving out the natives . . . or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother colony, but distinct (though dependent) dominions.<sup>32</sup>

<sup>29</sup> Jones, "Introduction" to G. Jones, *The Sovereignty of the Law—Selections from Blackstone's Commentaries on the Laws of England* xlix (1973).

<sup>30</sup> Letter from William Blackstone to William Eden, July 13, 1779, on file in the Hampton L. Carson Collection of the Free Library of Philadelphia, reprinted in *1 Am. J. Legal Hist.* 378 (1957).

<sup>31</sup> *1 Commentaries* 108.

<sup>32</sup> *1 Commentaries* 109.

Now Blackstone was trebly in error on the point. Until 1720 or so the distinction used by Blackstone had indeed dominated English discussions of common law reception, as it had since Coke raised it in *Calvin's Case*, 7 Coke Rep. 1, 17 (1608). But in that year Attorney General Richard West acknowledged that:

the common law of England is the common law of the [American] plantations and all statutes in affirmance of the common law, passed in England antecedent to the settlement of a colony, are in force in that colony, unless there is some private act to the contrary; . . . Let an Englishman go where he will, he carries as much of law and Liberty with him as the nature of things will bear.<sup>33</sup>

West's statement was the overwhelming view for the next forty-odd years, and Blackstone almost certainly erred in reviving Coke's distinction. Moreover, he erred in classifying the colonies as conquered rather than settled since few if any properly fit that category. Finally, even if they were conquered territories, the "ancient laws" could hardly govern since the Indian tribes would not have been regarded at common law as sovereigns whose laws would survive them.<sup>33a</sup> But granting all of this, there is no evidence that Blackstone intentionally twisted the law to deny the colonists' claims. To the contrary, even after West's statement the common law persisted in treating settlers of the colonies as *something* less than full subjects and recognized the prerogative authority of the king in those lands.<sup>34</sup> It would be fairer to say that Blackstone chose one side—the antiquated, and ultimately the wrong one—of a disputed issue and that later his choice would be used against the colonists. In any event, while his legal opinion might be used to buttress arguments for the Crown, it could hardly on its own precipitate the Revolution.

Similarly, the evidence hardly substantiates Wickersham's conclusion that Blackstone provided the philosophy behind the Declaration of Independence. But Blackstone and his *Commentaries* certainly provided fuel for the verbal and printed debates between the

<sup>33</sup> This statement is quoted in Horwitz, "The Emergence of an Instrumental Conception of American Law, 1780-1820," in *Law in American History* 294 (D. Fleming and B. Bailyn eds. 1971), whose discussion of the question I follow.

<sup>33a</sup> See J. Smith, *Appeals to the Privy Council from the American Plantations* 466-469. *Calvin's Case* distinguished between lands conquered from a Christian king and from infidels. Only in the former case did the existing law remain unaltered.

<sup>34</sup> Hanbury, "Blackstone in Retrospect," 66 *L.Q. Rev.* 318, 334 (1950). Joseph Story agreed with Blackstone's distinction, but not his application of it to the American colonies. 1 J. Story, *Commentaries on the Constitution of the United States* 134-39 (1833).

colonies and the mother country. Richard Barry, biographer of John Rutledge of South Carolina, suggests one reason for this in his discussion of a memorial against the Stamp Act sent by Congress to the House of Lords in 1765. Rutledge drafted the document and cited only one legal authority, Blackstone. James Otis brought Rutledge suitable quotes from the Whig Coke, but Rutledge rejected them and used only the Tory Blackstone since South Carolina's London agent had informed him of a curious failing of George III, "who believed himself to be a lawyer because he had read Blackstone in manuscript before publication. This was the only law-book he had read and his memory was not good, . . . but the name Blackstone was a power with him."<sup>35</sup> Another of the Revolutionary leaders who thought citations to Blackstone added weight to his arguments was Alexander Hamilton, whose "The Farmer Refuted" (1775) frequently borrowed Blackstone's words to reach conclusions that would have appalled Blackstone."

Although many of the doctrines put forth in the *Commentaries* were debated in the years before the Revolution, most of those debates would have gone on regardless of whether Blackstone had ever lived. In Book I, for instance, Blackstone repeated the traditional concept of sovereignty that in every state there must be a single supreme authority and added the Whig gloss that this authority lay not in the king himself but the king in parliament.<sup>37</sup> The colonists were forced to deal with this view since it was at the core of Parliament's assertion of authority. Accordingly, James Wilson" challenged Blackstone in a 1774 address entitled "On the Nature and Extent of the Legislative Authority of the British Parliament." Wilson's argument was not a justification of the right of Revolution, but rather an affirmation of loyalty to the Crown combined with a denial that Parliament could control the colonies. Others went further, granting the existence of a sovereign authority but

<sup>35</sup> R. Barry, *Mr. Rutledge of South Carolina* 117 (1942).

<sup>36</sup> E.g., A. Hamilton, "The Farmer Refuted," 1 *The Papers of Alexander Hamilton* 87, 88, 106-07 (H. Syrett & J. Cooke eds. 1961).

<sup>37</sup> 1 *Commentaries* 49-52.

<sup>38</sup> James Wilson (1742-1798) was one of the signers of the Declaration of Independence, a member of Congress (1782-83, 1785-87), a delegate to the federal Constitutional Convention of 1787, and the strongest supporter of the Constitution in the Pennsylvania ratification convention of that year. Subsequently he served as Associate Justice on the first United States Supreme Court (1789-98) and later as the first professor of law at what is now the University of Pennsylvania (1790).

locating it in the people themselves.<sup>39</sup> In every case, however, they were addressing a philosophical concept of long duration; Blackstone, at most, provided a fresh opportunity for the debate.

Much the same could be said of Blackstone's role in the other philosophical arguments of the Revolutionary era. Seldom an original thinker, Blackstone had borrowed bits and pieces of a number of current schools of philosophy and produced a strange *melange* of traditional natural law and more recent social contract thought. He spoke of the "law of nature, coeval with mankind and dictated by God himself" as superior to all other obligations and against which contrary human laws are void,<sup>40</sup> and recognized certain absolute rights of the individual such as freedom from taxation without consent.<sup>41</sup> Yet he asserted at the same time the absolute, uncontrolled authority of the king in parliament. The colonists were quick to pick up on these popular notions. Alexander Hamilton, for one, relied on Blackstone's references to the transcendent law of nature and absolute rights of individuals to buttress his legal arguments against Parliament.<sup>42</sup> Blackstone's use of even the most current phrases was anything but radical, however, as when he turned the concept of natural law on its head to limit the sphere within which man was free to create his own laws,<sup>43</sup> or when he dodged the old Whig dilemma of justifying the English Revolution of 1688 without encouraging others to revolt.<sup>44</sup> On all of these points the *Commentaries* would naturally provide ammunition (frequently for both sides), but only as convenient restatements of earlier authors from whom Blackstone had borrowed such as Burlamaqui, Pufendorf, and Montesquieu.<sup>45</sup>

Blackstone could have had a more direct role in the Revolution by influencing particular leaders of that movement, but such influence is difficult to prove. We know that he studied at the Middle Temple at the same time as a number of Americans who later gained

<sup>39</sup> G. Wood, *The Creation of the American Republic 1776-1787*, at 599 (1969).  
<sup>40</sup> 1 *Commentaries* 41.

<sup>41</sup> 1 *Commentaries* 140.

<sup>42</sup> A. Hamilton, "The Farmer Refuted," in 1 *The Papers of Alexander Hamilton*, 87-88 (H. Syrett & J. Cooke eds. 1961).

<sup>43</sup> D. Boors tin, *The Mysterious Science of the Law* 50-51 (1958).

<sup>44</sup> 1 *Commentaries* 245.

<sup>45</sup> On the origins of Blackstone's political philosophy, see generally D. Boors tin, *The Mysterious Science of the Law* (1958) and McKnight, "Blackstone, Quasi-Jurisprudent," 13 *Sw. L.J.* 399, 406-07 (1959). The colonists made frequent use of other common law authorities as well. B. Bailyn, *The Ideological Origins of the American Revolution* 30-31 (1967).

political prominence,<sup>46</sup> and at least one Revolutionary leader, Charles Cotesworth Pinckney, attended his Oxford lectures.<sup>47</sup> Certainly his lectures and writings were widely known in America even before the *Commentaries* were published. In 1759 John Adams wrote to Jonathan Sewall about the lectures,<sup>48</sup> and in 1760 he expressed a desire to obtain a copy of the *Analysis*.<sup>49</sup> In 1762 a New York merchant, John Watts, wrote of Blackstone, "We have a high character of a Professor at Oxford, who they say has brought that Mysterious Business [the study of law] to Some System, besides the System of Confounding other People and picking their Pockets, which most of the Profession understand pretty well."<sup>50</sup> In 1764 Blackstone's treatise on the law of descent in fee simple was published in New Jersey, and in 1765 Adams again mentioned Blackstone, this time in a conversation with Jeremiah Gridley, with whom he had studied law.<sup>51</sup>

Such prominence, however widespread, must pale before the impact of the *Commentaries*. The subscription list for Bell's first American edition includes such names as John Adams, Nathaniel Green, John Jay, Gouverneur Morris, Robert Morris, St. George Tucker, and James Wilson. In all, sixteen of the subscribers became signers of the Declaration of Independence, six were delegates to the 1787 Constitutional Convention, one became President of the United States and one Chief Justice of the Supreme Court.<sup>52</sup> Quite

<sup>46</sup> Three of his contemporaries at the Middle Temple became signers of the Declaration of Independence—Arthur Middleton, Thomas Lynch, Jr., and Thomas Heywood, Jr.—and another, John Dickinson, was an active member of the Continental Congresses. Other leading American families were also represented at the Inns of Court about that time, among them the Randolphs, Pickneys, Byrds, and Ingersolls. Jouett, "Sir William Blackstone: His Commentaries on the Laws of England," 16 *Ky. St. B.J.* 176, 178-79 (1951-52).

<sup>47</sup> D. Morgan, *Justice William Johnson* 21 (1954); C. Warren, *A History of the American Bar* 179 (1911). Pinckney, who lived from 1746 to 1825, fought in the Revolutionary War, attended the Federal Constitutional Convention, served as minister to France (1796) and was the Federalist candidate for Vice President (1800) and President (1804, 1808).

<sup>48</sup> C. Warren, *A History of the American Bar* 179 (1911).

<sup>49</sup> I J. Adams, *Diary and Autobiography* 169 (1961).

<sup>50</sup> Letter from John Watts to Sir William Baker, January 23, 1762, *The Letter Book of John Watts* 12-13, quoted in P. Hamlin, *Legal Education in Colonial New York* 64 (1939).

<sup>51</sup> C. Warren, *A History of the American Bar* 179 (1911).

<sup>52</sup> F. Hicks, *Men and Books Famous in the Law* 127 (1921); Jouett, "Sir William Blackstone: His Commentaries on the Laws of England," 16 *Ky. St. B.J.* 176, 183 (1951-52).

probably even Jefferson, who later was highly critical of the *Commentaries*, read the book before the Revolution."

But what is one to make of such contacts? These men were highly literate, were familiar with current and classic works of law, government, and philosophy, and would hardly have missed such a British success as the *Commentaries*. Given this background, it is unlikely that one book, an elementary one at that, would have changed their thought patterns.<sup>53a</sup> Even without Blackstone they would have fought the same war and debated the same issues, but at the very least the appearance of the *Commentaries* made it much easier to see what they were fighting for and provided a common frame of reference for their arguments. The significance of the many references made to the book before the Revolution lies not in the fact that Blackstone changed the minds of the participants, but that he so well expressed what was already in them. The role of the popularizer can be an important one, but it is distinct from that of the truly seminal thinker.

#### B. *American Politics to 1789*

Blackstone's biographers would have it that the *Commentaries* were responsible for the Constitution as well as the Declaration of Independence. Warden approvingly quotes an earlier writer, for example, to the effect that "his book was followed by the Makers of the Constitution in all branches of their work and with a fidelity which has even called forth criticism from modern English writers."<sup>54</sup> This is certainly an exaggeration, but at least the *Commentaries'* position as an authority on the common law was more firmly established in 1787 than in 1776. Accordingly, it is not surprising that there are many more references to the *Commentaries* during the constitutional debates than there were during the Revolutionary struggle. But it should be kept in mind that seldom if ever were the *Commentaries* cited as authority on the merits of a proposal; the *Commentaries* instead acted as a convenient reference work—as authority for the way things were, not for the way they ought to be.

<sup>53</sup> Waterman, "Thomas Jefferson and Blackstone's Commentaries," 27 Ill. L. Rev. 629,651-52 (1933).

<sup>53a</sup> The educated classes of the day seem to have been skeptical readers, carefully pondering both sides of disputed issues. See, e.g., R. Davis, *Intellectual Life in Jefferson's Virginia* 118 (1964).

<sup>54</sup> Warden 336, quoting C. Stevens, *Sources of the Constitution of the United States* 48 (1894).

Strangely enough, even though a number of readers of the *Commentaries* and at least one of his former students were delegates to the Philadelphia Constitutional Convention and the subsequent state ratification conventions, Blackstone's name rarely appears in the records of the debates. At one point in the Philadelphia convention, John Dickinson" referred to the *Commentaries* to determine that the term "ex post facto" applied in the common law to criminal cases only," but citations to the work occur more frequently in the state ratifying conventions. James Wilson repeatedly cited the *Commentaries* in the Pennsylvania convention on such matters as Parliamentary supremacy, the contractual basis of the British Constitution, and the possibility of appeals in common law courts." In Virginia, George Nicholas" and James Madison" cited the *Commentaries* regarding the treaty-making power of the king, and even that staunch anti-Royalist Patrick Henry<sup>60</sup> used the *Commentaries* in praise of the jury system." Similar references turn up occasionally in North Carolina" and South Carolina." There are occasional references, too, in the published arguments on the new Constitution, as in *The Federalist*, Number 84.<sup>64</sup>

While one might be tempted to conclude from the foregoing that the *Commentaries* exercised a powerful influence over the minds of the framers and ratifiers of the Constitution, putting these instances

<sup>55</sup> Dickinson (1732-1808) was a member of the Stamp Act Congress (1765), authored the popular *Letters From a Farmer in Pennsylvania* (1767-68), was a member of both Continental Congresses and a drafter of the Articles of Confederation. He later served as a delegate to the Federal Constitutional Convention from Delaware.

<sup>56</sup> 5 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 488 (2d ed. J. Elliott 1876) [hereinafter cited as *Elliott's Debates*]. Dickinson spoke on August 29, 1787.

<sup>57</sup> Nov. 26, 1787, 2 *Elliott's Debates* 424, 432; Nov. 28, 1787, 2 *Elliott's Debates* 437; Dec. 11, 1787, 2 *Elliott's Debates* 518.

<sup>58</sup> June 18, 1788, 3 *Elliott's Debates* 506.

<sup>59</sup> June 18, 1788, 3 *Elliott's Debates* 506. Madison's comment indicates widespread use of the *Commentaries*. It begins, "I will refer you to a book which is in every man's hand—Blackstone's *Commentaries*."

so Henry (1736-1799) served as the first governor of Virginia (1776-1779, 1784-1786) and as a member of the Virginia legislature (1780-1784, 1787-1790).

<sup>61</sup> June 20, 1788, 3 *Elliott's Debates* 544.

<sup>62</sup> The citation here is to a reference by a Mr. MacLaine on July 25, 1788 regarding parliamentary supremacy. 4 *Elliott's Debates* 63.

<sup>63</sup> The citation here is to a reference by Charles Cotesworth Pinckney on January 17, 1788 regarding the King's treaty-making power. 4 *Elliott's Debates* 278.

<sup>64</sup> In Number 84, Publius quotes the *Commentaries* on the importance of the writ of *habeas corpus*. *The Federalist*, No. 84 at 577, (J. Cooke, ed. 1961).

into context clearly demonstrates that such a conclusion is hardly justified. A review of the five volumes of Elliott's *Debates* indicates that most of the constitutional debates were over questions of policy, to which British law had little relevance, and that there was therefore very little citation to any established authority. The delegates were conscious of carving out new precedents and had little time to spend arguing about the interpretation of old ones. Moreover, when citation to the *Commentaries* was made, it was more often than not simply as a shorthand reference to a noncontroversial rule or to indicate a point of history. There is no evidence whatever that a single line of the *Commentaries* directly influenced any political decisions. Still, Blackstone's name does come up in the debates more frequently than that of any other author except Montesquieu, and it is, therefore, appropriate to discuss some of the points of political theory that appear in the *Commentaries* and reappear in the Constitution. It is all too easy in such a discussion to assume a causal relationship. Warden in his biography of Blackstone, for instance, spends several pages drawing parallels between the *Commentaries* and the Constitution with the apparent belief that the one determined the other.<sup>65</sup> That would be so only if Blackstone's ideas had been unique, and that was hardly the case.

The fact that Blackstone spoke of contractual duties imposed on the king by an original contract is not surprising since John Locke had made the same concept popular in England many years before. Blackstone's gloss on the idea was a simple one for a conservative lawyer, that is, to deny that the contract was an express one and write instead of an implied contract.<sup>66</sup> So far as the framers of the Constitution were influenced by contractarian theory, it was in this latter sense, and Blackstone could perhaps be credited with adding a dash of realism to the theory.

Similarly it is doubtful that Blackstone was in any way responsible for the system of checks and balances embodied in the Constitution. Blackstone praised the separation of powers between the King, the Lords, and the Commons,<sup>67</sup> but this was hardly an original notion since Montesquieu had made the same point years

<sup>65</sup> Warden 337-343.

<sup>66</sup> 1 *Commentaries* 47-48; Jones, "Introduction" to G. Jones, *The Sovereignty of the Law—Sections from Blackstone's Commentaries on the Laws of England* xl-xli (1973).

or 1 *Commentaries* 154-55.



before in his *The Spirit of the Laws*.<sup>68</sup> Since the idea was popular before Blackstone wrote, it would have been available to the Framers in any event, but perhaps his explication enhanced its utility. Once again, Blackstone was the popularizer rather than the inventor.

There are other similarities between the *Commentaries* and the Constitution, most notably in the allocation of executive powers and the establishment of an independent judiciary, but it is not necessary to belabor the point. In these matters as in others Blackstone described an idealized version of an existing system, and the Framers attempted to embody the ideal in the Constitution. But Blackstone did not create the concepts, and his influence therefore seems limited to making theories which were already known more familiar. To claim more for the *Commentaries* would not only be inaccurate but would also detract from the real impact of the work. There was indeed a real impact, though it came later than Warden and Lockmiller would claim. If today we read the Constitution as if it were written by Blackstone, it is not because it was, but rather because it has been interpreted by generations of judges trained on the *Commentaries*. His influence then was indirect and delayed, not direct and immediate.

### C. *American Politics to 1828*

At the time of the adoption of the Constitution the *Commentaries* had been available in America for more than 20 years. As the Revolutionary generation of political leaders died away and a new generation replaced them, the role of the *Commentaries* in American politics began to change. Once it had been seen as a new work, stirring up some disputes and providing ammunition for others; now it was read as a standard text and viewed with all the respect due a classic. By 1788 we find the young John Quincy Adams<sup>69</sup> noting the "inestimable advantage" it gave to law students," and later he cited it as authoritative on a point of British constitutional law.<sup>71</sup>

<sup>68</sup> ss 9 Baron De Montesquieu, *The Spirit of the Laws*, ch. 6 (1748); see generally, M. J. C. Vile, *Constitutionalism and the Separation of Powers* 102-105 (1967).

<sup>69</sup> John Q. Adams (1767-1848) served as an envoy to the Netherlands (1794-97), Prussia (1797-1801), Russia (1809-15) and England (1815-17) among other diplomatic posts. He served as United States Senator (1803-1808), Secretary of State (1817-24) sixth President of the United States (1825-29), and finally as a member of the House of Representatives (1831-48).

<sup>70</sup> John Q. Adams, entry of March 8, 1788, in *Diary of John Quincy Adams* 102 (1954).

<sup>71</sup> John Q. Adams, entry of January 16, 1831, in 8 *Memoirs of John Quincy Adams* 279 (C.F. Adams ed. 1876).

Even earlier James Monroe<sup>72</sup> had studied law with Thomas Jefferson, whose pupils are said to have mastered Blackstone.<sup>73</sup> A few years later Daniel Webster<sup>74</sup> discovered the *Commentaries* and returned to them again and again during his years in practice.<sup>75</sup> The magic of the book continued long into the nineteenth century; its appeal is exemplified by Abraham Lincoln who is quoted as saying that "I never read anything which so profoundly interested and thrilled me."<sup>76</sup>

If all of the leaders of the post-Revolutionary generation were as influenced by the *Commentaries* as these, a positive impact on American politics during this period could be assumed, though it would still be difficult to connect such evidence with particular policies. But at least one American politician of commanding position was not so favorably impressed. In fact, Thomas Jefferson's papers indicate a continuing effort to keep the *Commentaries* out of the hands of young students and its ideas out of the courts. Because Jefferson was more involved with the book than any other politician of the post-Revolutionary era, his involvement warrants some discussion.<sup>77</sup>

For the first forty-odd years after publication of the *Commentaries*, Jefferson had little to say about it and even thought enough of the work to assign it to his law clerks and recommend it to other prospective students.<sup>78</sup> But beginning around 1812 his correspondence reveals a strong dislike of Blackstone's ideas and a fear of their corrupting influence. At first his complaints seem to be more with Blackstone's editors than with the author himself. In a letter

<sup>72</sup> Monroe lived from 1758 to 1831 serving as a member of the Virginia legislature (1782-83) and as a delegate to the Continental Congress (1783-86). He also served as United States Senator (1790-94), as minister to France (1794-96), as governor of Virginia (1799-1802), as minister to England (1803-07), as Secretary of State (1811-17), as Secretary of War (1814-15), and as the fifth President of the United States (1817-25).

<sup>73</sup> H. Ammon, *James Monroe: The Quest for National Identity* 30 (1971).

<sup>74</sup> Daniel Webster (1782-1852) served as a U.S. Congressman (1813-17) and as a U.S. Senator (1827-41, 1845-50). He was the presidential nominee of the Whig Party in 1836. Webster additionally served as Secretary of State from 1841 to 1843, and from 1850 to 1852.

<sup>75</sup> G. T. Curtis, *Life of Daniel Webster* 48, 56, 59 (2d ed. 1870).

<sup>76</sup> Ogden, "Lincoln's Early Impressions of the Law in Indiana," 7 *Notre Dame Lawyer* 325-329 (1931-32).

<sup>77</sup> Professor Waterman deals admirably with just this topic in an old but still useful article, "Thomas Jefferson and Blackstone's *Commentaries*," 27 *Illinois L. Rev.* 629 (1933) [hereinafter cited as Waterman].

<sup>78</sup> Cf. Thomas Jefferson, "Education for a Lawyer (c. 1767)" in *The Complete Jefferson* 1044-45 (S. Padover ed. 1969); note 73 *supra*.

to Judge John Tyler recommending the "exclusion from the courts of the malign influence of all authorities after the *Georgium sidus* became ascendant," he recognized that this would "uncanonize" Blackstone,

whose book, although the most elegant and best digested of our law catalogue, has been perverted more than all others, to the degeneracy of legal science. A student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book, he is master of the whole body of law.<sup>79</sup>

He went on in that letter to approve the popular appellation of "Blackstone lawyers" as applied to "these ephemeral insects of the law." Later his attacks centered on Blackstone himself, reaching a crescendo in this 1814 Teter:

Blackstone and Hume have made Tories of all England, and are making Tories of those young Americans whose native feelings of independence do not place them above the wily sophistries of a Hume or a Blackstone. These two books, but especially the former, have done more towards the suppression of the liberties of man, than all the millions of men in the arms of Bonaparte. . . .<sup>80</sup>

And twelve years after that, Jefferson blamed the legal profession's "slide into toryism" on the fact that "the honied Mansfieldism of Blackstone became the student's hornbook."<sup>81</sup>

This peculiar, almost irrational dislike of Blackstone seems to have several bases. For one thing Jefferson possessed a gnostic view of legal history, believing it to be a continuing struggle of good against evil as exemplified in several periods of English and American development: Saxon versus Norman, Whig versus Tory, Republican versus Federalist. As spokesman on the law for the Tories, Blackstone assumed in Jefferson's mind all of the evil attributes of those other oppressors of mankind. As Waterman puts it, "The Commentaries, the embodiment of the anti-republican influences of Norman, Tory and their American descendent—Federalism=was spreading in the young nation the political principles of these

<sup>79</sup> Letter from Thomas Jefferson to Judge John Tyler, June 17, 1812, in 6 *Writings of Thomas Jefferson* 65-66 (Washington ed. 1861).

<sup>80</sup> Letter from Thomas Jefferson to Horatio G. Spafford, March 17, 1814, in 14 *The Writings of Thomas Jefferson* 119-20 (A. Lipscomb & A. Bergh eds. 1904).

<sup>81</sup> Letter from Thomas Jefferson to James Madison, February 17, 1826, in *The Life and Selected Writings of Thomas Jefferson* 726 (A. Koch & W. Peden eds. 1944).

aggressors upon ancient Saxon liberties."<sup>82</sup> For another, Jefferson considered William Murray, Lord Mansfield," to be the source of much of the British Government's opposition to the legal claims of the colonies before the Revolution, and thought of Blackstone as Mansfield's accomplice. In both of these respects he was probably correct to a degree. Finally, Jefferson saw the *Commentaries* as perpetuating the anti-democratic doctrines present in Mansfield's legal innovations, which he termed "sly poison" and dangerous to a free country.<sup>84</sup> In retrospect Mansfield's decisions from the King's Bench hardly seem poisonous, but his influence on Blackstone, good or bad, is undeniable.

Fortunately for Jefferson, the country was favored with a republican edition of Blackstone. St. George Tucker, Professor of Law at William and Mary, published a five volume edition of the *Commentaries* in 1803, adding lengthy appendices which were in close harmony with Jefferson's own views and which even praised much of the legislation Jefferson sponsored in Virginia. While Jefferson never repudiated his criticisms of Blackstone, this edition at least made it possible once again for him to recommend the *Commentaries* as a law text.<sup>85</sup>

But enough of Jefferson. He was, after all, a rare note of dissent in a chorus of praise. To turn from personalities to policies, it is possible to discern some Blackstonian influence on two major issues of the post-Revolutionary years, suffrage and free speech. In the *Commentaries* Blackstone strongly supported property qualifications for voting as a way of protecting the electorate from monetary corruption. In his words, "The true reason of requiring any qualification with regard to property in voters is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own." This notion certainly was the dominant one in the

<sup>82</sup> Waterman 640-42 and sources cited therein.

<sup>83</sup> Lord Mansfield (1705-1793) served as Solicitor General (1742-54) and Attorney General (1754-56) of England. In addition, he was a member of the House of Commons (1742-56), the Chief Justice of King's Bench (1756-88), and Speaker of the House of Lords (1760, 1770-71).

<sup>84</sup> For a discussion of this subject see Waterman 642-43. A more detailed discussion can be found in Waterman, "Mansfield and Blackstone's *Commentaries*," 1 *U. Chi. L. Rev.* 549 (1933-34).

<sup>85</sup> E.g., Letter from Thomas Jefferson to Dabney Terrell, February 26, 1821, in *The Complete Jefferson* 1088 (S. Padover ed. 1969); Letter from Thomas Jefferson to Francis Wayles Eppes, April 9, 1822, in *The Family Letters of Thomas Jefferson* 443-44 (E. Betts & J. Bear eds. 1966).

<sup>86</sup> 1 *Commentaries* 171. Again Blackstone borrowed from Montesquieu: "All

early years of the new nation (though property qualifications were seldom severe and often laxly enforced), and even so democratic a man as Jefferson recognized the wisdom of it.<sup>87</sup> Blackstone may not have invented the idea, but again, he gave it currency and added respectability.<sup>88</sup>

Similarly, Blackstone wrote of the common law of seditious libel as it stood in his day, hardly recognizing that there could be a contrary view:

To punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.<sup>89</sup>

Note that Blackstone speaks only of punishment after publication; freedom of the press for him prohibits only prior censorship, not subsequent penalty." It was this same limited concept of freedom of speech that underlay the Sedition Act of 1798, and not for many years was a more liberal construction of the First Amendment established.<sup>81</sup> The opponents of the Sedition Act wasted no time in attacking Blackstone's opinion. James Madison immediately spotted the inconsistency in the common law doctrine: "It would seem a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made."<sup>92</sup> Though he was cited and

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the inhabitants of the several districts ought to have a right of voting . . . except such as are in so mean a situation, as to be deemed to have no will of their own." 9 *The Spirit of the Laws* ch. 6 (1746).

<sup>87</sup> Jefferson would have granted the vote to all freeholders but would have withheld it from wage laborers because he believed their votes would be controlled by their employers. Cf. Hamilton, Book Review, 39 *Colum. L. Rev.* 724,733 (1939).

<sup>88</sup> See generally Williamson, "American Suffrage and William Blackstone," 68 *Pol. Sci. Q.* 552 (1953). Years earlier, Hamilton used this very argument to justify American resistance to Parliamentary taxation. Since only those in such "mean condition" are to be denied the ballot, Hamilton reasoned, all others—including the American colonists—are entitled to it. If they are unjustly denied the vote, they could not have given their consent to Parliament's governance. See Hamilton, "The Farmer Refuted," in 1 *The Papers of Alexander Hamilton* 106-07 (H. Syrett J. Cooke eds. 1961).

<sup>89</sup> 1 *Commentaries* 152.

<sup>90</sup> 4 *Commentaries* 151-153.

<sup>91</sup> Waterman, 654-56. See generally L. Levy, *Legacy of Suppression* (1960).

<sup>92</sup> J. Madison, "Report on the Resolutions of 1798," in 1 *The Nullification Papers* 35 (1832).

refuted, there is no evidence that Blackstone inspired the Federalists or increased the anger of the Republicans more than did the mere fact of the Act itself.

It is difficult if not impossible to tie the *Commentaries* to particular pieces of legislation, though there may be an undeniable ideological similarity. The least one can say, however, is that Blackstone's inherent conservatism was congenial to America, his picture of the British constitution so attractive that the new land was hardly tempted to make radical departures from its basic provisions. While Blackstone did not establish that constitution in America, his understanding and appreciation of it became part of our political vocabulary, and in that sense he was more influential than if he had written a score of our statutes.

### III

As one can evaluate the *Commentaries'* political influence by looking at particular legislative issues or by considering what leading politicians thought of the work, so, too, one can examine its impact on American courts through cases or judges. This section attempts to examine both.

#### A. Cases

Reported Federal and state cases through 1828 number in the thousands, making examination of each decision hardly practical. The following discussion is therefore based upon a random sample.<sup>93</sup> The cases in the sample, a total of some 471, were studied to determine the frequency and the importance of citations to the *Commentaries*.

The quantitative aspect of the study can be quickly summarized. The Federal and state courts showed remarkable consistency in their reliance on the *Commentaries*. The work was cited in 6.56% of the Federal cases sampled and 6.59% of the state cases, with no discernible geographic or chronological variation.<sup>94</sup> A more difficult problem is determining what significance those figures hold. Even adding the knowledge that the *Commentaries* were cited more frequently than any other text does not tell us in any objective sense whether 6 to 7% is "a lot" or "a little." Perhaps it is sufficient

<sup>93</sup> The sampling technique applied is described in the appendix.

<sup>94</sup> Louisiana, as the only civil law state, had virtually no citations to Blackstone and thus presents an exception.

for the moment to conclude that the *Commentaries* were cited often enough to indicate a position of some prominence.

The qualitative aspect is surprising, for it detracts from that position of prominence. The first relevant consideration is how the book was cited. The answer is clear: with only a few exceptions, citations appear in reports of arguments by counsel rather than in the decisions of the courts. Of the eight Federal cases citing the *Commentaries*, only two, *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64 (1827) and *United States v. Marchant*, 25 U.S. (12 Wheat.) 480 (1827), contain citations in the text of an opinion, and the first of those is a dissenting opinion. The major issue in *Dandridge*, which was a suit on a bond given the bank to insure the faithful performance of one of its employees, was whether the bank had accepted the bond since there was no formal corporate action to that effect. The Supreme Court held that the bond had been accepted and could be enforced, but Chief Justice Marshall in dissent relied heavily on Blackstone's statement in the *Commentaries* that a corporation can act only by affixing the corporate seal." In the *Marchant* case, Justice Story writing for the court simply cited the *Commentaries* as one authority for the common law basis of peremptory challenges in a criminal trial."

The state cases sampled show much the same pattern. Of the 23 cases in which the *Commentaries* are cited, only seven show any significant reliance by the court on the *Commentaries* as authority. In seven cases only counsel cited the *Commentaries*. In six more the court cited the *Commentaries* as only one of several authorities on point. Of the remaining three cases, one court disagreed with Blackstone's position,<sup>97</sup> the citation in the second was by a dissenting judge who did not even remain around to cast his vote,<sup>98</sup> and the third citation was given in a concurring opinion.<sup>99</sup>

The seven instances in which there was reliance by the court on the *Commentaries* involve narrow questions, but in most of those cases the narrow question proved determinative of the outcome. Thus in *Moore v. Graves*, 3 N.H. 408 (1826), the validity of an attachment of goods depended upon whether a minor could serve

<sup>95</sup> 25 U.S. (12 Wheat.) at 93.

<sup>96</sup> 25 U.S. (12 Wheat.) at 482.

<sup>97</sup> *Conner v. Bent*, 1 Mo. 140, 141 (1822).

<sup>98</sup> *Greenwood v. Curtis*, 6 Mass. 358, 365 n. (1812). Since Judge Sedgwick left the bench before the case was decided, his opinion is printed in a footnote for information only.

<sup>99</sup> *Lewis v. England*, 4 Binney 5, 18 (Pa. 1811).

the attachment on behalf of the sheriff. The court held that the attachment was valid, citing the *Commentaries* to show that since the office of sheriff was hereditary in some places it could be held by a minor.<sup>100</sup> Similarly, *De Freeze v. Trumber*, 1 Johnson Cas. 274 (N.Y. 1806), involved a single question, whether there was an implied warranty of title in the sale of a chattel. The court cited the *Commentaries* as sole authority for the general rule that such a warranty was implied.<sup>101</sup>

The case survey leads to the conclusion that in only one or two percent of the reported cases before 1829 did the *Commentaries* exert any significant influence.<sup>102</sup> But "influence" is a slippery term. If Blackstone's work determined one percent of the most significant cases of that period, its impact would be far greater than the percentage alone would indicate. To check that possibility, and to allow for the further possibility that the sample was not representative or the results not statistically significant, a separate group of nine Federal cases citing the *Commentaries* was gathered through independent research and then evaluated. This group included such major cases as *Chisholm v. Georgia*, 2 U.S. (2 Da11.) 419 (1793), *Marbury v. Madison*, 5 U.S. (1 Cranch) 168 (1803) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) (1824). (The random sample had already turned up *McCullough v. Maryland*, 17 U.S., (4 Wheat.) 316 (1819)).

This deliberately selected group did not produce results significantly different from the randomly selected group. Of the nine cases, two cited material added by an American editor rather than the original text of the *Commentaries*,<sup>103</sup> one involved citation by counsel but not by the court,<sup>104</sup> one cited the *Commentaries* perfunctorily only in a dissenting opinion,<sup>105</sup> and two explicitly rejected the

<sup>100</sup> 3 N.H. at 411.

<sup>101</sup> 1 Johnson Gas. at 275.

<sup>102</sup> Reference should be made to two earlier studies, both of which deal with quantity rather than frequency or reliance. William G. Hammand in preparing his 1890 edition of the *Commentaries* examined some 2,500 volumes of reported cases from 1787 to 1890 and concluded that Blackstone was cited more frequently than any other author. In 1915, William Carey Jones updated Hammand's research and concluded that Blackstone had been cited in some 10,000 cases since 1789. *Lochmiller* 180-81. With due appreciation for the hours of work involved, it is difficult to determine what, if anything, those studies signify.

<sup>103</sup> *Terrett v. Taylor*, 12 U.S. (9 Cranch.) 43, 47 (1815) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>104</sup> *Hollingsworth v. Duane*, 12 Fed. Cas. 359 (no. 6616) (C.C.D. Pa., 1801).

<sup>105</sup> *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 347 (1827) (Marshall, C.J., dissenting).



cited doctrines.<sup>106</sup> Of the three remaining cases, two do indicate some significant reliance on Blackstone. In *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va., 1811), Chief Justice Marshall, sitting as circuit judge, used unusually strong language. Referring to a distinction between local and transitory actions, he noted that "This distinction has been repeatedly taken in the books, and recognized by the best elementary writers, especially Judge Blackstone, from whose authority no man will lightly dissent."<sup>107</sup> And in *Marbury v. Madison*, 5 U.S. (1 branch) 137 (1803), Marshall approvingly cited the *Commentaries* several times in support of the proposition that the law must furnish a remedy for violation of a vested legal right and to define the nature of the writ of mandamus.<sup>108</sup>

So far as the cases speak, they indicate that the *Commentaries* were frequently used by counsel and courts, but that only rarely did the work have a decisive influence. Far more often the book was used as legal treatises are used today, to dress up an argument, neatly define a term, or rationalize a decision. If this were Blackstone's only impact on the judicial system, his stature among legal scholars would be only slightly higher than scores of text writers who have followed him.

### B. Judges

But perhaps Blackstone's influence was not so limited. An artist's influence, for example, may extend far beyond those who openly acknowledge it. Blackstone may likewise have exercised an indirect influence, shaping the minds and styles of judges who seldom quoted him in their opinions.

And indeed, there seems ample opportunity for such an influence. Many of the most important of our early judges—Wilson, Iredell, Marshall, Story, Kent and others—at some point acknowledged their indebtedness to the Commentator. Wilson studied the *Commentaries* almost as soon as they came off the press while reading law under John Dickinson in the 1760's<sup>109</sup> and throughout his life did Black-

<sup>106</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dallas) 419, 458, 462 (1793) (Wilson, J.), and *Gouverneur's Heirs v. Robertson*, 24 U.S. (11 Wheat.) 332, 351 (1826) (Johnson, J.). In the *Chisholm* case Justice Iredell also cited the *Commentaries* in a string of citations. 2 U.S. (2 Dallas) at 437 and 442-43.

<sup>107</sup> 15 Fed. Cas. at 664.

<sup>108</sup> 5 U.S. at 163, 165, 168-69.

<sup>109</sup> B. Konkle, *James Wilson and the Constitution* 10 (1907), cited in E. Bauer, *Commentaries on the Constitution, 1790-1860*, at 44 (1965).

stone the honor of taking scholarly issue with him on a number of points. Thus his 1774 pamphlet, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* was aimed particularly at Blackstone's notions of parliamentary supremacy<sup>110</sup> and his 1790 law lectures were in large part an attempt to refute Blackstone's definition of municipal law. Notwithstanding these disagreements, Wilson always accorded Blackstone a grudging respect, as when he commented, "on every account, therefore, he should be read and studied. He deserves to be much admired; but he ought not to be implicitly followed."<sup>112</sup> Or again, just after stating that he could not consider Blackstone "as a zealous friend of republicanism," Wilson termed him "a friend of the rights of man."<sup>113</sup> On balance, Wilson took an appreciative but critical view of the *Commentaries*.

Similarly, James Iredell<sup>n4</sup> was favorably impressed by the *Commentaries* while studying law in 1771:

They are books admirably calculated for a young student, and indeed may interest the most learned. The law there is not merely considered as a profession but as a science. The principles are deducted from their source and we are not only taught in the clearest manner the general rules of the law, but the reasons upon which they are founded. By this means we can more satisfactorily study, and more easily remember them, than when they are only laid down in a dictatorial, often an obscure manner. Pleasure and instruction go hand in hand.<sup>115</sup>

**In** *Chisholm v. Georgia*, the same case chosen by Wilson to reject Blackstone's definition of sovereignty, Iredell used the *Commentaries* in support of Georgia's claim of sovereign immunity.<sup>116</sup> Iredell's reliance on the *Commentaries* continued to his last year. In 1799, in a charge to a grand jury, Iredell quoted at length from the

<sup>110</sup> C. Becker, *The Declaration of Independence: A Study in the History of Ideas* 107 (1958).

<sup>111</sup> *Waterman* 649. See also Wilson's opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dallas) 419, 458, 462 (1793).

<sup>112</sup> *The Works of James Wilson* 20 (J. Andrews ed. 1896).

<sup>113</sup> *The Works of James Wilson* 19-20 (J. Andrews ed. 1896).

<sup>114</sup> James Iredell (1751-1799) served as a judge of the North Carolina Superior Court (1777-78), as the Attorney General of North Carolina (1779-81), as a delegate to the North Carolina ratification convention (1788), and finally as an Associate Justice of the United States Supreme Court (1790-99).

<sup>115</sup> Letter from James Iredell to Francis Iredell, July 31, 1771, quoted in G. McRee, *Life and Correspondence of James Iredell* 91 (1849).

<sup>116</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dallas) 419, 437, 442-43 (dissenting opinion).

*Commentaries* on the proper definition of liberty of the press and added these words of praise:

The definition of it [liberty of the press] is nowhere more happily or justly expressed than by the great author of the commentaries on the laws of England, which book deserves more particular regard on this occasion because for nearly thirty years it has been the manual of almost every student of law in the United States, and its uncommon excellence has also introduced it into the libraries, and often to the favorite reading of private gentlemen, so that his views of the subject could scarcely be unknown to those who framed the Amendments to the Constitution and if they were not, unless his explanation had been satisfactory, I presume the amendment would have been more particularly worded, to guard against any possible misunderstanding.<sup>117</sup>

We know that the greatest of American jurists, Chief Justice John Marshall,<sup>118</sup> was very nearly in awe of the *Commentaries* throughout his entire life. Marshall's father was one of the subscribers to Robert Bell's first American edition, buying it for his son's use as much as his own. The younger Marshall read the book with delight, his biographer tells us, "for this legal classic is the poetry of law, just as Pope [Marshall's previous favorite writer] is logic in poetry."<sup>119</sup> He read the book again while studying law under George Wythe at the College of William and Mary, and by the time he was twenty-seven he had read the volumes through four times.<sup>120</sup> Marshall's respect for Blackstone continued throughout his years at the bar and on the bench. It is probably too much to say, as Warden does, that Marshall's "opinions on law and government were in many respects but the echo of Blackstone,"<sup>121</sup> but his frequent citation of the *Commentaries* certainly betokens a strong influence. When Marshall reached for definitions, he chose Blackstone's;<sup>122</sup>

<sup>117</sup> Iredell's charge is reprinted in F. Wharton, *State Trials of the United States* 458, 478-79 (1849).

<sup>118</sup> John Marshall (1755-1835) served as a delegate to the Virginia House of Burgesses (1782-84, 87-91), as a member of the executive council (1782-95), as a delegate to the Virginia ratification convention (1788), as a U.S. Representative (1799-1800), and as the Secretary of State (1800-1801). His most distinguished years were, of course, spent as the Chief Justice of the United States Supreme Court (1801-35).

<sup>119</sup> A. Beveridge, *The Life of John Marshall* 56 (1919).

<sup>120</sup> Cullen, "New Light on John Marshall's Legal Education and Admission to the Bar," 16 *Am. J. Legal Hist.* 345, 347 (1972); 1 *The Papers of John Marshall* 39 n.5 (H. Johnson ed. 1974).

<sup>121</sup> Warden 328.

<sup>122</sup> E.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 347 (1827).

when referring to Blackstone, it was always with praise.<sup>123</sup> It is hard to escape the conclusion that Blackstone truly was "Marshall's great judicial collaborator."<sup>124</sup>

Other judges were not immune from this infectious admiration. Justice Joseph Story,<sup>125</sup> on the occasion of his inauguration as Dane Professor of Law at Harvard, praised the *Commentaries* profusely as "a work of such singular exactness and perspicacity, of such finished purity of style, and of such varied research, and learned disquisition, and constitutional accuracy, that, as a textbook, it probably stands unrivalled in the literature of any other language."<sup>126</sup> Justice Story subsequently imitated Blackstone's work with his own *Commentaries on the Constitution of the United States* in which he frequently quoted the earlier treatise.

Chancellor James Kent<sup>127</sup> of New York was another who was captivated by the *Commentaries*. In fact, Kent claimed that the *Commentaries* determined his career: "When the College [Yale] was broken up and dispersed in July 1779 by the British, I retired to a country village and finding Blackstone's *Commentaries* I read the fourth volume. Parts of the work struck my taste and the work inspired me at the age of sixteen with awe and I fondly determined to be a lawyer."<sup>128</sup> Kent, too, followed Blackstone's lead by publishing his law lectures in the form of *Commentaries on American Law*, which first appeared in 1826. In Lecture XXII of his *Commentaries* he refers to Blackstone,

who is justly placed at the head of all the modern writers who treat of the general elementary principles of the law. By the excellence of his arrangement, the variety of his learning, the justness of his taste, and the purity and elegance of his style, he communicated to those subjects which were harsh and forbidding in the pages of

<sup>123</sup> E.g., *Livingston v. Jefferson*, 15 Fed. Cas. 660, 664 (No. 8,411) (C.C.D. Va. 1811).

<sup>124</sup> R. Faulkner, *The Jurisprudence of John Marshall* 58 (1968).

<sup>125</sup> Joseph Story (1779-1845) was a state representative (1805-07, 1811), a U.S. Representative (1808-09), and an Associate Justice of the United States Supreme Court (1811-45).

<sup>126</sup> J. Story, "The Value and Importance of Legal Studies" in *Miscellaneous Writings of Joseph Story* 503, 547 (1852).

<sup>127</sup> Kent (1763-1847) was the first professor of law at Columbia College (1793-98). Kent also served as the New York master in Chancery (1796), as the Recorder of the City of New York (1797), as a judge of the New York Supreme Court (1798), and as Chancellor of New York (1814-1823).

<sup>128</sup> Letter from James Kent to Thomas Washington, October 6, 1828, reprinted in 2 *Am. L. School Rev.* 547, 548 (1902-11).

Coke, the attractions of a liberal science, and the embellishments of polite literature.<sup>129</sup>

Like Story, Kent followed in Blackstone's path, turning seventeenth century liberalism into eighteenth century conservatism and interpreting the Constitution in light of the common law.<sup>120</sup>

Blackstone had judicial critics as well as political ones, but interestingly the judicial criticism was unlearned. Justice Dudley of the New Hampshire Supreme Court is an example. It is said that he routinely charged juries: "It's our business to do justice between the parties; not by any quirks o' the law out of Coke or Blackstone—books that I never read and never will—but by common sense and common honesty between man and man."<sup>131</sup>

There seems to be a discrepancy between the few and generally perfunctory citations to the *Commentaries* in the reported cases and the impression the work obviously made on the very judges deciding those cases. However, there is a potential resolution to this discrepancy. It is certainly conceivable that the *Commentaries* so impressed the leading scholars of the period that they mastered it and made it their own in such a way as to make specific citation to it redundant. To put it another way, the *Commentaries* can be seen as largely responsible for the gradual reception of the common law in America. The reference here is not to just the English common law, but to that law as interpreted and described by Blackstone. In a sentence, the law which America took over from England was Blackstone's law. How that happened is the story of Blackstone's impact on legal education to which we now turn.

#### IV

Blackstone's purpose in writing the *Commentaries* was not to influence political or judicial decisions directly, but rather to educate in the common law of England the men who would later be called upon to make those decisions. Thus in the introduction, entitled "On the Study of the Law," he addressed himself to "our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation," not out of "abject flattery" or envy<sup>132</sup> but because those men were the ones called upon

iss 1 J. Kent, *Commentaries on American Law* 512 (2d ed. 1832).

<sup>130</sup> Cf. Waterman 657-58.

<sup>131</sup> "Law Versus Common Sense," 40 *Am. L. Rev.* 436, 437 (1906).

<sup>132</sup> Chroust, "Blackstone Revisited," 17 *U. Kansas City L. Rev.* 24, 26 (1948-49).

to be jurors, lay justices, legislators, and judges.<sup>133</sup> Like a modern law professor—or at least like the less public of that breed—Blackstone sought to improve society indirectly through the works of his students.

Blackstone was therefore primarily concerned with legal education, and his emphasis was two-fold. First, he insisted that the subject matter of legal education be devoted to the common law rather than the civil or canon law, if a choice must be made.<sup>134</sup> And second, he claimed that the study of law could best be undertaken in the context of the university rather than at home, at court, or in the law office. Blackstone saw the university setting as carrying with it several favorable implications for the study of law. Only at the university could the study of law be a *science* "which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in it's [*sic*] theory the noblest faculties of the soul, and exerts in it's [*sic*] practice the cardinal virtues of the heart."<sup>135</sup> Only at the university could the science of the law improve itself through self-analysis:

The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads, for improving it's [*sic*] method, retrenching it's [*sic*] superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system: a task, which those, who are deeply employed in business and the more active scenes of the profession, can hardly condescend to engage in 1.36

And only in the university could law study be "liberal," i.e., concerned with principles and first questions rather than mere details and procedure. Blackstone saw the lack of this last-mentioned point as the chief shortcoming of the current alternative to the university study of Law, the apprenticeship system:

Making therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attorneys and solicitors, will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost

<sup>133</sup> 1 *Commentaries* 7-12.

<sup>134</sup> 1 *Commentaries* 5.

<sup>135</sup> 1 *Commentaries* 27.

136 1 *Commentaries* 30.

his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.<sup>137</sup>

By university legal education Blackstone meant more than a few random professorships of common law. Soon after his appointment as Vinerian professor he conceived the idea of establishing a separate school of law and later attempted to give birth to that idea by converting New Inn Hall into a College of Law. The idea never came to fruition in England, however, but it did obtain acceptance many years later in the United States.

Because Blackstone's principal efforts during his career were in the field of legal education, it is most appropriate in gauging his impact in America to place greatest weight on his role in the development of our system of legal education. As will be seen, his influence was more direct and more powerful on American legal education than upon the American political system or the American courts. That influence took forms he did not intend and would not necessarily appreciate since it extended far beyond the walls of American universities to the text-writers, to the very apprenticeship system he disliked, and to the rude frontier villages he would have detested.

#### A. *Formal Education*

Once Blackstone had conquered academic prejudice and made the common law an accepted academic subject, it was not long before Americans followed his lead. Blackstone's influence took two forms: the early American lectureships on the common law were fashioned after his Vinerian chair, and most of the early lecturers were themselves greatly impressed by the *Commentaries*.

The first attempt to establish such a professorship occurred even before the Revolution. In 1774 Governor Tryon of New York granted land to King's College (now Columbia University) to establish a number of "Tryonian Professors," the first of which would teach English law, but the College never realized an income from the grant and never established the professorship.<sup>138</sup> In 1777 Yale's president, Ezra Stiles, drafted a plan for a professorship of law in that institution, but his proposal was not implemented for many years.<sup>139</sup>

<sup>137</sup> 1 *Commentaries* 32.

<sup>138</sup> A. Reed, *Training for the Public Profession of the Law* 114 (1921).

<sup>139</sup> 12 W. Holdsworth, *A History of English Law* 100 (1938).

Finally in 1779 Governor Thomas Jefferson of Virginia established the first American professorship of law at the College of William and Mary. Jefferson secured the appointment for his own law tutor, Chancellor George Wythe.<sup>140</sup> In light of Jefferson's later fears that the *Commentaries* were corrupting the American bar, it is ironic that his appointee immediately based his plan of instruction on that text, and doubly ironic that one of the students in that first class was Jefferson's Federalist nemesis, John Marshall.<sup>141</sup> It is known that Jefferson was aware of Wythe's reliance on the *Commentaries*<sup>142</sup> but, unfortunately, we cannot be certain what he thought about it.

The irony is compounded by the fact that Wythe's successor, St. George Tucker, not only used the same text as the basis for his lectures but published his own edition of the *Commentaries*, which, it is said, "fixed the Blackstone tradition in this country."<sup>143</sup> Tucker revealed the extent of his reliance on Blackstone in the preface to his edition. Speaking of himself in the third person, Tucker described his teaching methodology:

The method, therefore, which he proposed to himself to adopt, was to recur to *Blackstone's Commentaries* as a text, and occasionally to offer remarks upon such passages as he might conceive required illustration, either because the law had been confirmed, or changed, or repealed, by some constitutional or legislative act of the *Federal Government*, or of the commonwealth of *Virginia*. This method he was led to adopt, partly, from the utter impracticability of preparing a regular course of lectures, for the reasons before mentioned; and, partly, the exalted opinion he entertained of the *Commentaries* as a model of methodical elegance and legal perspicuity: a work in which the author has united the various talents of the philosopher, the

140 Chancellor Wythe (1726-1806) served as a member (1758-68) and clerk (1768-75) of the Virginia House of Burgesses, as Delegate to the Continental Congress (1775-77), and was a signer of the Declaration of Independence. He was Chancellor of Virginia from 1778 to 1801. Wythe also served as a delegate to the federal Constitutional Convention and to the Virginia ratification convention (1788).

<sup>141</sup> See Devitt, "William and Mary: America's First Law School," 2 *Wm. & Mary L. Rev.* 424 (1960).

<sup>142</sup> In June of 1784 Jefferson visited President Stiles of Yale, and Stiles noted in his diary: "Blackstone the Basis of Law Lect in Wm. & Mary Coll., Philosophy, Medicine and Law seem to be their object." 3 E. Stiles, *Literary Diary of Ezra Stiles* 124, 126 (F.B. Dexter ed. 1901).

<sup>143</sup> A. Reed, *Training for the Profession of the Law* 117 (1921). Tucker's edition was published in 1803. His son, Henry St. George Tucker (1780-1848), his grandson, John Randolph Tucker (1823-97), and his great-grandson, Henry St. George Tucker (1853-1932), carried on his tradition as professors of law at the University of Virginia, Washington and Lee, and George Washington University, respectively.



antiquarian, the historian, the jurist, the logician and the classic: and which has undergone so many editions in England, Ireland, and America, as to have found its way into the libraries of almost every gentleman whether of the profession, or otherwise; and from general acceptance, had become the *guide* of all those who proposed to make the law their study. By these means he proposed to avail himself not only of the Commentator's incomparable method, but of his information as an historian and antiquarian, his classical purity and precision as a scholar, and his authority as a lawyer; without danger either of loss, or depreciation by translating them into a different work; he was also encouraged to hope that by these means he might render that incomparable work a *safe*, as well as a delightful guide to those who may hereafter become students of law in this cornwealth.<sup>144</sup>

Nor was Jefferson more successful in later years in limiting the *Commentaries'* use by William and Mary students. An 1817 pamphlet published by the College stated that "Tucker's Blackstone is the textbook for the law class."<sup>145</sup>

The William and Mary professorship was unusual in its day. A more common form of legal education was the private law school run by a distinguished judge or practitioner, of which the most important was established by Judge Tapping Reeve at Litchfield, Connecticut in 1784. During its brief existence (it lasted only until 1833), it graduated many of the leading lawyers of the nineteenth century, including sixteen United States Senators, 50 United States Congressmen, 40 justices of higher state courts (including 8 chief justices), 2 justices of the United States Supreme Court, 10 governors, and 5 cabinet members.<sup>146</sup> Judge Reeve not only used the *Commentaries* as a text, but also structured his curriculum around the topics of instruction suggested by Blackstone.<sup>147</sup> Student notes from 1803 show that Reeve also followed Blackstone's methodology explaining the reasons for rules of law as well as the rules themselves and supporting them with case citations.<sup>148</sup> Another of the leading private law schools of the period was that run by Peter Van

<sup>144</sup> Tucker, "Editor's Preface" to W. Blackstone, *Commentaries on the English Law* vi (Tucker ed. 1803).

<sup>146</sup> "Officers, Statutes and Charter of the College of William and Mary," quoted in A. Sutherland, *The Law at Harvard* 27 (1967).

<sup>146</sup> A. Sutherland, *The Law at Harvard* 28 (1968).

<sup>147</sup> Stevens, "Two Cheers for 1870: The American Law School," in *Law in American History* 432 nn.31-32 (D. Fleming & B. Bailyn eds. 1971); A. Reed, *Training for the Public Profession of the Law* 454 (1921).

<sup>148</sup> A. Sutherland, *The Law at Harvard* 28 (1968); D. Boorstin, *The Mysterious Science of the Law* 4 (1958).

Schaack in his home at Kinderhook, New York from 1786 to 1826. When the first American edition of the *Commentaries* appeared in 1771, Van Schaack praised it as a brilliant compendium and later recommended it enthusiastically to his students. Like Tucker, he attempted in his own teaching to apply Blackstone's principles to the American setting.<sup>149</sup>

By the 1790's more colleges had established lectures in the common law. The most important of these were offered by two judges mentioned previously, James Wilson at the College of Philadelphia (which later became part of the University of Pennsylvania) in 1790 and James Kent at Columbia University from 1793 to 1798. Wilson's objective in offering his lectures almost paraphrases Blackstone: ". . . to furnish a rational and useful entertainment to gentlemen of all professions and in particular to assist in informing the legislator, the magistrate, and the lawyer." Like Tucker and Van Schaack, Wilson saw the need to restate Blackstone in American terms and to correct the anti-democratic tendencies he found in the English author.<sup>150</sup> Kent likewise addressed his lectures to "every Gentleman of Polite Education." He resigned his lectureship in 1798 to begin his career on the bench but returned to Columbia for a year and a half in 1824. From Kent's early and late lectures came his *Commentaries on American Law*, published in four volumes from 1826 to 1830 and written in the general spirit of Blackstone's *Commentaries*. Together with Blackstone's work, Kent's *Commentaries* nourished generations of American lawyers.<sup>151</sup>

But Blackstone's greatest legacy was not born until well into the nineteenth century. Long before then, in 1781, a loyalist refugee named Isaac Royall died in London, leaving property in Massachusetts to Harvard College to establish a professorship. This was the beginning of the Harvard Law School, but it was almost the beginning of the Medical School instead, since Royall's will spoke of "a Professor of Laws in said College or a Professor of Physic and Anatomy whichever the said Overseers and Corporation shall judge to be best for the benefit of said College."<sup>152</sup> Fortunately, for legal educa-

<sup>149</sup> M. Bloomfield, *American Lawyers in a Changing Society 1776-1876*, at 25 (1976).

<sup>190</sup> F. Aumann, *The Changing American Legal System: Some Selected Phases* 107 (1969).

<sup>151</sup> A. Reed, *Training for the Public Profession of the Law* 120-21 (1921); A. Sutherland, *The Law at Harvard* 30 (1968); E. Griswold, *Law and Lawyers in the United States* 39-40 (1965).

<sup>152</sup> Quoted in A. Sutherland, *The Law at Harvard* 38 (1968) (emphasis added),

don in this country the Harvard Corporation decided a professor in laws was more important than a professor in "physick or anatomy," but it was not until 1815 that the first Royall professor was appointed. That was Massachusetts Chief Justice Isaac Parker, and though his years at Harvard were not especially notable, he was soon followed at Harvard by Joseph Story, who served as Dane Professor of Law from 1829 to 1845. The Dane professorship exhibits several striking parallels to the Vinerian professorship. It was established by the bequest of a lawyer who had spent a number of years writing an abridgment of the law, its first occupant (Justice Story) was a distinguished scholar who wrote several legal treatises, and Story's inaugural lecture recommended "the study of the law to American citizens generally, as Blackstone recommended it to the English gentry." Story himself was aware of these similarities between his role as Dane Professor and Blackstone's as Vinerian Professor, and called attention to them in his inaugural lecture.<sup>153</sup> That Story was enamored of the *Commentaries* needs no elaboration. Suffice it to say Harvard retained the *Commentaries* as a text throughout this period.<sup>154</sup>

To the extent that there was formal legal education in the United States before 1829, Blackstone was its source as well as its text. But his influence spread as well to those who were informally taught, and this group formed the vast majority of the American bar until very recent times.

### B. Informal Education

Until the twentieth century most legal education took place outside of formal schools. The most common informal training was of course the apprenticeship system, under which a prospective lawyer would sign on to "read law" with an experienced practitioner. The quality of this education varied widely. Although some employers would spend a good portion of their time with their clerks and try to impose some semblance of a curriculum on them, many prac-

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whose discussion of the origins of the Harvard Law School I follow. Royall may have been influenced by Viner's bequest to Oxford or by the *Commentaries*, but there is no clear evidence on the point.

<sup>153</sup> J. Story, "Value and Importance of Legal Studies," in *Miscellaneous Writings of Joseph Story* 503, 547 (1852).

<sup>154</sup> Gawalt, "Massachusetts Legal Education in Transition, 1776-1840," *17 Am. J. Legal Hist.* 27, 47 (1973); E. Bauer, *Commentaries on the Constitution 1790-1860*, at 337 (1965).

tioners saw clerks as simply a form of cheap labor, suitable for copying documents and not much else. Peter Van Schaack took in a few clerks before he opened up his law school in New York, and trained them better because of his own unhappy clerkship. In 1769, he complained about his own experience:

Believe me, I know not above one or two [lawyers] in town that do tolerable justice to their clerks. For my part, how many hours have I hunted, how many books turned up for what three minutes of explanation from any tolerable lawyer would have made evident to me! It is vain to put a law book into the hands of a lad without explaining difficulties to him as he goes along.<sup>155</sup>

Publication of the *Commentaries* must have seemed a blessing to the clerks. At last a single work contained the total outline of the law, well organized and well written in addition. Most attorneys recognized its value as a student's text and recommended it to their clerks. Van Schaack did so as soon as the American edition was published,<sup>156</sup> and William Wirt<sup>157</sup> was still doing so fifty years later. In 1822, Wirt described the way he trained his clerks to a prospective law student:

The plan of study which I have used had depended on the time which the student proposes to devote to it. On every plan, however, Blackstone is the best introductory author as opening to the student all the original sources of his science, besides giving him a clear and comprehensive view of it's [sic] present state. In all studies, historical, political or any other, dependent for their perfection on the march of mind a synopsis like that of Blackstone is, of great value. . . . Blackstone, therefore, thoroughly understood (the best edition being Judge Tucker's to be read with his notes and appendixes) I direct the attention of students in the next place to the great sources from which all the laws of civilized countries are derived. . . .<sup>158</sup>

It is likely that the clerks thought as highly of the *Commentaries* as their masters. William Bradford, for one, wrote to James Madison in 1773 about his legal studies and commented that he was reading

<sup>155</sup> Letter from Peter Van Schaack to Henry Van Schaack, January 2, 1769, in H. Van Schaack, *The Life of Peter Van Schaack, LL.b.* 9 (1842).

<sup>156</sup> M. Bloomfield, *American Lawyers in a Changing Society 1778-1876*, at 25 (1976).

<sup>157</sup> William Wirt (1772-1834) was the United States Attorney General from 1817 to 1829. He was also the Anti-Masonic party candidate for President in 1832.

<sup>158</sup> Heaney, "Advice to a Law Student: A Letter of William Wirt in the Hampton L. Carson Collection of the Free Library of Philadelphia," 2 *Am. J. Legal Hist.* 256, 257 (1958).

the *Commentaries* "which I am pleased with and find but little of that disagreeable dryness I was taught to expect."<sup>159</sup>

A number of other future lawyers, particularly in the frontier states, read law on their own, without the guidance of an attorney. As should be clear, the *Commentaries* were a godsend to these, either to help them pass the bar examination in those states that had one, or to give them enough of the rudiments of the law to bring in the clients who would make on-the-job training possible. Such a course is inconceivable today, and the modern reader is certainly justified in doubting the competence of such self-taught barristers. Still they served a necessary function in times where there was often no alternative, and some of them—Abraham Lincoln comes to mind again—compared favorably with the graduates of the fledgling law schools.

The *Commentaries* played another role in a less obvious form of legal education, which we refer to today as "continuing." Although Blackstone wrote the *Commentaries* as an introductory text, what was basic for England often appeared on the frontier as advanced or at least comprehensive. That was particularly true with regard to the law since American lawyers in comparison with their English counterparts were, as Boorstin comments, "semi-lawyers, pseudo-lawyers, or mere smatterers."<sup>160</sup> There are many accounts of lawyers moving into newly-settled areas with just one or two legal works, usually including Blackstone's *Commentaries*. William Wirt, for example, is said to have started his law practice in Culpeper County, Virginia in the 1790's with no equipment other than "a rapid and indistinct enunciation, a considerable degree of shyness, a copy of Blackstone, two volumes of Don Quixote, and a copy of *Tristram Shandy*."<sup>161</sup> When William C. C. Claiborne, later governor of the Mississippi Territory, first left Richmond to go west he took with him only the Revised Statutes of Virginia and Blackstone's *Commentaries*.<sup>162</sup> The same was true elsewhere, for the work repeat-

<sup>159</sup> Letter from William Bradford to James Madison, November 5, 1773, 1 *The Papers of James Madison* 98 (W. Hutchinson & W. Rachal eds. 1962). Another clerk trained on Blackstone was Pennsylvania Judge Sharswood, who later put out his own edition of the work. G. Sharswood, "Family Memoranda," in the Hampton L. Carson Collection of the Free Library of Philadelphia, reprinted in 2 *Am. J. Legal Hist.* 259, 263 (1958).

<sup>160</sup> D. Boorstin, *The Mysterious Science of the Law* (1968).

<sup>161</sup> Heaney, "Advice to a Law Student: A Letter of William Wirt in the Hampton L. Carson Collection of the Free Library of Philadelphia," 2 *Am. J. Legal Hist.* 256 (1958).

<sup>162</sup> Williamson, "American Suffrage and Sir William Blackstone," 68 *Pol. Sci. Q.* 552, 555 (1953).

edly turns up in records of the earliest lawyers' libraries in the frontier areas.<sup>163</sup> Where the *Commentaries* themselves were not available, students of the new law schools at least had their notes with them as they moved West. "In this way Blackstone's work, copied in the handwriting of the American law student, was diffused throughout the West, and was to help provide a foundation of legal ideas for the American hinterland."<sup>164</sup> Sometimes there were no lawyers at all, and the local residents who acted in their stead still tried to pick up the rudiments of the law. John Adams provides an extreme example of a village tavern keeper:

In Kibby's Barr Room in a little Shelf within the Barr, I spied 2 Books. I asked what they were. He said every Man his own Lawyer, and Gilberts Law of Evidence. Upon this I asked some Questions of the People there, and they told me Kibby was a sort of Lawyer among them—that he pleaded some of their home cases before Justices and Arbitrators & etc.<sup>165</sup>

Adams was kind enough to recommend to Kibby that he add a copy of Blackstone to his library.

Consider what this westward movement of the *Commentaries* meant. Poorly prepared lawyers moved to unsettled areas and argued to lay judges out of the primary text of the most sophisticated legal system in the world. In the process those lawyers, of necessity, steeped themselves in the rules, history, and principles of that system. This is not to say that simple courts in backwoods Ohio or Kentucky functioned on as high a level as Westminster. To the contrary, there was probably more show than substance to this use of Blackstone and other legal authorities, at least in the early years. But, as Hamilton wryly notes, "at least it provided the trappings of ceremonial and circumstance necessary to affect simple matters with an air of mystery and allow to the attorney his professional strut before the laity."<sup>166</sup> The reason for this reliance on Blackstone was more important than mere ceremony, however. He gave to these partially educated lawyers as much of the law as they could absorb, and gave it to them in a simple yet attractive and above all highly utilitarian form.

There were side benefits to the community in this use of the

<sup>163</sup> See, e.g., Brown, "Frontier Justice: Wayne County 1796-1886," 16 *Am. J. Legal Hist.* 126, 145 (1972); Harris, "The Frontier Lawyer's Library: Southern Indiana, 1800-1850, as a Test Case," 16 *Am. J. Legal Hist.* 239, 247 (1972).

<sup>164</sup> D. Boorstin, *The Mysterious Science of the Law* 4 (1958).

<sup>165</sup> 2 *Diary and Autobiography of John Adams* 27 (H. Butterfield ed. 1961).

<sup>166</sup> Hamilton, Book Review, 39 *Colum. L. Rev.* 724, 738 (1939).

*Commentaries*. It introduced the lawyer and his audience to history, government, and rhetoric as well as law, and served as a text for statesmen as well as pettifoggers. It provided formal procedure for dispute resolution, the courtroom duel between hired advocates being much less harmful to the peace of the community than the main-street duel between hired guns. And finally, it provided the means by which the literate layman could "grasp the large outlines of his legal tradition," making Blackstone to American law "what Noah Webster's blue-back speller was to be to American literacy."<sup>167</sup> Professor Boorstin points up the humor of the situation:

One of the delightful ironies of American history is that a snobbish Tory barrister, who had polished his periods to suit the taste of young Oxford gentlemen, became the mentor of Abe Lincoln and thousands like him. By making legal ideas and legal jargon accessible in the backwoods, Blackstone did much to prepare selfmade men for leadership in the New World.<sup>168</sup>

While he was directly educating the first generation on the frontier, he was indirectly educating their descendents as well, for his influence on legal scholars caused them to embody his ideas in texts which would supplement and ultimately replace his own. Many, perhaps most, of the law books published in America before 1829 borrowed heavily from the *Commentaries*,<sup>169</sup> as did the handbooks written for non-lawyer officials,<sup>170</sup> and even those works lacking specific citation were frequently inspired by his pioneering work.<sup>171</sup>

Blackstone's influence on legal education appears all-pervasive: from universities to private schools to simple offices; from courts in Philadelphia to roving justices in the West; from students to lawyers and simple citizens, his book shaped the forms and content of the law of the nation.

## V

Summing up these varied strands of intellectual impact is immensely difficult, but one theme seems clear. Blackstone's influence

<sup>167</sup> D. Boorstin, *The Mysterious Science of the Law* 202 (1958).

<sup>168</sup> *Id.*

<sup>169</sup> Kent's and Story's works have already been mentioned. See also, e.g., T. Reeve, *The Law of Baron and Femme* (1816); J. Angell, *A Treatise on the Common Law in Relation to Water Courses* (1824).

<sup>170</sup> See, e.g., R. Dickinson, *A Digest of the Powers and Duties of Sheriffs, Coroners, Constables and Collectors of Taxes* (1810); J. Backus, *The Justice of the Peace* (1816).

<sup>171</sup> See Woodard, "The Limits of Legal Realism: An Historical Perspective," 54 *Va. L. Rev.* 689, 697 (1968).

on the new republic was more indirect and far more diffuse, but not any less significant, than is usually claimed. He did not bring about the Revolution or even contribute significantly to the Declaration of Independence. His contribution to the Constitution and the debates over its adoption was limited to defining a few concepts. Though frequently cited in the debates over the Sedition Act, the *Commentaries* did not aid in its passage or ease the fears of its opponents. Nor did he do much to determine the outcome of many of the early legal cases in the nation.

But on the other hand, Blackstone powerfully affected the men who drafted those laws and issued those opinions. Those educated in the law after 1765 must have felt followed by his name and his book, for references to Blackstone's *Commentaries* continually appeared during their law studies, during their years at the bar, and during service in the legislature. And those who reached the bench followed precedents written by Blackstone's disciples and applied the law after reading texts that were inspired by the *Commentaries*.

While the name of Blackstone is largely forgotten, his influence, embodied in the common law and in our system of legal education, remains as strong today as in any previous year. Indeed that influence is so firmly fixed that if Jefferson were alive today, he would not know where to begin should he still wish to eradicate it. But given the good that has resulted, even Mr. Jefferson would be inclined to reconcile himself to the "honied Mansfieldism" of Blackstone's *Commentaries*.

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## APPENDIX

### *Methodology*

The case survey discussed in Part III, was carried out in the following manner. Volumes 1 through 26 of the *United States Reports* (containing all Supreme Court decisions through 1828) and four randomly-selected volumes of *Federal Cases* (containing decisions of the lower federal courts) were initially examined. All decisions in these 30 volumes of one page or more in length were numbered consecutively, reaching a total of 1224. (The one page limitation was applied to eliminate summary orders which were unlikely to be supported by any authority.) A random sample of 10% of these cases was selected for further examination. Of the 122 sample cases, 8 or 6.56%, contained one or more citations to the *Commentaries*.

The same technique was applied to the state decisions. Decisions of the highest state courts before 1829 were contained in some 274 volumes after eliminating redundant reports. A random 10% sample of those volumes was drawn, and cases of one page or longer in those 27 volumes were numbered consecutively, reaching a total of 3487. Of that number, a further 10% sample was drawn. Of the 349 cases in the final sample, 23 or 6.59% contained citations to the *Commentaries*.

All random selections were made using tables from The Rand Corporation, *A Million Random Digits with 100,000 Normal Deviates* (1955).

One possible source of sample bias is the fact that several of the new states for a time prohibited court citation of English authorities (see C. Warren, *A History of the American Bar* 232-233 (1911)). The bias does not seem to be serious, however, because such prohibitions were uncommon, short-lived, and frequently ignored, as the following remarks of Pennsylvania Chief Justice Tilghman indicate:

But although our legislature has forbid the citing of [British cases after July 4, 1776] in our courts, yet it was never so unwise or so illiberal, as to wish to restrain the judges from deriving useful information from the opinions of learned foreigners of all nations. I have, therefore, had the curiosity to run through the English decisions on questions similar to that before us. . . .

*Lewer v. Commonwealth*, 15 Sergeant & Rawle 93, 95 (Pa. 1827).

The usefulness of the survey is limited by the fact that, the sample was not controlled for time or geography. This could be a prob-

lem since the latter years of the period and some states had a disproportionate percentage of the total available reports. On the other hand the final sample of state court cases contained a good cross-section in terms of both variables, and my own review of those cases noted no significant variances, with one minor exception. Louisiana, as the only civil law state, had few citations to common law authority of any sort. Accordingly, the results of the survey are probably not representative of the decisions in that state.