COMMENTARIES ON THE LAWS OF ENGLAND

BOOK I OF THE RIGHTS OF PERSONS

WILLIAM BLACKSTONE

With a General Editor's Introduction by Wilfrid Prest
With an Introduction, Notes, and Textual Apparatus by David Lemmings

OXFORD

THE OXFORD EDITION OF BLACKSTONE

General Editor
WILFRID PREST

COMMENTARIES ON THE LAWS OF ENGLAND

The Oxford Edition of Blackstone

General Editor
Wilfrid Prest

Editorial Board
Sir John Baker, Paul Brand, Joshua Getzler,
John Langbein, and Steven Sheppard

Book I: Of the Rights of Persons
Volume Editor: David Lemmings

Book II: Of the Rights of Things
Volume Editor: Simon Stern

Book III: Of Private Wrongs
Volume Editor: Thomas P. Gallanis

Book IV: Of Public Wrongs
Volume Editor: Ruth Paley

COMMENTARIES ON
THE LAWS OF ENGLAND

BOOK I: OF THE RIGHTS OF PERSONS

WILLIAM BLACKSTONE

WITH AN INTRODUCTION, NOTES,
AND TEXTUAL APPARATUS BY
DAVID LEMMINGS

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2016

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2015947706

ISBN 978–0–19876897–5 (hardback)
ISBN 978–0–19960099–1 (paperback)
ISBN 978–0–19960103–5 (hardback set)
ISBN 978–0–19960098–4 (paperback set)

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Contents

General Editor's Introduction

Why do we need a new edition of Blackstone's *Commentaries*, two and a half centuries after it first appeared? The *Commentaries on the Laws of England* has remained continuously in print from the 1760s to the present day. There are now nearly 200 recorded English, Irish, and American editions, to say nothing of abridgments, extracts, translations, and other works founded on the *Commentaries*.[1]

Yet Blackstone's original text—whether in the form of an eighteenth-century rare book, a nineteenth- or twentieth-century reprint heavily embellished with notes and citations to later cases and statutes, the more recent University of Chicago Press facsimile of the first (1765–9) edition, or some electronic version of the above—presents inevitable difficulties to the modern reader. The meticulously drafted sentences and paragraphs, with their occasional allusion, barb, or jest, are no real barrier in themselves; indeed, the power and elegance of its prose is one main reason for the *Commentaries*' remarkable longevity. (As Harper Lee's character Calpurnia puts it, 'Mr Blackstone wrote fine English.'[2]) But each of the four volumes also includes many words, phrases, and quotations in Latin and Law French, plus some occasional classical Greek and Anglo-Saxon. There are also numerous references to events, institutions, and personages in antiquity and British history of all eras (including the author's own), besides archaic, obsolete, or highly technical words and phrases. Careful reading, a good dictionary, and the internet can all help to some extent. Yet the translation of passages from languages other than English and brief explanatory notes or glosses on more or less obscure names and terms are no less essential steps towards making Blackstone accessible in the twenty-first century than modernization of the original hand-press typography. All this makes it easier to appreciate that Blackstone's *Commentaries* are something more than a dry legal text, of interest only to antiquarian-minded lawyers and legal historians. For their author was actually compiling a general account of the major economic, political, and social institutions of his time and place, as well as an introduction to its laws and legal structures.

No previous edition of the *Commentaries* has attempted to identify and incorporate the numerous changes Blackstone himself made to the successive re-issues of his original text, up to and including the ninth (and first posthumous) edition of 1783. While most differences from one impression to the next involve no more than minor variations in the spelling, order, or choice of words, there were also significant shifts of emphasis and meaning, reflecting changes in the law (whether by parliamentary legislation or decisions of the courts), the author's further thoughts, or some combination of the two. Finally, most readers may have little desire or need to immerse themselves in the large mass of scholarship that continues to accumulate around the *Commentaries*. But the substantial editorial introductions,

[1] See A. J. Laeuchli, *A Bibliographical Catalog of William Blackstone* (Buffalo NY, 2015). Books cited were published in London unless otherwise noted.

[2] H. Lee, *To Kill a Mocking Bird* (New York, 1960; 2002), 142.

which place each of Books I–IV within its historical and intellectual context, will aid understanding of what was distinctive about Blackstone's approach to his subject, in terms of the goals he set himself, the manner in which he sought to achieve those ends, and the extent to which he succeeded.

The introductions to each of the following volumes have been written by scholars with particular expertise in the subject matter of the book they have edited; this brief general introduction is concerned with the *Commentaries* as a whole. It outlines why and how Blackstone came to write his masterwork, sketching its immediate reception, further dissemination, and longer-term influence. An account of the conventions and practices adopted in preparing the present edition follows the volume editor's introduction.

Origins

Blackstone's *Commentaries* are sometimes represented as the handiwork of a failed barrister turned Oxford don, who took to expounding the law in immediate reaction to his lack of success at the bar.[3] But the story is both less straightforward and more interesting than that.

The author of the *Commentaries* was the third surviving son of a London silk merchant. His father died several months before William's birth on 10 July 1723, leaving an indebted luxury goods business to be run by his mother. She too died when her youngest son was just eleven years old and an academically outstanding scholarship student at London's prestigious Charterhouse School. With the support of a maternal uncle, William went on to win another scholarship to Oxford University's Pembroke College, at the then not unusually tender age of fifteen. A prized competitive fellowship at the much wealthier All Souls College followed, before he had turned twenty-one. While still a voracious reader and book collector, who had already written a treatise on architecture and would soon publish a verse essay in comparative theology, William had by then abandoned his original Arts course, transferring to the Faculty of Law and graduating with a BCL in 1744.

That degree was, of course, in civil or Roman law, since common law, the law of the land, had as yet no place on the curriculum of either English university. So when Blackstone decided to become a barrister, he turned for his professional qualification to one of London's four inns of court. He had already joined the Middle Temple in 1741, thereby beginning to acquire the requisite 'standing', or seniority, for call to the bar and admission to practice. But mere membership of an inn of court had long since ceased to entail any educational or residential obligations. It was not until January 1746 that William moved back to London, commencing his common law studies with a course of private reading: no formal tuition whatever was provided by his inn. Yet his call to the bar came less than a year later, in November 1746. The

[3] Cf. my own superficial characterization in *Albion Ascendant* (Oxford, 1998), 199; for a more considered and extensive account, see my *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford, 2008; 2012).

grossly inadequate state of English legal education, for the deficiencies of which the *Commentaries* sought to supply a remedy, was something Blackstone had experienced at first hand.

Little evidence survives of his first attempt to establish himself at the London bar. However, two facts stand out. First, as his brother-in-law and biographer James Clitherow observed, he 'made his Way very slowly', acquiring 'little Notice and little Practice'.[4] Second, All Souls College remained his principal residence—as an orphan, he had no other home. Indeed, by 1750, when he acquired, through mere lapse of time and cash payment, the higher degree of doctor of laws, he was spending around eight months of each year in Oxford, where he had major commitments both as a college administrator and in broader university politics. The second largely explains the first: because he found more interesting things to do in Oxford, Blackstone evidently spent too little time at the law courts or waiting in chambers for clients. Having previously expressed some distaste for 'wrangling courts', it is scarcely surprising that, by 1753, he found his 'Constitution, Inclinations, and a Thing called Principle' incompatible with 'the active Life of Westminster Hall'.[5] There were also intriguing prospects of academic promotion, whether to existing Oxford chairs in history and civil law, or to a new professorship in the common law endowed by the wealthy and ageing alumnus Charles Viner.

Lectures

In June 1753, just short of his thirtieth birthday, Dr Blackstone circulated around the university a printed prospectus advertising a new fee-paying course of 'Lectures on the Laws of England', intended not just for would-be lawyers, but 'such others also, as are desirous to be in some Degree acquainted with the Constitution and Polity of their own Country'.[6] Whatever his shortcomings as counsel at the bar (he was certainly more comfortable on paper than speaking *viva voce*) and despite a former pupil's later sneer at his 'formal, precise, and affected' delivery, Blackstone's radical project attracted 'a very crowded Class of young Men of the first families, Characters and Hopes'.[7] Next year's prospectus, after mentioning 'the favourable Reception' given to his 'first and imperfect Draught', went on to specify the lecturer's aims:

> to lay down a general and comprehensive Plan of the Laws of England; to deduce their History and Antiquities; to select and illustrate their Leading Rules and fundamental Principles; to explain their Reason and Utility; and to compare them frequently, with the Laws of Nature and of other Nations; without dwelling too minutely on the Niceties of Practice, or the more refined Distinctions of particular Cases.[8]

[4] 'Preface, Containing Memoirs of his Life', in [W. Blackstone], *Reports of Cases Determined in the Several Courts of Westminster-Hall, from 1746 to 1779*, ed. J. Clitherow (1781), i. p. vii.

[5] Prest, *Blackstone*, 58; Blackstone to Sir Roger Newdigate, 3 July 1753, in *The Letters of Sir William Blackstone 1744–1780*, ed. W. Prest (2006), 29.

[6] W. S. Holdsworth, *A History of English Law* (1938), xii. 745.

[7] Clitherow, p. x.

[8] Prest, *Blackstone*, 115.

In short, Blackstone undertook to show that the common law was not a dark impenetrable jumble of antiquated forms and obscure procedures intelligible only to practitioners, but a rational body of knowledge, whose underlying principles and structures reflected both the nation's history and universal norms. This ambitious agenda was addressed in a sequence of seventy lectures extending over the full academic year. As explained in an accompanying 'Syllabus',[9] these were to be 'divided into four distinct Parts' foreshadowing the four books of the *Commentaries*: 'Of the Rights of Persons' (public and constitutional law); 'Of the Rights of Property' (land and other property law); 'Of Private Wrongs' (civil remedies, courts, and procedure, including equity); and 'Of Public Wrongs' (criminal law). Indeed, the *Commentaries* as we have them today are essentially a published version of this lecture course and its sequels, as they were delivered, polished, and revised over the following decade.

In an extended note-form outline of the entire lecture course series, first published in 1756 as *An Analysis of the Laws of England*, Blackstone recounted his 'Endeavour, to mark out a Plan of the Laws of ENGLAND, so comprehensive, as that every Title might be reduced under some or other of its general Heads, which the Student might afterwards pursue to any Degree of Minuteness; and at the same time so contracted, that the Gentleman might with tolerable Application contemplate and understand the Whole'. That task had required him 'to adopt a Method in many respects totally new', even though he was by no means the first to attempt to 'reduc[e] our Laws to a System'. He thereby acknowledged an intellectual debt to earlier works by the common lawyer Sir Henry Finch and the civilian Thomas Wood, 'for their happy Progress in reducing the Elements of Law from their former Chaos to a regular methodical Science', and above all to Chief Justice Sir Matthew Hale's *Analysis of the Law*, published posthumously in 1713. Blackstone nevertheless maintained that 'compounding their several Schemes, to extract a new Method of his own' clearly distinguished his approach from the mere imitation of any predecessor.[10] This may be strictly correct. At the same time, in organizing his material Blackstone was also influenced by the basic structure of Justinian's *Institutes*, the elementary Roman law primer dating from the sixth century AD. That influence was channelled not only via his own reading of Roman law and through the medium of Hale's *Analysis*, but also possibly in the form of a scheme resembling the structure of the *Commentaries* devised by Dionysius Gothofredus (1549–1622), a Dutch civil lawyer and editor of Justinian.[11]

Twelve surviving sets of student notes taken at Blackstone's Oxford lectures between 1753–4 and 1766–7 have now been identified, although most do not provide complete coverage of a full academic year, while the earlier note-takers seem to have been more conscientious than those who had the advantage of the *Analysis*.[12]

[9] Bodl. MS G. A. Oxon. b. 111 (55b).

[10] *Analysis*, pp. v–viii. For Blackstone's distinctive preoccupation with method, structure and 'juridical logic', see J. M. Finnis, 'Blackstone's Theoretical Intentions', *Natural Law Forum*, 12 (1967), 163–83.

[11] J. W. Cairns, 'Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State', *Oxford Journal of Legal Studies,* 4 (1984), 318–60; A. Watson, 'The Structure of Blackstone's *Commentaries*', *Yale Law Journal*, 97 (1988), 795–821.

[12] Law Society, London, BLA/V61A (Thomas Bever, 1753–4); British Library, Add. MS 38838 (Thomas Bever, Parts 3–4, 1754); Somerset County Archive and Record Service, DD/WY 183 (Alexander Popham, Parts 1 & 3–4,

These widely scattered texts have yet to be analysed as a group, in comparison both with each other and the printed *Commentaries*. But it is clear that the basic four-part structure of the lecture course was translated into the four books of the *Commentaries*, notwithstanding minor changes in arrangement and coverage of the printed chapters when compared to the corresponding lectures. As Oxford lecturer, Blackstone also showed himself considerably more opinionated and outspoken than as author of the *Commentaries*, for reasons which may have no less to do with changing times and passing years than any sense that what could be said to a small undergraduate audience might be neither proper nor prudent to publish more widely.[13]

Like the lectures, the *Analysis*—which Blackstone described as 'exhibit[ing] the Order, and principal Divisions, of his Course ... a larger Syllabus, interspersed with a few Definitions and general Rules, to assist the Recollection'—proved highly successful, not least in commercial terms. After its first appearance in 1756, three more editions of 1,000 copies each appeared over the next three years, with another in 1762, a pirated Dublin edition in 1766, and the last in 1771. Besides its buoyant sales, the *Analysis* anticipated the *Commentaries* in another way, by including an appendix of sample legal documents to illustrate general points made in the lectures. From its 1758 third edition (the first to bear the author's name on the title page), the *Analysis* also incorporated Blackstone's first public lecture as Oxford's inaugural Vinerian Professor of the Laws of England. This 'Discourse on the Study of the Law', a powerful justification of English common law as an academic subject, worthy of study by would-be lawyers and laymen alike, reappears to introduce the first book of the *Commentaries*.

The success of the *Analysis* possibly tempted Blackstone to try his hand at a more specialized pedagogical publication. This brief pamphlet, a *Treatise on the Law of Descents in Fee Simple* (1759), was avowedly intended to help his Oxford pupils understand the rules governing the transfer of landed property. Of particular interest in the present context is its reprinting, seven years later, as chapters 14 and 15 of Book II of the *Commentaries*. Paid the dubious compliment of an unauthorized Dublin edition in 1760, and out of print two years after that, the *Treatise* further demonstrated the existence of a large market for law books from Dr Blackstone's pen. Meanwhile Lord Bute as royal tutor had invited him to present his lectures before the then Prince of Wales, later King George III (who received written copies when Blackstone declined to desert his Oxford classes). Far away on the other side of the Atlantic, word was spreading 'of a Professor at Oxford', said to have brought the law's 'mysterious business to some system'; his 'Inaugural Oration' and 'Analysis' were

1753–4); University College London, Add. MS 120 (John Wilkinson, 1757–8); Oxfordshire Record Office, JXXVI/a/1 (anonymous, Parts 1 and 4, incomplete, 1757–8); Harvard Law School MS 4175 (anonymous, *c.* 1761–2); Harvard Law School MS 4196, http://nrs.harvard.edu/urn-3:HLS.LIBR:11829405 (anonymous, pre-1766, Part 1, lectures 4–11 only); British Library, Additional MS 36093-36101 (John Edwards, 1761–2); All Souls College, Codrington Library, MS 300 (anonymous, 1761–2); Law Society, London, BLA/V61A (anonymous, 1761–2); Queen's College, Oxford, MS 401 (Jeremy Bentham, 1764–5, incomplete); Boston College Law School Library, KD 660 B47 (anonymous, 1765–6); Hampshire Record Office, 21 M57/D33 (anonymous, pre-1766, incomplete). Of the five sets identified by Holdsworth, one (then belonging to Professor Harold Temperley), cannot now be located.

[13] See I. Doolittle, *William Blackstone: A Biography* (Haslemere, 2001), 81–4.

both 'much admired', according to John Adams, future president of the United States of America, then a young Boston lawyer.[14]

By now Blackstone had resumed legal practice in London, this time with far more success. Greater financial security enabled him to marry the sister of a former All Souls colleague in 1761 and set up house away from Oxford, returning only to deliver his lectures, carefully scheduled not to clash with sessions of the London courts. While still interested in university affairs (not least the operation of the university's printing and publishing arm), he was increasingly absorbed by domestic life, the demands of clients, and parliamentary business, having been elected to the House of Commons through Bute's patronage shortly after his marriage. A slump in lecture fees, perhaps due in part to the widening circulation of transcripts taken from students' notes, with rumours that a version of these would shortly be published in Ireland (outside the reach of English copyright law), precipitated his decision to give a final lecture course in 1765–6 and meanwhile to prepare for the press the first volume of the *Commentaries on the Laws of England*.

Publication

A bibliophile since his student days, as a reforming 'delegate' (or board member) of Oxford's university printing house, Blackstone had also acquired an extensive knowledge of the book trade.[15] So it is hardly surprising that, like his previous *Analysis* and the *Treatise,* the first editions of the *Commentaries* were self-published. Printed for Blackstone at the university's Clarendon Press as 'author's books', while he bore the risk of financing his own publications, he also kept whatever profits resulted from their sales—which in this case were enormous. As they appeared over five years from November 1765, each of the four volumes of the *Commentaries* proved an immediate best-seller. The initial 1,500 copies of Book I were exhausted within three months; second and third editions of Books I and II came out even before the publication of Books III and IV, in 1768 and 1769 respectively. The fourth edition of 1770 was the last in which Blackstone held a direct financial interest, since he sold his copyright in 1772 to a consortium of bookseller-publishers for the huge sum of £2,000. This brought his proceeds from the *Commentaries* to a then truly stupendous total of £14,488, the equivalent of at least £1.3 million in twenty-first-century money values. The *Commentaries* went on to earn their new owners a further £7,000 over the next fifteen years, while Blackstone continued to correct and update further editions of his book (each now issued with a print run of 3,000 copies) until his death in February 1780.[16]

[14] *Letter Book of John Watts*, ed. D. C. Barck (New York, 1928), 13; *The Diary and Autobiography of John Adams*, ed. L. H. Butterfield (Cambridge MA, 1961), iii. 285.

[15] M. Kilburn, 'The Blackstone Reforms 1755–1780', in I. Gadd (ed.), *The History of Oxford University Press*. i: *Beginnings to 1780* (Oxford, 2013), 139–57.

[16] Cf. V. Feola, 'Law', in *History of Oxford University Press*, i. 467.

The ninth (and first posthumous) edition appeared three years later, under the editorship of the energetic elderly clergyman Dr Richard Burn, whose treatise on the office of justice of the peace had earlier been singled out for particular praise by Blackstone (see I. 343). Burn claimed to have 'preserve[d] the author's text intire', incorporating Blackstone's own amendments since the eighth (1778) edition 'from a corrected copy in his own handwriting' which could be 'seen at Mr Cadell's [the publisher's] office in the Strand', while confining himself to noting changes made by new statutes and 'some other few necessary observations' (see p. xxx below). Unfortunately, there is now no sure way to distinguish Burn's contributions from those of Blackstone, except where textual changes in the 1783 edition clearly refer to events which occurred only after Blackstone's lifetime.

Despite soaring sales and the plaudits of reviewers, all four books of the *Commentaries* provoked some immediate negative responses. Among the critics were Protestant Dissenters, Roman Catholics, Irish patriots, the young Edward Gibbon (although he also found much to praise), and most notably the still younger Jeremy Bentham, whose anonymously published *Fragment on Government* (1776) depicted his former Oxford lecturer as a 'bigotted or corrupt defender of the works of power', a confused apologist for England's current unreformed legal and political establishment.[17] Although Blackstone's parliamentary identification with the opponents of John Wilkes, followed by his own subsequent elevation to the judiciary in 1770, had seen him publicly branded a court toady and ministerial tool in sections of the London press, Bentham's attack may not have made much immediate impression. Over the long term, however, the caricature of 'everything-is-as-it-should-be' Blackstone proved enormously influential, especially in conjunction with Bentham's radical critique of all existing institutions against a utilitarian criterion, as against Blackstone's pragmatic tendency to endorse most (if by no means all) of what had supposedly stood the test of time.[18] The legal profession, much maligned by Bentham, provided an opposite line of attack; some practising common lawyers decried Blackstone's *Commentaries* as excessively abstract, general, and superficial, hence misleading to students and useless to practitioners.[19]

Yet demand for the *Commentaries* was little affected by these various caveats, cavils, and complaints. While law students of various kinds doubtless constituted the major market, abridged versions were prepared for use in schools, and the education of young ladies.[20] When sweeping legislative change in the 1830s made much of Blackstone's original text obsolete, a radical redrafting produced H. S. Stephen's *New Commentaries on the Laws of England (partly founded on Blackstone)*, first published under the Butterworth imprint in 1841, with twenty subsequent editions down to

[17] J. Bentham, *A Fragment on Government* (1766), ed. J. H. Burns and H. L. A. Hart (Cambridge, 1988), 9.

[18] Bentham, *Fragment*, 10, 18.

[19] M. Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford, 1991), 47–9.

[20] Cf. V. Wanostracht, *The British Constitution, or an Epitome of Blackstone's Commentaries on the Laws of England for the Use of Schools* (1823); [J. Eardley-Wilmot], *An Abridgement of Blackstone's Commentaries on the Laws of England, in a Series of Letters from a Father to his Daughter, chiefly intended for the Use and Advancement of Female Education* (1822, 1853, 1855); S. Warren, *Select Extracts from Blackstone's Commentaries, carefully adapted to the Use of Schools and Young Persons* (1836, 1837, 1855, 1856).

1950. The classic status of the *Commentaries* was definitively signalled by the advent in 1844 of the 'Comic Blackstones', gentle burlesques or parodies of the original text, first published as serials in the magazine *Punch*.

The influence of the *Commentaries* was still greater outside England, above all in North America. While Blackstone had no sympathy with the rebellious colonists of the fledgling United States, his personal politics were largely irrelevant to the general acceptance of his conception of the nature of law in general and the common law in particular, or its adaptation to American conditions. As in England, the *Commentaries* became the standard beginner's introduction to legal studies, and Blackstone was soon Americanized. St George Tucker's five-volume edition, *Blackstone's Commentaries: with Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia*, inaugurated this new genre in 1803. Even those who rejected Blackstone's anti-republican emphasis on parliamentary omnipotence, like James Wilson, Supreme Court justice and founding professor of law at the College of Philadelphia, had no difficulty in accepting the validity of Blackstone's exposition of English common law as founded on custom, divine law, and the law of nature, hence providing an entirely appropriate legal foundation for the incipient USA.[21]

During the course of the nineteenth century, numerous updated and Americanized editions, abridgments, and other student guides ensured the continued iconic status of the *Commentaries*. Although Blackstone no longer dominated legal education after the casebook method had spread from Harvard Law School in the 1870s, his work remains authoritative; indeed, in recent decades, the *Commentaries* has been cited in signed opinions of the US Supreme Court more often than at any time since the beginning of the nineteenth century.[22] Canada also saw several local editions of Blackstone 'adapted to the present state of the law in Ontario', while Blackstone became 'the first point of reference for basic principles of the British constitution and the criminal laws of England' in the mixed civil- and common-law jurisdiction of Quebec. As both legal authority and elementary law textbook, Blackstone's influence spread with the British imperial diaspora to Asia, Africa, and the South Pacific.[23]

It is important to recognize that this influence was not confined to lawyers and law students. Blackstone had fully understood that the viability of his original lecture plan depended on attracting a fee-paying audience from the entire Oxford student population, not just a small minority of would-be common lawyers. So while the word 'constitution' appears neither on the title page nor in the general index to the *Commentaries*, the institutions and practices of British government are a major concern of the work as a whole, as they had been in the Oxford lectures. Given Britain's economic prosperity and geopolitical standing, this was understandably a subject of great interest, both

[21] See E. H. Pearson, *Remaking Custom: Law and Identity in the Early American Republic* (Charlottesville VA, 2011), 2–5, 39–42, 186–7.

[22] J. Allen, 'Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone', in W. Prest (ed.), *Re-interpreting Blackstone's* Commentaries (Oxford, 2014), 218.

[23] See Prest (ed.), *Re-Interpreting Blackstone's* Commentaries: chapters by J. W. Cairns, M. Morin, and W. Prest, 73–124, 146–65.

in Blackstone's own lifetime and much later. It attracted the attention not only of the British themselves, both at home and abroad, but also of those who sought encouragement, inspiration, or instruction from the British example. Hence the multiple translations of Blackstone, especially Book I of the *Commentaries*, into French, German, Italian, Polish, and Russian, the latter commissioned by the self-consciously enlightened Empress Catherine II.[24] During the nineteenth and early twentieth century, liberal Indian intellectuals were as familiar with the works of Blackstone as those of Locke or Hume.[25] In Japan, Fukuzawa Yukichi, the foremost interpreter and popularizer of Western ideas and institutions during the Meiji restoration, translated the first chapter of Book I, 'Of the Absolute Rights of Individuals', a difficult task because it involved concepts 'for which there had been no idea even remotely equivalent in the old Confucian philosophy'.[26] So we should not think of Blackstone's *Commentaries* as no more or less than a law book, or a book for lawyers only. On the contrary, it has made a significant contribution to the global dissemination of modern constitutional ideas about human rights and the state's duty to its citizens.

More than a handful of people have worked over more than seven years to produce this new edition of an old book. Some might find such an expenditure of energy, time, and money hard to justify, at a time when 'research' is increasingly defined in terms of the acquisition of new knowledge. But the preservation, re-interpretation, and enhanced understanding of previously existing knowledge—'scholarship' as traditionally practised—is equally necessary and worthwhile. Modern readers, including those without a specialist interest in eighteenth-century history or law, can now more readily discover for themselves what Blackstone has to offer. Besides his classic exposition of the rules and structures of public and private law, there is a remarkable literary achievement, in the arrangement, ordering, and presentation of large masses of information with ease, clarity, and often considerable subtlety; for the *Commentaries* still 'live by their style'.[27] Second, a rich assortment of miscellaneous facts, opinions, and stories, from kings and queens, lords and vassals, clocks and trial by combat, the language of the law and the workings of the post office, all presented within a historical framework sensitive to elements of both change and continuity. Lastly, while some of Blackstone's attitudes and values trouble modern sensibilities, a similar sensitivity to the time and place in which the *Commentaries* were written will help readers better appreciate its author's modest, pragmatic, and humanistic approach to the conceptualization of society and social relations.

Wilfrid Prest

[24] M. Raeff, 'The Empress and the Vinerian Professor: Catherine II's Projects of Government Reforms and Blackstone's *Commentaries*', *Oxford Slavonic Papers*, n.s. 7 (1974), 18–42.

[25] C. A. Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (Cambridge, 2012), 184–6.

[26] C. Blacker, *The Japanese Enlightenment* (Cambridge, 1964), 104; A. Macfarlane, *Yukichi Fukuzawa and the Making of the Modern World* (Basingstoke, 2002), 40–1; A. M. Craig, *Civilization and Enlightenment: The Early Thought of Fukuzawa Yukichi* (Cambridge MA, 2009), 30–1, 68, 138.

[27] A. V. Dicey, 'Blackstone's Commentaries', *Cambridge Law Journal*, 4 (1932), 294.

Acknowledgements

A great many people have supported this project in many different ways. The original impetus to turn a vague notion into something more specific came from conversations with Ian Doolittle and John Langbein in 2007. Subsequent discussions culminated in a planning meeting, hosted appropriately enough by All Souls College, at which the basic elements of the new edition were agreed upon and an advisory committee instituted: thereafter its members have continued to provide invaluable expertise (bibliographic, legal, and linguistic), together with much appreciated moral support. Financial assistance, for which I am also exceedingly grateful, has come from the American Society for Legal History, the Australian Research Council (DP120101749), and the William Nelson Cromwell Foundation; particular thanks are due to Conrad Harper and John Gordan III for recognizing the importance of making this edition as widely available as possible. It would not have come to pass at all without the digital files generously supplied by Thompson Cengage, now Gale-Cengage Learning, and the technical wizardry of the 'Factotum' team at Monash University, particularly David Squire and Dmitri Nikulin, the latter now with Google Corporation.

Since work on this new edition has inevitably benefited from my previous research on Blackstone's life, the list of archivists, historians, librarians, and other scholars to whom thanks are due could easily extend over several pages. While hopeful that all those who have contributed in various ways will accept this token of appreciation, I must mention the staff of the Barr Smith Library and Sir John Salmond Law Library of the University of Adelaide (notably Cheryl Hoskin, Margaret Hosking, Peter Jacobs, and Margaret Priwer) and their counterparts at the library of Balliol College, Oxford, the Australian National Library, the Bodleian Library, the British Library, the Codrington Library (Gaye Morgan and Norma Aubertin-Potter), the Harvard Law School Library, the library of the Law Society, London, Somerset County Archive and Record Service, and the Lillian Goldman Law Library of Yale University (Mike Widener and the late Morris Cohen). Nor should Gillian Dooley's generous assistance with a copy of the eighth edition of the *Commentaries* from Flinders University's Library go unmentioned.

In a co-operative venture of this kind, much inevitably depends on one's colleagues and co-workers. The four volume editors have borne with fortitude my various requests and demands, even those which occasionally contradicted some that had come before. Perhaps it was fortunate that none of us quite realized the magnitude of the task we had set ourselves until we were too far along to turn back. Two other joint venturers, Alex Flach and Natasha Flemming of Oxford University Press, must also have wondered at several points whether and when the four volumes of this book would ever see the light; copy-editing by Malcolm Todd and proofreading by Ela Kotkowska, and the expert oversight of Caroline Hawley, were crucial in the final stages of production. That it has finally appeared is something else for which, once again, I thank Sabina, *sine qua non*.

Wilfrid Prest

Editor's Introduction to Book I

Aims and Claims, Organization and Achievement

In the sustained lecturing and publishing project that produced his *magnum opus* Blackstone had three broad aims. First, he intended to establish the political importance of studying English law for politely educated young gentlemen, including those laymen who were likely to become justices of the peace and members of parliament, as well as professional barristers and judges. Secondly, he hoped to demonstrate that English law could be explained as an intellectually respectable system rivalling Roman law, by contrast with the prevailing impression, that it was an uncouth, irrational, and merely practical assemblage of rules and remedies accumulated over the centuries.[1] Finally, and most importantly for this first volume, which mainly addressed what we would today call constitutional law, he wanted to demonstrate that Britain's arrangements for government represented the achievement of a unique historical process by which 'political or civil liberty is the very end and scope of the constitution' (I. 11).[2]

Statement of claims

The preface to Book I and the reprinted text of the inaugural lecture 'On the Study of the Law' (delivered in 1758 and subsequently published as a pamphlet) were intended to persuade the public of the importance of the Vinerian/Blackstonian project for studying English law as a 'liberal science' (I. 3). By this term Blackstone meant a form of study suitable for a free man—literally a gentleman.[3] For modern readers the phrase also connects with the growth of liberal philosophy around natural rights, and Book I of the *Commentaries* acknowledged debts to the works of John Locke, as well as the historical-sociological approach to English liberty of Montesquieu. So, besides making a claim for its intellectual importance in the tradition of natural law, there are early hints of classical republicanism: Blackstone suggests that gentlemen should participate in government because it is their public duty to administer the law; otherwise, as he explains later in Book I, the 'virtue' of the state might succumb to corruption (I. 40, 113, 215–16).[4] More specifically, acquisition of historical and philosophical knowledge about the laws of England was the responsibility of gentlemen, to enable them properly to discharge their obligations as JPs and MPs. He therefore signalled the potential of his complex programme for jurisprudential

[1] See D. Lemmings, 'Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth-Century England', *Law and History Review*, 16 (1998), 211–55; D. Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford, 2000), esp. ch. 4.

[2] After Montesquieu, *De l'Esprit des Lois* (1748).

[3] See *OED* under liberal: 'worthy of or suitable for a person of noble birth or superior social status'; and S. Johnson, *A Dictionary of the English Language* (1755), under liberal: 'Becoming a gentleman'.

[4] Classical republicanism emphasizes the importance of active participation by independent citizens. For the adaptation of this political theory in the Anglo-American context see J. G. A. Pocock, *The Machiavellian Moment: Florentine Political thought in the Atlantic Republican Tradition* (Princeton NJ, 1975).

education to serve as a device for liberal and gradualist law reform, exemplified here by the judicial work of Lord Mansfield, lord chief justice of England from 1756 to 1788, but also recommended to future legislators, as well as lawyers (I. 3; also III. 177–8, IV. 285).[5]

According to Blackstone's inaugural lecture, patriotic Englishmen should recognize the contemporary élite's relative ignorance of common law as a serious problem, because the survival of England's constitution of freedom was by no means assured into the future. Two threats were imminent. First, there was the folly of what is today called *hyperlexis*, or the tendency to resort to law-making as a solution for every problem.[6] The second and connected danger, only hinted at in the inaugural lecture, was of creeping constitutional corruption. This was clearly identified later in Book I with the expansion of 'servile influence' created by the progress of modern state finance and standing armies: officers and contractors who were constitutionally unfree dependents of government threatened to overcome the virtue of the electorate and the parliaments they chose (I. 215–16).

As epitomized by Oxford's new Vinerian foundation, the antidote to these contemporary constitutional and political maladies was to integrate the study of common law into the normal university curriculum, thereby educating gentlemen and lawyers in the patriotic tradition of English constitutional history, ensuring that they would develop the virtuous sentiments necessary to protect its libertarian spirit. Indeed, Blackstone's appeal to his auditors and readers was consistently imbued with the language of patriotic emotion. The sons of the gentry who attended Oxford and Cambridge were reminded by the Vinerian Professor that as potential future MPs they were 'the guardians of the English constitution ... bound ... to transmit that constitution and those laws to their posterity' (I. 12–13).[7] Future barristers and judges were likewise encouraged to undergo a preparatory course of university education because Oxford and Cambridge would inculcate 'affectionate loyalty to the king, a zeal for liberty and the constitution, a sense of real honour, and well grounded principles of religion', all of which were qualities 'of the heart' necessary to form 'a truly valuable English lawyer' (I. 29). By providing the funds which made the Vinerian chair possible, Charles Viner had certainly fulfilled his patriotic duty, and Blackstone concluded his inaugural lecture on a note of pathos, by drawing attention to his patron's heroic self-sacrifice, as 'worn out in the duties of his calling' Viner 'consecrated' his wealth to educating young men 'in the wisdom of our civil polity' (I. 31–2).

Organization and achievement

The inaugural lecture was mainly devoted to establishing the libertarian spirit of English law as the core of the nation's constitutional history, and to proving the

[5] Cf. P. O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone and the Rise of Judicial Activism* (Chicago, 2003), 115, 162–6.

[6] B. Manning, 'Hyperlexis: Our National Disease', *Northwestern Univ. Law Review*, 71 (1976–7), 767–82, esp. 772–3. Manning defines 'hyperlexis' as 'America's national disease—the pathological condition caused by an overactive law-making gland' (p. 767).

[7] See also I. 141; IV. 285.

necessity of legal-historical education for preserving the virtue of English government. Indeed, it is arguable that, following Montesquieu, historical exegesis of the continuous thread or spirit in the development of freedom under common law was Blackstone's guiding principle for all four books of the *Commentaries*, and a discontinuous narrative along those lines certainly informed the substance of Book I.[8] Thus, after the second introductory essay discussing the natural law foundations of municipal law, the origins and principal types of civil government, and the nature of sovereignty (Introduction section 2), the remainder of the Introduction (sections 3 and 4) and Chapters 1–18 aim to provide a clear historical exposition and justification of the arrangements for government (i.e. the rules governing the relations of king, parliament, and people) which applied in England and its dependencies, demonstrating their value in constituting a liberal, balanced polity which guaranteed the freedoms of English men and women. The *Commentaries*' bedrock reliance on a historical analysis of law revealing the evolving liberal spirit of the polity is substantially derived from the precedent of Montesquieu's *De l'Esprit des Lois*, but in accordance with Blackstone's *Analysis of the Laws of England* (1756), these subjects are considered under the general heading 'Of the Rights of Persons'.[9] Of course, it should also be noted that the main body of the text was written in the 1750s as the original Oxford lecture course, and it takes a broadly Tory perspective on the 'virtue and corruption' politics of George II's reign.[10]

Blackstone's project for instructing the élite in the patriotic virtues and historical rationality of the English constitution depended on the *Commentaries*' readability as a coherent and easily intelligible primer suitable for the sensibilities of liberally educated English gentlemen (see I. 9–10, 15, 24–5, 83). As he pointed out in his inaugural lecture, quoting Sir John Fortescue's advice to the Lancastrian heir to the throne in the fifteenth century, his task consisted in 'tracing out the originals and as it were the elements of the law', meaning an extended explication of its historical continuity and enduring principles, as they conduced to the liberties and happiness of the English people (I. 30).[11] This account promised to be both 'so comprehensive, as that every Title might be reduced under some or other of its general Heads' and also 'so contracted', that it would be easily digestible for the non-specialist, as well as those who intended to practise law.[12] How did it turn out?

Generally, Book I is very clearly written and methodically constructed according to the 'Rights of Persons' (i.e. legal rights and duties relating to individuals and institutions) scheme prefigured in Blackstone's *Analysis*. Derived as it was from Roman law, via the seventeenth-century jurist Sir Matthew Hale's prototypical *Analysis of the*

[8] Carrese, *Cloaking of Power*, 113–14.

[9] See Carrese, *Cloaking of Power*, 89–90, 123.

[10] R. Willman, 'The Politics of Blackstone's *Commentaries*: Whig or Tory?' in G. J. Schochet (ed.), *Empire and Revolutions* (Washington DC, 1993), 279–302. For the 'virtue and corruption' politics of the period, by which the ideal of the virtuous landed citizen was compared with the Whig government's allegedly corrupt dependence on patronage and commercial interests, see J. G. A. Pocock, *Virtue, Commerce and History* (Cambridge, 1985), esp. 48, 239–41.

[11] See J. Fortescue, *De Laudibus Legum Angliae* (1468–71, 1st printed edn, 1545–6).

[12] [Blackstone,] *Analysis*, p. iv.

Common Laws of England, and reflecting the traditional association between powers under law and personal status, this scheme allowed for the separate treatment of particular species of laws associated with the rights and duties of magistrates (ranging from the king to the overseers of the poor), and those relating to 'the people' (encompassing both the native-born and resident foreigners, the clergy, the military, and the navy). The sections on 'the people' also addressed the legal regulation of crucial private social relationships, such as those of master and servant, husband and wife, parent and child, and guardian and ward. Finally, there is additionally an interesting chapter outlining the law relating to corporations, and although this appears somewhat tacked on to the end of the book, its placement under 'persons' follows Hale's *Analysis*.[13]

It is interesting to note that in the original edition Blackstone took 235 pages to discuss the rights and privileges of the king and other magistrates and only 100 pages (pp. 235–302) to discuss legal duties and powers relating to ordinary people. Did this reflect his interests, or the relative proportions of English law? I would argue that it maps the narrative essence of his project. Although organized under a relatively abstract analytical framework and informed by a complex and dialectical synthesis of natural law precepts, common law tradition, and contemporary legal positivism, Book I of the *Commentaries* is much more than the sum of its parts. Indeed, by explicating the historical context of the English constitution Blackstone constructed an affecting epic story about liberty under law ultimately triumphing over 'unconstitutional oppressions'. These were usually associated with the royal prerogative and the absolutist style of monarchy favoured by Roman law, but occasionally they were also identified with the threat of a 'tyrannical' parliament (I. 103, 159). Admittedly in Book I the dramatic story of English liberty is generally expressed in pointillist style, but the flashes of patriotic colouring are relatively continuous through the important chapters relating to the rights of individuals, parliament, and the king; and of course the full epic is re-told in joined-up form by the final chapter of Book IV, under the heading 'Of the Rise, Progress and gradual Improvement of the Laws of England'.[14] Crucially, however, Blackstone was at pains to suggest the constitution of liberty that had been so painfully constructed was not guaranteed to be a permanent fixture. As Willman has pointed out, for Blackstone 'progress' included substantial regressions, as well as advances; and the dramatic power of the narrative is materially enhanced by hints and warnings that, without prudential human intervention, the constitutional achievements of the later seventeenth century might well be reversed by corrupt use of the modern powers associated with the king in parliament.[15]

Certainly, as promised at the start, the text of Book I provides a clear and elegant historical account of the origins and development of the constitution, as informed by

[13] [M. Hale,] *The Analysis of the Law: Being a Scheme, or Abstract, of the Several Titles and Partitions of the Law of England, Digested into Method* (1713), 2.

[14] See Johnson's definition of the epic, which 'relates some great event in the most affecting manner': K. Simonsuuri, *Homer's Original Genius: Eighteenth-century Notions of the Early Greek Epic (1688–1798)* (Cambridge, 1979), 27, 86. Extended and heroic warfare against an alien tribe was an essential feature: I. Watt, *The Rise of the Novel: Studies in Defoe, Richardson and Fielding* (1957), 242–3.

[15] Willman, 'Politics of Blackstone's *Commentaries*', 283–5; I. 97, 107, 117–18, 122–3, 159, 215–16.

medieval common law, tested against the laws of nature, and compared with theory and practice in civil law jurisdictions (I. 30). But it is also a deft exercise in appealing to 'rational emotion', or, adapting the language of political science, 'constitutional patriotism', as a means of persuading readers to identify affectively with the abiding virtues of the common law tradition.[16] It is true that the constitution is glossed in neo-Newtonian terms as a balanced 'machine of government', but as is appropriate for successful pedagogy, Blackstone's style consistently appeals to the 'feelings of humanity' he identifies as the driving force of freedom (I. 104, 159).[17] Thus affective inflections serve to humanize his more metaphysical comments about liberty informing the consistent, if contested, development of English law.[18] In accordance with Blackstone's political objectives, this epic human story is consistently related to the theme of maximizing civil liberty and resisting attempts at oppression from above (i.e. from the monarch), anarchy from below (exemplified by the radicalism and parliamentary tyranny of the 1640s and 1650s), and creeping corruption from within (identified with the contemporary influence of the government in parliament and in summary judicial proceedings). Again, the principal emphasis is on the uniquely English 'spirit of liberty' which Blackstone argued had animated the constitution over the centuries since Saxon times and, following the regression into 'slavery' of the Norman conquest, ultimately secured the personal rights and liberties of Englishmen, most visibly in landmark legislative settlements such as Magna Carta and its re-issues, the Petition of Right, the 1679 Habeas Corpus Act (described as 'that second *magna carta*, and stable bulwark of our liberties'), the Bill of Rights, and the Act of Settlement (I. 86–7, 91–2, 93).

Like every good epic, this story features heroes, exemplified here by the great lawmaker Alfred, and the 'English Justinian' Edward I; and also identifies villains, most obviously the Normans, the pre-Reformation clergy, and the actual or would-be autocrats Henry VIII and James II (I. 10, 22, 49–51, 79–80, 99, 134, 137–8, 145, 151, 159, 161, 174, 183–4, 234, 263).[19] But just as there are impersonal evils, such as Norman jurisprudence generally, with its Law French (stigmatized as 'a badge ... of conquest'), and the medieval laws relating to forests and game ('nobody would now wish to see them again revived'), the abiding hero of the *Commentaries* is English law itself (I. 45, 120, 186). The inspiring narrative of liberty under law is closely associated with the endurance and overriding legitimacy of common law, legitimate because it was based on popular consent, as proven 'by long and immemorial usage and ... universal reception throughout the kingdom', and found by the courts to be consistent with reason and justice (I. 48, 52–3, 55). Indeed the foundational status of rules derived from common law is frequently compared with the marginal role of law-making by statute, which is presented as potentially dangerous, in so far as it sometimes

[16] Cf. S. Stern, 'Blackstone's Legal Actors: The Passions of a Rational Jurist', in N. Johnson (ed.), *Impassioned Jurisprudence: Law, Literature and Emotion, 1760–1841* (Lewisberg PA, 2015), 1–19. See also 'Symposium: Constitutional Patriotism', *International Journal of Constitutional Law*, 6 (2008), 67–152.

[17] Cf. A. V. Dicey, 'Blackstone's Commentaries', *Cambridge Law Journal*, 4 (1932), 296.

[18] e.g. I. 86 (on the spirit of liberty and the legal repugnance of slave-owning), 97 (on the rights and liberties of Englishmen).

[19] Edward Gibbon noticed the heroic strain of *The Commentaries* too (see BL, Add. MS 34,412, f. 220: Edward Gibbon's abstract of Blackstone's *Commentaries*, Book I).

deviated from the guiding principles of the common law tradition (I. 50–1, 69). Thus, according to Blackstone, statutory breaches in common law were invariably regretted later, when 'the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation'.[20]

As A. V. Dicey remarked, by teaching law according to a 'historical method', the *Commentaries* risked losing students 'in the mazes of pedantic antiquarianism'.[21] Like other critics, moreover, Dicey recognized that a 'worshipper of the Common Law' who provided a patriotic history of English law as the story of liberty overcoming oppression was liable to magnify the positive features of contemporary law and the administration of justice at the expense of their flaws. Indeed, he commented that Blackstone's general veneration for the English constitution ultimately bordered on 'idolatry'.[22] This strain of criticism is normally associated with Jeremy Bentham, who had attended Blackstone's Oxford lectures as a student. Bentham famously condemned the *Commentaries* and blasted their author as 'everything-as-it-should-be Blackstone', thereby suggesting that he was indefatigably opposed to 'reformation' of the 'moral world', despite the contemporary fashion for 'discovery and improvement' in the 'natural world'.[23] In modern parlance, he accused Blackstone of being against enlightened reform, and serving as an apologist for the substantial defects in the law.[24] He also noted that a principal reason for this 'hydrophobia of innovation' was the author's belief in Christian scripture as a principal source of natural law: a limitation which meant that rather than assessing law and government by the principle of utility, he followed 'the beckoning of the priest', thereby tending towards a conservative doctrine of resistance to unjust laws which was more appropriate to Jesuitical traditions than an age of reason and Enlightenment.[25]

It is true that Blackstone took a conservative approach to current law. For example, in discussing the need for judicial decisions to follow precedents and customary rules he insisted generally on 'deference to former times' (I. 53). Unlike Bentham, he also seemed to support a restrictive interpretation of free speech, and implicitly endorsed the deployment of prosecutions for seditious libel.[26] The *Commentaries*' general recommendations for law reform were relatively modest: confined to 'improving its method, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system' (I. 27). Edward Gibbon had noticed Blackstone's 'pious' approach to contemporary law in his analysis of Book I, and the author himself later admitted that he

[20] I. 52–3. For a more general discussion of contemporary attitudes towards statutes see D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* (Cambridge, 1989).

[21] Dicey, 'Blackstone's Commentaries', 294, 296.

[22] Dicey, 'Blackstone's Commentaries', 289, 292–3.

[23] See *The Works of Jeremy Bentham*, ed. J. Bowring (Edinburgh, 1838–43), ii. 443 (*The Book of Fallacies*); also J. Bentham, *A Fragment on Government* (1776), in J. H. Burns and H. L. A. Hart (eds.), *A Comment on the Commentaries and A Fragment on Government*, (Oxford, 1977), 393, 400, 407; and *A Comment on the Commentaries*, in Burns and Hart (eds.), *A Comment on the Commentaries and A Fragment on Government*, 13. Cf. IV. 32.

[24] See J. H. Burns, 'Bentham and Blackstone: A Lifetime's Dialectic', in Schochet (ed.), *Empire and Revolutions*, 261–78.

[25] *Comment*, 346. See also *Fragment*, 482–3.

[26] See I. 154–5, 160; cf. *Fragment*, 485.

generally avoided pointing out modern 'deviations and corruptions, as length of time and a loose state of national morals have too great a tendency to produce'.[27] Indeed, he has been accused of deliberately perpetuating 'myths' about the clarity and stability of substantive law, and his account was generally formalist, rather than realistic, in the sense that his text represented the formal relations and structures of the common law courts and political institutions, rather than the ways they operated in practice.[28] In his criticisms of the *Commentaries* Bentham was selective and more than a little unfair, however; and it is clear that Blackstone was not opposed to careful law reform.[29] Rather, he was against the proliferation of legislation by MPs ignorant of common law who had lost sight of its precious freight of liberty, and he was clearly nervous about the growth in the power of government that had occurred under Walpole and the Pelhams (I. 107, 215–16).[30] Yet he favoured incremental liberal reform as an appropriate function of those learned in the law; noted that the common law was a compound of several nations' customs, 'thereby in all probability improving the texture and wisdom of the whole'; and cited Bacon's proposals for reform approvingly (I. 27, 48–9).[31]

Book I of the *Commentaries* also manifests progressive attitudes towards public policy that infer the desirability of reform in particular areas of government. For example, Blackstone admitted that the arrangements for the representation of the people in parliament were hardly 'perfect', and he complained particularly about the lax implementation of laws against electoral bribery; he also hinted that he favoured extension of the franchise (I. 113). He roundly condemned the post-1660 laws of settlement as 'inadequate to the purposes they are designed for', attributed their failure to deviation from the principles of local government that informed the common law from the time of Alfred, and blasted the 'miserable shifts and lame expedients' that contemporary statutes had introduced to deal with the unemployed poor (I. 234). Additionally, critical comments on penal transportation and the need for 'proportion' in punishment together anticipate his remarkably wholesale criticisms in Book IV about 'the multitude of sanguinary laws' in eighteenth-century England as 'a kind of quackery in government' (I. 93, 204; IV. 17). If Bentham had paid more attention to these and other critical passages, his characterization of Blackstone as an unreflecting apologist for the established order in constitutional and jurisprudential affairs would have been unsustainable. Indeed, the *Commentaries* included 'touches of Augustan satire' subtly designed to signal imperfections in the practice of government.[32]

Despite his overall critical stance, even Bentham admitted that the *Commentaries* improved on previous legal primers because it taught jurisprudence 'to speak the

[27] BL, Add. MS. 34,412, ff. 216–17; W. Holdsworth, *A History of English Law* (1922–72), xii. 728, 753; I. 338 ⟨55⟩ (8th edn, 1778).

[28] See J. H. Langbein, 'Blackstone on Judging', in W. Prest (ed.), *Blackstone and his Commentaries: Biography, Law, History* (Oxford, 2009), 65–77.

[29] Carrese, *Cloaking of Power*, 114.

[30] D. Lemmings, *Law and Government in England during the Long Eighteenth Century: From Consent to Command* (Basingstoke, 2011), ch. 5.

[31] Cf. Carrese, *Cloaking of Power*, esp. 140, 151.

[32] Willman, 'Politics of Blackstone's Commentaries', 279. See also I. 338 ⟨55⟩ (8th edn, 1778).

language of the Scholar and the Gentleman'. But for him Blackstone's mastery of literary style explained why such an unsatisfactory account of law and government had become so popular, despite its obvious flaws: it had simply been dressed up 'to advantage, from the toilette of classic erudition'.[33] This is an excessively superficial explanation for the *Commentaries*' success. As I have suggested, Blackstone cultivated the self-image of his readers as educated and virtuous citizens capable of discerning the relatively obscure but abiding merits of English legal history in its struggle for civil liberty. Certainly, by combining a veneer of the Enlightenment appetite for rationality and order with a more substantial emotional underlay of the English 'passion for justice', the *Commentaries* effectively educated its readers into an affective appreciation of common law which combined aesthetics and utility.[34] In this rhetorical achievement it was conspicuously a novelty, given the previously negative view of English legal literature as too severely practical and crabbed for polite readers. By contrast with Bentham's blunt reformist juggernaut, however, Blackstone's work should be regarded as a more subtle but deliberate political intervention which attempted to shape and ultimately improve the practice of government in eighteenth-century England.

Subject Matter: Themes and Perspectives

Key themes

Above all, Book I of the *Commentaries* is an explicitly *patriotic* history of civil liberty or rights under government. Thus the Introduction refers repeatedly to the struggles of 'our ancestors' under the yoke of the Normans to maintain the laws of Alfred and Edward the Confessor, and celebrates their ultimate endurance, despite 'the repeated attacks of the civil law'. These were struggles which had contributed substantially to the development of 'the free constitution of England', identified as a country where uniquely '[t]he idea and practice of... political or civil liberty flourish in their highest vigour' (I. 50, 86). In its appeal to patriotism the *Commentaries* was an *affective* performance about English liberties overcoming 'unconstitutional oppressions', as much as an exercise in reason. By identifying the positive merits of English law with the triumphs of English liberty, Blackstone was seeking to constitute an ideal of civilized Englishness while projecting his own love of this virtuous narrative history onto his readers. They were also enjoined to subscribe to an aesthetic appreciation of the common law's origins and historical development which appealed subtly to the essential symmetry and coherence espoused in contemporary valuations of classical culture among the landed élite.[35]

If the ideally constructed reader of the *Commentaries* was a constitutional patriot, how was this appeal related to contemporary currents of political patriotism? Patriot-

[33] Bentham, *Fragment on Government*, 413.
[34] See Stern, 'Blackstone's Legal Actors', 6.
[35] Stern, 'Blackstone's Legal Actors', 7–8.

ism was the essence of the opposition to Walpole and the Pelhams in the 1730s and 1740s. The ideology which informed it, clearly articulated by the Tory Lord Bolingbroke in his contributions to *The Craftsman* and his *Letter on the Spirit of Patriotism* (1736), rested on a distinction between honest and independent Englishmen who worked for the public good and self-interested politicians who were prepared to corrupt the institutions of government by exploiting the 'influence' (i.e. patronage) of the crown in parliament and elections. These ideas about virtue and corruption gave a central role to gentlemen of independent means who would act as the watchdogs of the constitution and thereby preserve the nation's liberties through their disinterested service in parliament and their control of the local institutions of government.[36] Indeed such elements of eighteenth-century classical republicanism can be traced in Book I of the *Commentaries*. Blackstone's definition of municipal law constructed men as citizens with a duty to 'contribute ... to the subsistence and peace of the society', and as we have seen, gentlemen had a particular obligation to participate in government and protect the constitution so as to preserve civil liberties (I. 37).[37] Blackstone's ideas about constitutional patriotism may also owe some debt to Bolingbroke's *Idea of a Patriot King* (1749). Like Bolingbroke, he looked to the king as a moderating influence on the power of modern government, and he praised George III in particular as a monarch who demonstrably respected 'the free constitution of Britain'.[38]

Bolingbroke was the principal ideologue of the country Tories, and Book I of the *Commentaries* espouses several policy positions characteristic of the mid-eighteenth-century Tory opposition. For example, Blackstone referred critically to England's 'ruinous' entanglements in medieval Europe caused by the defence of royal possessions there, and used this historical lesson to advocate a typically Tory foreign policy that prioritized the nation's 'maritime interests'. At the same time he pointedly marginalized Hanover and the king's other properties in Germany as 'entirely unconnected with the laws of England', implying that they deserved no attention from government (I. 76). Such a 'blue water' foreign policy was also recommended as patriotic and constitutional because it depended on the strength of the royal navy, 'the floating bulwark of the island' and a defence force from which, unlike a standing army, 'no danger can ever be apprehended to liberty' (I. 268). The maintenance of a professional army by successive Whig governments was represented in the *Commentaries* as a modern innovation which threatened the constitution directly and was characteristic of absolute monarchies governing by fear, rather than 'a land of liberty'.[39] Like his fellow Tories, Blackstone much preferred a citizen militia, as first established under King Alfred, and he cited Montesquieu approvingly for his insistence

[36] H. T. Dickinson, *Bolingbroke* (1970), ch. 13. See also I. Kramnick, *Bolingbroke and his Circle* (Cambridge MA, 1968).

[37] See also I. 12–13, 68–9, 113, 141.

[38] I. 216 (and editorial note). See also Willman, 'Politics of Blackstone's *Commentaries*', 302; D. Armitage, 'A Patriot for Whom? The Afterlives of Bolingbroke's Patriot King', *Journal of British Studies*, 36 (1997), 397–418.

[39] I. 216, 262. See also [W. Blackstone] to Sir Roger Newdigate, 27 Feb. 1758 in *Letters*, ed. Prest, 54.

that 'armies ... should consist of the people, and have the same spirit with the people' (I. 263, 266).[40]

Another characteristically 'country Tory' theme of Book I is its negative assessment of modern methods of state finance. Blackstone singled out the laws relating to the administration of the excise duties as 'hardly compatible with the temper of a free nation' because they gave powers of search and entry to the revenue officers. He also condemned summary trial proceedings (i.e. before Justices of the Peace, or commissioners of excise) for prosecution, a method which made no provision for juries (I. 205). In describing the creeping progression of the excise since its first introduction during the Civil War he again deployed the affective power of his constitutional patriotism, observing caustically that 'from its first original to the present time, its very name has been odious to the people of England' (I. 206). The *Commentaries* also criticized the system of state finance organized around public borrowing as a drag on 'the land, the trade, and the personal industry of individuals'. While Blackstone admitted that some measure of public debt financing was advantageous because it increased the availability of capital for investment, he stigmatized 'the indolent and idle creditor' who lived off investments in the funds, and complained about the inflated size of the national debt (I. 210–11). These views about parasitic moneyed men chimed perfectly with the virtue and corruption paradigm which constituted the political essence of the *Commentaries*; and Blackstone devoted several pages of Book I to a dire warning about the insidious 'influence' associated with the Whiggish financial and administrative revolution achieved since 1689. He concluded that, by the 1760s, after decades of this creeping corruption, the only bulwark standing against the 'corrupt and servile influence' associated with modern government was the patriotism of George III (I. 215–16).

A final Tory theme played upon in Book I of the *Commentaries* is the consistently High Church and anti-Catholic perspective on the history of Christianity and the clergy and the constitutional place of the Church of England. This prejudice is hardly surprising. Blackstone had been educated in the tradition of patriotic allegiance to the Church, had read deeply in Anglican controversial theology as an undergraduate at Oxford, and had close familial connections among the established clergy. His first published work was a poem which manifested a commitment to High Church opinions, and, like many of his Oxford contemporaries, for most of his life he was also intolerant of protestant dissent.[41] The *Commentaries*' historical account of the royal revenue dwelled on the 'papal usurpations over the clergy of this kingdom' and related how the pre-Reformation clergy were complicit in the 'criminal bigotry' by which the Pope claimed the first-fruits and tenths from the profits of ecclesiastical livings (I. 183–4). Moreover, on the very first page of his chapter on the laws and constitutions of the clergy Blackstone justified the reduction of clerical powers and privileges achieved by the protestant Reformation because of the 'ill use' to which the Catholic clergy had put them; and he seems to have regarded the surviving jurisdiction of the church courts as an offensive rem-

[40] See also S. Skinner, 'Blackstone's Support for the Militia', *American Journal of Legal History*, 44 (2000), 1–18.
[41] Prest, *Blackstone*, 25, 37–9, 57.

nant of the Norman Yoke (I. 242, 309; also III. ch. 5). On the other hand he noted that by the Bill of Rights and the Act of Union the king was bound to swear solemnly that he would maintain the established church, and he interpreted this oath as an essential restatement of the original contract of government between monarch and people (I. 70, 152–3). Indeed his insistence that the Church of England's legal establishment, including the penal laws prohibiting any dissent, formed a fundamental and unalterable part of the constitution ultimately proved offensive to the leaders of the English protestant dissenters (I. 70–1).[42]

In addition to these particular themes, the subject matter and viewpoints of Book I of the *Commentaries* were clearly influenced generally by near-contemporaneous events, especially the constitutional crises and civil wars of the seventeenth century, which continued to resonate with contemporaries. Blackstone's historical account of English law referred frequently to the travails of the Stuart constitution and treated them in a superficially even-handed way, which acknowledged the dangers of monarchical tyranny, as well as the descent into parliamentary anarchy. Thus he wrote approvingly of the abolition of the court of Star Chamber by the Long Parliament as a welcome step towards the independence of the judiciary, and referred critically to the levying of ship money and tonnage and poundage under Charles I. But while unconstitutional acts of government were identified as 'causes of those unhappy discontents, justifiable at first in too many instances', Blackstone went on to complain that they 'degenerated at last into causeless rebellion and murder' (I. 144, 173–4, 203). Indeed, while the *Commentaries* acknowledged obliquely the threat of tyranny in Charles I's tendency to govern without parliament, the text was much more explicit and its author's language became more affective when he turned to the abolition of monarchy in 1649 (I. 98, 103). Blackstone feared anarchy, which he saw as a consequence of constitutional breakdown, more than royal misgovernment; and this view derived partly from an impeccably Tory source, Clarendon's *History of the Rebellion* (I. 24, 41).[43] For Blackstone, then, seventeenth-century English history taught clear constitutional lessons; and correctly interpreting the settlement of the constitution under the later Stuarts was crucial to the *Commentaries*' didactic purpose.

Positive morals and injunctions

The most important moral to be derived from Blackstone's treatment of the history of English law in Book I of the *Commentaries* is that England was uniquely fortunate in its system of government because it promoted liberty under what today would be called the rule of law. This is apparent from his unexpected emphasis on the legislative achievements of Charles II—not a monarch normally celebrated for achieving the 'perfection of our public law' (IV. 283). One of the legislative reforms Blackstone

[42] J. Priestley, *Remarks on Some Passages in the Fourth Volume of Dr. Blackstone's Commentaries on the Laws of England, Relating to the Dissenters* (1769), 4–5; Prest, *Blackstone*, 247–50.

[43] R. Willman, 'Blackstone and the "Theoretical Perfection" of English Law in the Reign of Charles II', *Historical Journal*, 26 (1983), 49, and 'Politics of Blackstone's *Commentaries*', 294; Prest, *Blackstone*, 170. See also I. 103, 136, 264.

consistently singled out for finally restoring the balance between liberty and the prerogative was the 1679 Habeas Corpus Act (I. 87, 92, 93). As previously mentioned, in Book I he described this statute as 'that second *magna carta*', and later explained that while the Great Charter had declared that no man should be imprisoned unless according to law, the act of Charles II established the legal process which mandated an appearance in court (IV. 283). So here was the key to freedom under the constitution: just as the abolition of feudal tenures (in 1660) secured the right to property, so the Habeas Corpus Act protected rights to life and liberty of person, by interposing the law between the subject and the arbitrary pleasure of the crown (I. 90–1).[44]

For Blackstone, therefore, these provisions restored the original contract, because they fulfilled the promise, anciently embodied in the coronation oath, whereby the subject submitted to government in return for protection, on condition that the king's power was limited by law (I. 151–3). As demonstrated throughout the *Commentaries* more generally, the 'perfection' of government was constitutional government by consent, according to common law tradition, explicitly distinguished from 'the principle of despotic power' enshrined in Roman law (I. 38–9, 95, 151–5; II. 32–3; IV. 5). Emphatically, under the English constitution, the king was not the 'original' of justice, but merely its instrument or 'distributor', since its origins were derived from the social compact (I. 171–2). Here again, the *Commentaries* aimed to encourage, and actively to shape, a distinctive love of law as a characteristic feature of English patriotism.[45]

In Blackstone's quasi-republican formulation the rule of law was government by consent because animated by active popular participation. Although the language of the *Commentaries* frequently seems to ascribe agency to 'the law', this is simply a convenient figure of speech, for its author was passionate about popular legalism.[46] Indeed, while he described laws as commands 'prescribed by the supreme power in a state', it is important to emphasize his positive valuation of 'the feelings of humanity' which—as his narrative history showed—had continuously informed 'the vigour of our free constitution' (I. 36–7, 86, 159). He recognized that affective participation also operated beneficially at the more quotidian level of the administration of justice, especially among the propertied jurymen, participants in a unique legal institution lauded elsewhere in the *Commentaries* as 'the glory of English law'. Trial by jury is singled out as 'the most transcendent privilege which any subject can enjoy' (III. 249–50). Again, however, Blackstone's positive rendering of popular participation in the constitution was consciously idealistic; he acknowledged with regret that jurors were likely to be heavily influenced by judges, and he knew very well there was plenty of room for judicial discretion in interpreting the law (I. 12).[47] In the aggregate, as embodied by the English flesh and blood which formed it, Blackstone's rule of law was 'tender' as well as commanding (I. 97, 161, 168, 284). But in individual cases the

[44] Willman, 'Theoretical Perfection', esp. 39–41.

[45] Cf. Stern, 'Blackstone's Legal Actors'.

[46] Cf. P. Halliday, 'Blackstone's King', in W. Prest (ed.), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Oxford, 2014), 12–13.

[47] Langbein, 'Blackstone on Judging', 66–7, 69–71.

administration of justice was a complex business of human relations, and as his introductory lecture insisted, outcomes depended on educating jurors so that they knew what they were doing (I. 12).

Classical republicanism taught that participation in government should be limited to men of independent means, however, and although Blackstone cautiously recommended extension of the parliamentary franchise, the *Commentaries* was generally pessimistic about decision-making by 'the multitude' (I. 113; III. 250). Book I supported the exclusion from the parliamentary franchise of such people 'as can have no will of their own' (because of their poverty, which was supposed to render them vulnerable to corruption) and complained wearily about the persistent influence of bribery and corruption in elections (I. 113, 117–18, 218). Moreover, since under these circumstances human nature did not guarantee rational outcomes, hereditary succession to the crown was essential if the repeated descents into 'bloodshed and misery' typical of elective monarchies were to be avoided. Indeed, Blackstone fulminated against the radical assertion, made at the 'infamous and unparalleled' trial of Charles I, that the English crown had ever been elective (I. 124–6). This issue was so important that he spent more than two-thirds of his substantial chapter on the king and his title in 'a short historical view' of the succession from early Saxon times until the accession of the Hanoverians, thereby proving that the crown was hereditary, although the line of succession might be altered, with full constitutional propriety, by act of parliament (I. 128–41).

Finally, and in accordance with this extended diatribe about the dangers of allowing 'the democratical part of our constitution' to overbalance the other parts, Blackstone's interpretation of what had happened in 1688–9 was calculated to obviate the radical threat posed by the constitutional implications of Lockean contract theory (I. 112). The reader was prepared for this conservative pragmatism in the Introduction to Book I, where Blackstone warned that 'Mr. Locke ... perhaps carries his theory too far' by proposing that, in the event of a constitutional crisis, sovereignty reverted to the people; for this would amount to a 'state of anarchy' with unknown outcomes (I. 42). He had already written scathingly about the Lockean notion of the original contract as a conscious accord between people in the state of nature to establish a system of government (I. 38). In fact, there was no historical state of nature. Rather, men had always lived in societies, and the original social contract was simply the tacit fundamental agreement that underwrote every state: individual people expected protection from the community, and in return submitted to its laws (I. 38–9).[48] Thus, when it came to his historical exegesis of English monarchy and the dilemma of what to do in 1688, 'the principles of Mr. Locke' were quite consistently rejected as inappropriate, since they tended towards an interpretation that allowed for 'a total dissolution of the government' (I. 138). On the contrary, given the real danger in 1688–9 that the accumulated benefits of the rule of law might be lost, the grandees of the Convention Parliament had acted sensibly and avoided a lapse of government by re-establishing the ancient constitution with a restatement of the original contract in the form of the

[48] Willman, 'Theoretical Perfection', 55–6.

Declaration of Rights (I. 151–3).[49] Thus in the *Commentaries* resistance to the sovereign was justified by the threat of popular anarchy, not by perceptions of misgovernment. For Blackstone the implications of this crisis were clear. The subject had no right under the constitution to determine the limits of obedience: indeed, the subject's right of resistance was a 'latent' right, by definition extra-legal, and it was best to avoid speculation as to the circumstances when it might be exercised (I. 138, 159, 163).[50]

Problems?

There are some apparently unresolved tensions in the *Commentaries*' substantive treatment of the constitution, especially in regard to its reconciliation of political theory with historical practice. For example, while frequently critical of legislation as incoherent and potentially oppressive, Blackstone nevertheless insisted on an absolutist doctrine of sovereignty, identifying parliament as the supreme lawmaker in the land. Indeed, it was in parliament that he located that 'supreme, irresistible, absolute, uncontrolled authority', which he believed essential for every state: he characterized legislation unequivocally as an 'absolute despotic power' (I. 39, 107).[51] Moreover, anticipating Burke, Blackstone recognized the independence of MPs from their constituents. They were not mere deputies, since their ultimate duty was to advance the public interest, rather than to represent their local constituencies; so they were not obliged to consult with, much less be directed by, their electors (I. 106).[52] Given his doubts about the practical application of legislation and the competence of legislators, why did he set their power so high?

In taking such a strong line on the power of parliament, Blackstone's understanding of recent history seems to have made him a realist: he understood that by the mid-eighteenth century, the king-in-parliament Leviathan was effectively absolute.[53] But it was fundamental to Blackstone's didactic purpose that readers of the *Commentaries*' account of England's travails in the seventeenth century and the subsequent rise of parliament's legislative supremacy should understand that parliamentary power was potentially subversive of liberty. Indeed, as suggested above, the Vinerian/Blackstonian project for accessible legal education was designed to promote legal literacy among the class of Englishmen who supplied MPs and peers; for if this was achieved, future legislation would surely conform to the common law tradition of incremental improvement.[54] Thus the *Commentaries* and the lectures that preceded them may be regarded as a practical exercise in classical republicanism, by which free-born Englishmen were encouraged to participate in government according to law.

[49] For the ancient constitution see J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (rev. edn, Cambridge, 1987).

[50] Willman, 'Theoretical Perfection', 57–9.

[51] See also I. 66–7, 134.

[52] See Edmund Burke, 'Speech to the Electors of Bristol' (3 November 1774), in *The Writings and Speeches of Edmund Burke*, ed. P. L. Langford (Oxford, 1981–2000), iii. 68–70.

[53] See Lemmings, *Law and Government*, 128. Also e.g. I. 132, 136–7.

[54] Lieberman, *Province of Legislation*, ch. 2; Lemmings, 'Blackstone and Law Reform by Education'.

So was Blackstone merely a historical pragmatist who justified the eighteenth-century constitution by its provenance? Such criticism threatens to render the political theory of Book I no more than intellectual embellishment designed to make the *Commentaries* palatable to readers with a taste for enlightened philosophy. Certainly many scholars have identified contradictions between Blackstone's treatment of individual rights under natural law and his historical account of English common law.[55] The *Commentaries* were intellectually ambitious in seeking to follow an institutional framework by relating the substance of English law to the law of nature; but the ultimate price of this classical model was the difficult task of deriving common law rules from natural jurisprudence.[56] The result, as Lieberman has shown, was an ingenious, if only partly satisfactory, dialectical compromise, which radically limited the scope and practical application of natural jurisprudence. In Blackstone's formulation of legal evolution, rather than natural law being a positive source of rules, it serves as a mere judicial check; customs were accepted as common law only if they were found by the courts to conform to natural 'reason' and justice; and the imperative of natural law is interpreted broadly as the pursuit of happiness (I. 34–5, 52–3). Accordingly, the province of law wholly determined by natural law precepts dealing with natural rights and duties was effectively minimal, as compared with the positive duties and 'things indifferent' which informed the bulk of municipal law (I. 43, 44–5, 87–95).[57] Thus, while it provided a veneer of intellectual respectability, 'Blackstone's natural law ... soared high above the detail of law at ground level, without explaining'.[58] So it could be said that Blackstone's attempted harmonization of natural law with English law was an aesthetic and affective—or even poetic—project, rather than a genuine attempt at deductive reasoning.[59]

It is arguable, however, that for Blackstone natural law operated as a guiding principle that informed incremental reform of common law.[60] Certainly, as a Christian, Blackstone took natural law as fundamental: he fully understood that by no means all English law could be reconciled with natural precepts, and he was not at all diffident about drawing attention to the areas where it was glaringly repugnant to natural law. So laws imposing the death penalty for mere property offences were morally illegitimate and fundamentally 'unlawful' in this respect because they took life 'for slight offences, or such as are merely positive', which were not transgressions against natural law.[61] The 'sanguinary' nature of England's criminal code was therefore evidence of the law's natural injustice, as well as exemplifying the practical weaknesses in crude parliamentary law-making that the Vinerian/Blackstonian lecturing and publishing project was designed to inhibit. The moral consequences were clear: in a

[55] See J. Finnis, *Natural Law and Natural Rights* (Oxford, 2nd edn, 2011), 50, 364–5; Finnis, 'Blackstone's Theoretical Intentions', *Natural Law Forum*, 12 (1967), 179–82.

[56] M. Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford, 1991), 19–26. See also J. W. Cairns, 'Blackstone', 318–60.

[57] Lieberman, *Province of Legislation*, 44–6.

[58] Lobban, *Common Law*, 43.

[59] Cf. Halliday, 'Blackstone's King'.

[60] Carrese, *Cloaking of Power*, 174–5.

[61] IV. 5–7, 11; also Willman, 'Politics of Blackstone's *Commentaries*', 298–9.

chilling warning, Blackstone declared that legislators who exceeded their authority from God by imposing capital sentences for minor offences risked incurring '[t]he guilt of blood' (IV. 7).[62]

Perhaps more difficult to understand, at least for modern critics, were Blackstone's complex and somewhat unsatisfying discussions about the separation of powers.[63] Some ambiguity should be expected in this case because, like Montesquieu, he referred to the 'powers' of government in two quite different ways, as institutions or elements, and as functions.[64] Thus he distinguished concretely the three orders of king, lords, and commons, representing different social 'interests', and associated them with three different species of government (I. 40–1). But he also referred to the primary distinction between the legislative and executive *functions* of government, meaning the powers of making and enforcing laws (I. 98). And ultimately he identified a third, 'distinct and separate' judicial power (I. 173).[65] It is important to understand that while in England the *elements* of government were beneficially intermixed, for Blackstone they blended in a way that nevertheless promoted the Montesquieuan ideal of separating its *functions*.

Certainly, it was vital that the legislature should maintain equilibrium between the three orders of society: king, peers, and commoners. As we have seen, the *Commentaries* explicitly maintained a high doctrine of sovereignty in quasi-Hobbesian terms, but Blackstone argued that by investing the supreme power in the 'mixed' legislature of king in parliament, the constitution represented the virtues and balanced the social interests of monarchy, aristocracy, and democracy (I. 40–1).[66] Indeed, he insisted that to avoid tyranny by crown or parliament, the executive must be a 'branch' of the legislature (I. 103). Thus in the English context liberty was preserved because neither crown nor parliament could make law and administer it too: parliament needed royal concurrence to legislate, and only the king and his ministers could apply acts of parliament, law which had previously been passed by the lords and commons. Indeed, the interpenetration of king and parliament had to be partial, for just as complete separation would result in destructive antagonism, so fully combining the powers of legislation and administration would overcome the parliament's jealousy about entrusting too much power to the executive, tending to acts subversive of freedom and justice, as had occurred after 1649 (I. 98, 103–4).[67]

Paradoxically, therefore, according to the *Commentaries*, the constitution's blending of institutions representing the orders of society promoted the separation of its powers and promoted liberty. As Blackstone hinted at the start of his discussion about parliament, this unexpected outcome is best explained by considering the 'judicial' power (I. 98). Later in Book I, when reviewing the king's prerogative, he insisted that it would be an 'absurdity' for the king to act as a judge in criminal

[62] For blood guilt, see P. Crawford, 'Charles Stuart, that Man of Blood', *Journal of British Studies*, 16 (1997), esp. 42–4.

[63] For Bentham's criticism see *Fragment on Government*, 464.

[64] Carrese, *Cloaking of Power*, 57.

[65] Cf. Carrese, *Cloaking of Power*, 25.

[66] Willman, 'Theoretical Perfection', 44, 48.

[67] Cf. Halliday, 'Blackstone's King', 179–81.

proceedings, since prosecutions were carried on in his name; and he emphatically applauded the growth of the English judiciary's formal independence from the crown, in terms of their security of tenure (I. 172–3). Referring to the oppressive decisions of the court of Star Chamber, Blackstone maintained 'nothing ... is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state' (I. 173). Taken in the context of contemporary judicial politics, this might be read as a Tory warning against the extensive use of legal patronage by the Whig governments to manage parliament and the judiciary.[68] Alternatively, however, the gradual emergence of the judges in Book I of the *Commentaries* as a 'grand depositary of the fundamental laws of the kingdom' may be interpreted as an appreciation of the judiciary as a separate equitable power in the constitution: a moderating influence on the executive and legislature which arguably prefigured the development of judicial review in the United States constitution (I. 52, 172; note that 'depositary' is rendered plural by the eighth edition).[69]

Blackstone only travelled a limited distance towards the modern constitutional theory of the separation of powers, however.[70] The *Commentaries* did not formally articulate a doctrine of judicial review, and a further explanation for the book's theoretical under-development in this area lies in an appreciation of the author's somewhat parochial pragmatism. For although overtly derived from Montesquieu, Blackstone's prescription for avoiding constitutional breakdown via checks and balances was also grounded in his conservative appreciation of recent British history, wherein he identified the causes of civil war in uncertainty about the distribution of powers between the king and parliament, legal doubts which also involved disputes about the constitutional accountability of the judiciary and the army (I. 103–4, 173–4, 215–16, 264, 265–6). His version of the post-1688 balanced constitution was a pragmatic solution to these particular domestic problems, whereby the judges were insulated from royal interference and parliament voted an annual militia bill to fund the army. But he was not seeking openly to judicialize politics and law-making.[71] Rather, the *Commentaries*' stress on maintaining the constitutional balance between king and parliament ultimately rendered the judiciary an instrument of the legislature: they were 'lions under the mace, rather than under the throne'.[72] Indeed, despite his early remarks, following a discussion about the interpretation of statutes, that equitable judgment is applied to 'assist, to moderate, and to explain' the law, Blackstone later stated explicitly that any overt review by the law of legislative or executive power would ultimately destroy the idea of sovereignty (I. 66–7, 158–9).

[68] D. Lemmings, 'The Independence of the Judiciary in Eighteenth–Century England', in P. Birks (ed.), *The Life of the Law* (1993), 125–49.

[69] Cf. Carrese, *Cloaking of Power*, 126, 138–48, 140, 159.

[70] Cf. Willman, 'Theoretical Perfection', 44.

[71] Cf. Carrese, *Cloaking of Power*, 3.

[72] S. N. Katz, 'Introduction' to W. Blackstone, *Commentaries on the Laws of England* (Chicago, 1979), i. p. ix; C. Hill, *Intellectual Origins of the English Revolution Revisited* (Oxford, 1997), 235.

This was a view that was ridiculed by Bentham, who gave several examples of European governments that did not conform to such a concept of supreme power.[73] Moreover the future showed that supreme authority could itself cause instability. Certainly, Blackstone proved unable to appreciate that from the perspective of the American colonies, although legislature and executive were supposedly checked and balanced at home, the absolute power of the composite king-in-parliament might appear oppressive to dominions substantially unrepresented in it. It is only with the benefit of hindsight that Blackstone may be criticized for not anticipating the problems in constitutional relations with the Americans, however, for the first edition of the *Commentaries* Book I was published in 1765, before the crisis in Anglo-American relations erupted. Indeed, Book I of the *Commentaries* furnished arguments for and against the American rebellion, as shown by various references to the work in parliamentary debates over the repeal of the Stamp Act.[74]

Varia: Authorial Changes between the Second and the Ninth Editions (1766–83)

The overwhelming majority of changes Blackstone made to the text of Book I were relatively insignificant, in so far as they amount to correcting errors of printing and orthography. He also fixed substantive mistakes and added or replaced words to clarify his original meaning. For example, in his comparative discussion of divine law and natural law, the second edition (1766) expanded the original reference to 'the natural law' to read 'that moral system, which is framed by ethical writers, and denominated the natural law'.[75] Certainly, like any other conscientious author, Blackstone sought to improve comprehension of his text, in this case by reinforcing his point about the superior authenticity of revealed law over human reason. In the Age of Enlightenment such an insistent emphasis on the prescriptive authority of scripture over philosophy was hardly insignificant. Equally telling of Blackstone's position on a different contemporary issue was a fourth-edition (1770) amendment to his discussion of equity, which confirmed the discretionary power of common law judges to interpret acts of parliament according to 'liberality of sentiment'.[76] Like this affirmation of the judges' role as 'living oracles', many amendments to the text simply reinforced the *Commentaries*' favourite themes.[77]

Given their coincidence with the American crisis, it was perhaps inevitable that the second and subsequent editions of Book I devoted much additional space to further elaboration of the *Commentaries*' passages that related to Britain's legal relationship

[73] *Fragment*, 489.

[74] Prest, *Blackstone*, 225–6.

[75] I. 35, 319 ⟨4⟩ (1st edn, 1765; 2nd edn, 1766).

[76] I. 67, 322 ⟨42⟩ (1st edn, 1765; 4th edn, 1770). See also Carrese, *Cloaking of Power*, 147.

[77] e.g. I. 354 ⟨27⟩, 2nd edn, 1766: on mitigation by juries; I. 362 ⟨15⟩, 2nd edn, 1766: on corruption of sheriffs; I. 374 ⟨16⟩, ⟨17⟩, 4th edn, 1770: against standing armies; I. 359 ⟨95⟩, 5th edn, 1773: deleterious consequences of national debt.

with its colonies. Blackstone was an MP until he became a judge in 1770, and from the time that the second edition was published, both as politician and author, he came down firmly against the colonists' resistance to imperial power.[78] Just as in the House of Commons he stubbornly opposed the repeal of the Stamp Act, so in the second edition of the *Commentaries* he insisted that 'subordinate dominions' in general were bound by 'the sovereign legislative power', if explicitly included by legislative provisions; declared that 'the whole of their constitution ... [is] ... liable to be new-modelled and reformed, by the general super-intending power of the legislature in the mother country'; and pointedly referred to the freshly minted Declaratory Act of 1766 as a response to the American colonists' insubordination. Additionally, the second edition included a new passage stipulating that the king in council had original jurisdiction in adjudicating disputes relating to colonial charters in America and other British colonies, 'upon the principles of *feodal* sovereignty'.[79] Subsequent editions duly highlighted successive retributive imperial acts, suspending the government of New York and the port of Boston, revoking the charter of Massachusetts, and providing for stationing troops in America.[80] Blackstone's hard line on the constitutional position of dominions like America could not have been conveyed more clearly. It even endured after his death in 1780: for following the repeal of the Irish Dependency Act, in 1782, this landmark setback for British imperial power was only noticed by a footnote in the ninth edition, prepared by Richard Burn.[81]

During his decade as a sitting MP, Blackstone was no doubt concerned that the *Commentaries* might be quoted against him in debate, and his vulnerability to this kind of criticism may account for serial amendments to the text that seem to represent a careful navigation of domestic politics. Its treatment of the radical John Wilkes is exemplary of such trimming. In May 1769 Blackstone's speech in favour of excluding Wilkes from taking his seat in the House of Commons was confuted by George Grenville, who drew the House's attention to what appeared to be a contrary opinion in the *Commentaries*.[82] Blackstone had already made extensive additions to an earlier passage in the text discussing the privileges of parliament, whereby he insisted that MPs accused of publishing seditious libels (as Wilkes was in 1763) were not entitled to privilege, and several subsequent amendments appear to track the ongoing controversy over Wilkes and radical interpretations of English liberties.[83] Certainly the fourth edition (1770) amended the original text further so that it conformed to his 1769 speech supporting the ultimate power of parliament to disqualify Wilkes from sitting as an MP.[84] The fifth and ninth editions (1773, 1783) added yet more text qualifying MPs' privileges from arrest in legal proceedings, a question which had been aired in the original clash between Wilkes and the government in 1763.[85] Given these

[78] See L. Namier and J. Brooke, *The House of Commons 1754–1790* (1985), ii. 97.
[79] I. 75–6 (1st edn, 1765); I. 324 ⟨20⟩, 326–8 ⟨31⟩, ⟨33⟩, 346 ⟨9⟩ (my emphasis) (2nd edn, 1766).
[80] I. 327–8 ⟨33⟩ (4th edn, 1770; 7th edn, 1775).
[81] I. 326 ⟨28⟩ (9th edn, 1783).
[82] Namier and Brooke, *House of Commons*, ii. 97. See I. 115–16 (1st edn, 1765).
[83] I. 336–7 ⟨43⟩, ⟨45⟩ (2nd edn, 1766). See P. D. G. Thomas, *John Wilkes: A Friend to Liberty* (Oxford, 1996), 47–54.
[84] I. 335 ⟨32⟩, ⟨35⟩, 338 ⟨60⟩, 339 ⟨78⟩ (4th edn, 1770).
[85] I. 335–6 ⟨39⟩, ⟨41⟩, ⟨42⟩, ⟨44⟩ (5th edn, 1773; 9th edn, 1783); Thomas, *John Wilkes*, 43–4; 'Wilkes, John', *ODNB*.

amendments, it is not surprising that the opposition clearly preferred the first edition of the *Commentaries*, because none of the later ones could possibly be cited in favour of Wilkes.[86]

Finally, there is evidence in later editions of Book I that Blackstone was responding to published criticisms of his work, although amendments of this kind seem to have been exceptional, and were never explicitly acknowledged. The fifth edition (1773) watered down the statement in the original text that changing the liturgy of the Church of England or Church of Scotland would endanger the Union of the two kingdoms, in so far as it admitted the possibility of consensual changes; this may have been a response to Joseph Priestley's pamphlet published in 1769.[87] Although not insignificant, the amendment to Book I was insubstantial, however (Priestley's criticisms were mainly provoked by Book IV), and the text of the passage on the Act of Union and the two established churches had already been substantially extended in the second edition (1766), perhaps indicating the author's own awareness that representing the ecclesiastical establishments as virtually perpetual would be provocative to dissenters.[88]

A more direct response to published criticism was included in the eighth edition (1778), where Blackstone added a postscript to his original preface. Here he complained that, despite his earlier request for the reader's indulgence, the *Commentaries* had been 'vehemently attacked'; he admitted listening to some objections and revising his text accordingly, while ignoring those he believed to be erroneous. In this first edition to be published after Bentham's *Fragment on Government* (1776) an ironic passage enjoins 'the candid and intelligent reader' to interpret his encomiums on the constitution with some subtlety: surely an oblique but critical response to the *Fragment*. The new preface's reference to being attacked by 'zealots of all (even opposite) denominations, religious as well as civil; by some with a greater, by others with a less, degree of acrimony' was most likely directed at branding Bentham's comments as fundamentally prejudiced, while also acknowledging the less 'uncandid' criticisms of Priestley.[89]

Reception

Although Jeremy Bentham's criticisms forced Blackstone to become somewhat defensive after 1776, the early reception of *Commentaries* Book I was generally very favourable. The *Critical Review* printed a twenty-six-page review over two issues in December 1765 and January 1766, within two months of Book I's first publication.[90] The anonymous reviewer clearly understood, and indeed reinforced, Blackstone's

[86] *St. James's Chronicle*, 11–13 May 1769; Prest, *Blackstone*, 246.

[87] I. 323 ⟨6⟩, ⟨7⟩, ⟨8⟩ (5th edn, 1773); Priestley, *Remarks*.

[88] I. 323 ⟨6⟩, ⟨7⟩ (2nd edn, 1766).

[89] I. 317 ⟨2⟩, 338 ⟨55⟩ (8th edn, 1778); see also Balliol College Library, 1550.i.21, I. ii–[iii] (7th edn, 1775): Blackstone's holograph addition to the preface, acknowledging Priestley's 'genteel apology' for the intemperance of his 1769 *Remarks*. Prest, *Blackstone*, plate 16.

[90] Book I was published on 18 November 1765 (*Gazetteer and New Daily Advertiser*, 18 & 20 November 1765), although entered in the Stationer's Register on 16 November: A. J. Laeuchli, *A Bibliographical Catalog of William Blackstone* (New Haven CT, 2015), 2.

patriotic message. He recommended study of the laws of England because 'the result of it will convince an Englishman of the peculiar excellence of the government under which he lives, and of the laws which frame it'.[91] Accordingly, at the outset he strongly endorsed the *Commentaries*: 'It is here they will learn to venerate the incomparable worth of their forefathers'.[92] And after paraphrasing Blackstone's stirring declamation on the vigorous assertion and reassertion of Englishmen's rights and liberties from Magna Carta to the Act of Settlement, he forcefully echoed Blackstone's warnings about the dangers of corruption: 'Such is the basis on which the fabric of our excellent government is reared, and the pillars with which it is fortified; a fabric which nothing can shake, but the total degeneracy of its inhabitants.[93] Admittedly, the *Critical Review* was not wholly complimentary, since the reviewer insisted, contrary to Blackstone, that the people retained a residual power to overrule the king in parliament, in case of abuse. The author also offered some pedantic quibbles about style, but he ultimately characterized the book as 'learned, elaborate, spirited, and judicious' and virtually apologized for his cavilling by concluding with the comment 'Gold cannot be too much refined'.[94] The *Monthly Review* was a little more critical, but only in so far as its reviewer thought Blackstone was overly optimistic about the future prospects for constitutional government, and did not sufficiently condemn the tendency to corruption exemplified by Walpolian methods of parliamentary management. Indeed, the author concluded with an unqualified eulogy.[95]

Certainly, Book I of the *Commentaries* was successful in its broad appeal to 'citizens' as well as lawyers; and on first appearance it proved very relevant to contemporary British politics. In January 1766 the *London Magazine* quoted extensively from 'the learned Mr. Blackstone's commentaries' on the controversy as to whether the British parliament had the right to impose taxes on its American colonies, that 'being a question now much agitated both in writing and conversation'.[96] But although it provided immediate and welcome ammunition for making the government's case in the emerging American crisis, subsequent events showed the *Commentaries*' authority might cut several ways, as Blackstone found to his own discomfort during the Wilkes controversy of 1769–70.[97] Its practical utility as a text for understanding the obscurities of English law was less controversial and more enduring, however. Even Sir William Meredith MP, who as a Rockingham Whig was one of Blackstone's political opponents in the Wilkes affair, admitted (in 1770) that 'your Commentaries ... have introduced to our Acquaintance, a System that was most important for every Man to

[91] *Critical Review*, 20 (December 1765), 424.

[92] *Critical Review*, 20 (December 1765), 425.

[93] *Critical Review*, 20 (December 1765), 432.

[94] *Critical Review*, 20 (December 1765), 433–4; *Critical Review*, 21 (January 1766), 12–13.

[95] [Owen Ruffhead] *Monthly Review*, 35 (May 1766), 392. See also *Monthly Review*, 34 (February 1766), 108: 'Our masterly Commentator … unites the qualities of the historian and politician, with those of the lawyer'; and [Edmund Burke] *Annual Register 1767* (1768), 286–307, reviewing the second edition of Books I and II, which substantially plagiarizes Ruffhead.

[96] *London Magazine*, 35 (January 1766), 3, quoting I. 75–6.

[97] Prest, *Blackstone*, 239–46.

know; yet, 'till you brought it from Darkness into Light, had been as carefully secreted from Common Understandings, as the Mysteries of Religion ever were'.[98] A thorough reading and digestion of all four volumes of the *Commentaries* subsequently became de rigeur for anyone contemplating legal practice.[99] Years later Lord Chancellor Thurlow declared that thereby 'the student [will] lay for himself such a foundation of legal and constitutional knowledge, as will enable him to follow his profession with ease'.[100] And even Joseph Priestley, who was famously offended by Blackstone's references to protestant dissent in Book IV, said (in 1769): 'your commentaries on the laws of England will probably last as long as the laws themselves'.[101]

In 1776, however, Bentham's anonymously published *Fragment on Government* launched a ferocious attack on the *Commentaries*, and while its detailed analysis concentrated on only a few pages of the second section ('On the Nature of the Laws in General') in the Introduction to Book I, overall its criticisms proved influential (I. 38–42). The *Fragment*'s rather superficial disparagement of Blackstone as an apologist for the status quo has been discussed previously. More worthy of serious consideration—although often merely tendentious and sarcastic—was its treatment of Blackstone's attempt at political philosophy, whereby in these pages he had analysed the origins and principal forms of government and justified the arrangements for sovereignty in contemporary Britain. For Bentham (who dismissed these sections as 'a riddle' and 'a digression stuffed into the belly of a definition'), and for the school of analytical jurists which developed around his work, the philosophical grounding that Blackstone sketched here was hopelessly confused, and he was condemned from this perspective as a 'lax thinker'.[102] Indeed, although the *Fragment* received mixed reviews at the time of its publication, its overall hostility to Blackstone's philosophical approach struck a chord with educated opinion. As one of its admirers wrote presciently in 1776: 'I will venture to foretell, that the Fragment will live at least as long as the Commentaries.[103] Certainly, although the reputation of the *Commentaries* recovered with the resurgence of historical jurisprudence in the later nineteenth century, the works of Blackstone and Bentham were henceforward locked into an ongoing critical dialectic.[104]

There was criticism of Blackstone's *magnum opus* in America too, but it did not seem to inhibit sales overmuch.[105] We may surmise that Book I was of particular interest to Americans animated by the emerging constitutional crisis with Britain. Indeed, Edmund Burke famously observed, 'I hear that they have sold nearly as many of Blackstone's *Commentaries* in America as in England'; he counted exceptionally

[98] [Sir William Meredith,] *Letter to Dr. Blackstone, by the Author of the Question Stated* (1770), 2.

[99] Lemmings, *Professors*, 139.

[100] *A Treatise on the Study of the Law* (1797), 69.

[101] *London Chronicle*, 10–12 October 1769.

[102] *Fragment on Government*, 439, 473, 500; Holdsworth, *History of English Law*, xii. 733–4; Dicey, 'Blackstone's Commentaries', 290.

[103] *Morning Chronicle*, 29 August 1776; see also *Morning Chronicle*, 10 July, 2 September, 12 November 1776.

[104] Holdsworth, *History of English Law*, xii. 727, 736.

[105] A. W. Aschuler, 'Rediscovering Blackstone', *University of Pennsylvania Law Review*, 145 (1996), 5–14; J. S. Waterman, 'Thomas Jefferson and Blackstone's *Commentaries*', *Illinois Law Review*, 27 (1932–3), 630–2.

widespread legal knowledge among the population as a cause of the Americans' 'fierce spirit of liberty' which drove them to resist what they saw as British oppression.[106] Much later Thomas Jefferson was critical of the 'honied Mansfieldism' that he claimed to find in the *Commentaries*; by which he seems to have meant the allowance of judicial activism. As a democrat he was also instinctively alienated by what he identified as its baneful tendency to encourage Toryism in political philosophy.[107] But he may have purchased a set before 1776; and at least sixteen subscribers to the first American edition of the *Commentaries* (published in 1772) later signed the Declaration of Independence. One modern American scholar has remarked '[a]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in Sir William Blackstone's *Commentaries on the Laws of England* ... [and] the *Commentaries* rank second only to the Bible as a literary and intellectual influence on the history of American institutions'.[108]

This apparent paradox—whereby the ideological origins of American independence from Britain were substantially informed by a work of English constitutional patriotism written by a Tory lawyer—may be partly explained by the fact that contemporary American criticism of the *Commentaries*' treatment of constitutional law took a quite different track from the Benthamite approach. Like Jefferson, the future Supreme Court justice James Wilson was offended by what he regarded as Blackstone's Tory philosophy, which he deduced from the *Commentaries*' insistence that there must be a supreme power in every state—an idea that he associated with divine right and derogation of the social contract. Eighteenth-century American lawyers like Wilson, St. George Tucker, and Jefferson believed Blackstone's position on natural rights was inadequate, in so far as he defined them too narrowly as against the extensive application of municipal law. From this neo-Cokean and fundamentalist perspective, the *Commentaries*' endorsement of parliamentary supremacy only legitimized the legislative oppression of the American colonies.[109]

The influence of Blackstone on American thinking about the constitution was enduring, if complex. It is appropriate, indeed, to refer to a distinctively 'American version of Blackstone's jurisprudence and constitutionalism' inspired by federalists who were more receptive to Blackstone than Jefferson was, because they sought to restrict democracy by the application of common law; an aim achieved by founding a supreme constitutional court. Ultimately, it has been argued, in America the 'subtle judicialization of politics' advanced by neo-Blackstonian jurists helped to herald the triumph of judicial activism as exemplified by Oliver Wendell Holmes.[110]

[106] *Writings and Speeches of Edmund Burke*, ed. Langford, iii. 123–4, 125 (speech on 22 March 1775).

[107] Waterman, 'Jefferson and Blackstone's *Commentaries*', esp. 634–46.

[108] R. A. Ferguson, *Law and Letters in American Culture* (Cambridge MA, 1984), 11. See also Waterman, 'Jefferson and Blackstone's *Commentaries*'.

[109] Waterman, 'Jefferson and Blackstone's *Commentaries*', 648–51; Aschuler, 'Rediscovering Blackstone', 9–14, 16, 24–36. Arguably, American lawyers were more liberally educated than their English counterparts; and patriot lawyers like John Adams and Thomas Jefferson were inspired by a historicized reading of Sir Edward Coke's works (see Lemmings, *Professors*, 241–2, 245).

[110] See Carrese, *Cloaking of Power*, 231–2, 241; Waterman, 'Jefferson and Blackstone's *Commentaries*', 657–9.

The constitutional and political legacies of the *Commentaries* Book I in the English-speaking world consisted partly in the institutionalization of judicial politics by review of legislation, even tending towards an imperial jurisprudence. But more broadly, they represented the enduring affective power of stories identifying the rule of law with the pursuit of individual happiness and liberty. Book I was fundamentally a political project; and it built upon its author's understanding of the 'sensible' apprehension of reason, therefore requiring poetics as well as logic.[111] While Bentham warned readers of the *Commentaries* 'what may tickle the ear, or dazzle the imagination, will not always inform the judgement', Blackstone recognized that human beings were swayed by passion rather than abstract reason (which since the Fall, was 'corrupt, and ... full of ignorance and error'). Emphatically, they were not 'true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence'.[112] In so far as the *Commentaries* established the knowledge of English law as living history as well as legal education, Book I was an exercise in the politics of emotional persuasion, as much as a 'scientific' treatment of constitutional law.

David Lemmings

[111] Again, this appears to represent Montesquieu's influence (see Carrese, *Cloaking of Power*, 94–5, 110–11).
[112] Bentham, *Fragment on Government*, 500–1; I. 35, 125.

Acknowledgements

My thanks to William Woods for his unremitting dedication to the editing task, and also to Carly Osborn and Adam Osborn for their able research and technical assistance. I would also like to thank the General Editor and Sabina Flanagan for their enduring support and expert advice. I am particularly grateful to them, and also to Sir John Baker and Paul Brand, for their learned comments on the text, which have saved me from many errors. Of course I am also deeply grateful for the forbearance and support of my partner Claire Walker and my children Tom and Charlotte over several years' work on this project. They will be very relieved it is done!

David Lemmings

Editorial Conventions and Practices

In 1890 William G. Hammond, the scholarly dean of the St Louis Law School, published a remarkable new version of the *Commentaries*. Whereas previous editors had sought to annotate and update Blackstone's text in an effort to keep pace with ongoing changes in the law, Hammond was primarily concerned to present that text as an expression of the evolution of Blackstone's legal thought.[1] Using an ingenious system of superscript numerals and footnotes, Hammond sought to list all authorial changes made between the first (1765–9) and the eighth (1778) edition of the *Commentaries*, the last to appear before the author's death in 1780. The ninth (1783) edition was rejected as copy text because Hammond doubted the claims of its editor Richard Burn that all his interventions, other than references to recently enacted statutes, were derived from the author's own manuscript. Hammond maintained that '[a]nyone familiar with Blackstone's style and that of his annotator may be pardoned for sometimes doubting the self-restraint of the latter and for excluding these changes.'[2]

Little information about his own working methods was provided. But it seems possible that at least part of the massive task of collating some two thousand pages from each of the successive nine editions of the *Commentaries* may have fallen to his 'young gentlemen' students, whom Hammond credits with the almost equally challenging role of identifying citations to the *Commentaries* in 2,500 volumes of US Federal and state law reports. So an element of caution about the reliability of Hammond's collations is justified, notwithstanding his praise of the zeal with which his assistants went about their work, subject to 'such checks and supervision as he could give'. Copies of his edition are rare (the publisher's surviving stock and printing plates were destroyed in the San Francisco fire of 1906), although facsimile scans of indifferent quality from the original compact and finely printed duodecimo have recently become available in print-on-demand format. Nor is it more helpful to readers lacking a classical education and Blackstone's own wide range of historical and literary reference than any previous or subsequent version of the *Commentaries*.

Modernizing typography, translating maxims, quotations, tags, and individual words in languages other than English, unpacking Blackstone's cryptic footnote citations to cases and treatises, and annotating esoteric proper nouns and allusions are relatively manageable and straightforward editorial operations. The task of identifying all authorial changes to the first nine editions of the *Commentaries* poses different challenges. Over a century after Hammond's pioneering collation venture, digital technology offers a means, promising in principle both greater accuracy and efficiency, to undertake that same operation. Yet to prepare digital files of all nine editions and then

[1] Cf. K. M. Parker, 'Historicising Blackstone's *Commentaries on the Laws of England*', in A. Fernandez and M. K. Dubber (eds.), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford, 2012), 33–5.

[2] *Commentaries on the Laws of England … From the Author's Eighth Edition, 1778. Edited for American Lawyers by William G. Hammond* (San Francisco, 1890), i. p. xvi. Hammond did footnote changes in the ninth edition, '[w]herever they added anything of value, or seemed to be in Blackstone's manner'.

run them through a file comparison program which can recognize and mark every textual difference between successive editions has proved more easily said than done.

In the first place, even sophisticated optical character recognition software cannot readily handle the vagaries of eighteenth-century typography and typesetting, while keyboard operators working from on-screen images of the original texts also struggle with elegant but now unfamiliar font characters, particularly the long letter 's', easily misread as 'f'. Hence an accurate digital facsimile of the first edition proved surprisingly difficult to achieve, despite two successive keyboarding runs and multiple proof-reading in Chennai, Oxford, and Adelaide. This problem eventually resolved itself as having more to do with the need to correct single-letter literals (e.g. 'left' for 'lest', 'fame' for 'same', 'ease' for 'case', and '*nibil*' for '*nihil*') in the final text which is the basis of this edition, than the identification of authorial changes between that first (1765–9) and later editions.

We were fortunate in being able to entrust the latter process to the textual comparison program 'Factotum', recently developed at Monash University by Dimitri Nikulin and David Squire, which proved entirely capable of achieving what was required, even if much of its initial output consisted of false positives generated by errors in the text files it was processing. Factotum produced reports showing textual differences from one edition to the next, down to the level of a single character. Comparison of these results with sample chapters from Hammond's edition was reassuring, in that Factotum consistently recognized changes not registered by Hammond.[3] But it also became apparent that in some cases Factotum was registering changes ('varia') in a later edition than that in which they had actually first occurred. In so far as this problem seemed attributable to deficiencies in the text files, it should have been overcome by repeated revision of those files. But in the hope of eliminating any residual inaccuracies of this nature, a final check of all reported varia against both the original editions in which they are registered as having first occurred and the previous edition has also been undertaken. Of course none of these procedures can be guaranteed to eliminate all possibility of error, whether human, mechanical, or some combination of the two.[4] The relative ease with which type could be changed at any point during a print run in the hand-press era may also caution us against placing overmuch reliance on the very concept of those individual editions as constituting discrete and uniform entities.

Varia have been marked in each chapter and in the four introductory sections of Book I by a preceding numeral enclosed in angled brackets: e.g. ⟨n⟩. These are keyed to sequential lists, similarly numbered and grouped by chapter at the end of each volume. Here every item is preceded by the number of the edition in which the authorial change first occurred, enclosed in square brackets: e.g. [ed. 5]. The listing

[3] For example, at I. 13 the change between first and second editions, from 'It is really amazing' to 'It is perfectly amazing'; similarly at I. 46, the omission of 'vacant' in the phrase 'to vacant benefices'.

[4] At the same time, it is reassuring to know that the holograph changes Blackstone inserted in a copy of the seventh edition now in the Balliol College Library seem to have been faithfully incorporated in the two copies of the eighth edition which have been consulted for this purpose, one in the Goldsmith-Kress collection digitized by Cengage Thompson, the other in a copy now held at Flinders University.

commences with the relevant word, clause, sentence, or longer passage from the first edition, followed by a vertical divider | separating the original from the altered text. Where the new passage includes footnotes, the content of these notes is explicitly indicated as such. Omitted text or footnotes may be so annotated, or shown by simple omission from the text on the right-hand side of the divider. Where textual changes to the same sentence or paragraph occur over more than one edition, these are indicated either by inserting the relevant information (i.e. the edition in which a subsequent change first occurred and the changed words themselves), enclosed in square brackets to denote an editorial intervention, or listed in a separate paragraph following the first numbered entry.

A modern scholar has characterized Hammond's collection of Blackstone's authorial amendments as 'obsessive'. Hammond himself was well aware that such a 'careful and minute examination of the text' might be hard to justify, especially where Blackstone's changes 'may seem too trifling to be noted, as when he replaces "a" with "an" or "antiquarians" with "antiquaries"'. Since Factotum reported these and many other differences of equal or even greater seeming insignificance, some working rules of thumb were necessary to keep the lists of changes within manageable bounds. Hence the following are generally not included: (i) changes in punctuation and/or spelling (e.g. enquire/inquire, seised/seized); (ii) unambiguous typographical errors, including misspellings, omissions, and erroneous repetition of single words corrected in subsequent editions; (iii) incorporation of footnotes in text, or vice-versa; (iv) changes in cross-references due to different pagination in later editions; (v) alterations made in one edition reversed in the next or following editions; (vi) changes of form which do not change meaning, as where adjacent words are transposed, or paragraphs recast. However, the temptation to exclude all changes which appear to be merely of style rather than substance has been resisted, both because it is not always easy to make such a distinction, and also because Blackstone's concern with style ('literary form and finish' as well as 'accuracy of expression', to quote Hammond again) is so central to his achievement and the overall impact of the *Commentaries*. Besides enabling us to follow closely Blackstone's own preoccupation with the choice of words and their placement in sentences, the varia make it possible to trace in some detail his changing positions on particular issues, perhaps most notably the legal status of slaves and Protestant Dissenters, as well as his concern to keep abreast of ongoing changes in the law.

At an early stage in planning this edition, it was decided not to attempt to modernize Blackstone's language. While his spelling of common words often does not accord with current usage, variants such as 'antient', 'embassador', 'misdemesnor', 'larciny', 'nusance', 'sceleton', and 'vasals' are perfectly comprehensible phonetic equivalents of the modern form. There are also occasional inconsistencies (such as the same word spelled both 'recompense' and 'recompence' in the same sentence), apparent neologisms and real ones.[5] But it seemed a pity to deprive readers of the chance to

[5] I. 304. Apparent neologisms, but all found in the *OED*: 'ebriety' (IV. 17); 'promulging' (III. 211); 'specifical' (III. 104, 179); 'substruction' (I. 268). Real neologisms include 'purgatition' (III. 293) and 'proveditor' (in an English rather than Italian context) (I. 185).

experience the etymological richness of Blackstone's prose, especially since his meaning is rarely concealed by his choice or coinage of words. A similar policy has been applied with regard to punctuation and the use of capital letters and italics, except for removing the apostrophe from the possessive 'it's', and silently correcting evident misspellings and other typographical lapses.

Blackstone's footnotes present difficulties of a different kind. Rather than numerals, letters of the alphabet serve both as in-text cues and foot-of-page markers; following contemporary Latinate convention, the letter 'j' is usually omitted, but the substitution of 'w' for 'v' is more idiosyncratic, while on occasion the full English alphabet is used, although not always in the expected order. Further, the notes themselves often consist of cryptic and far from consistent bibliographical citations, to which no key or gloss is provided.[6] This seems an odd omission, given his previously demonstrated concern to smooth the way for students, even if it reflects a realistic expectation that the majority of readers would not wish or need to follow up most footnote references. For those who may now wish to do so and others interested in the wide spectrum of Blackstone's references, to non-legal as well as legal sources, a table of abbreviations follows this section. While most of his references have been identified, a few uncertainties and blanks still remain. It should also be noted that Blackstone's quotations are often more in the nature of a paraphrase than a verbatim rendition of the passage cited.

Editorial annotations to Blackstone's footnotes appear in square brackets; where footnotes refer to published reports of identifiable law cases, the case name precedes the citation. A table of cases appended to each volume provides dates and, where possible, a reference to the *English Reports* (although Blackstone sometimes cites differently paginated early editions of nominate reporters reproduced in that standard series)[7] or other source; his citations cannot always be matched to a particular case. He also used the Julian calendar, in which each new year began on 25 March rather than 1 January, for events and parliamentary statutes before 1752, when Britain adopted the Gregorian calendar; hence the Bill of Rights, presented to William and Mary in February 1689 according to our modern 'new style' calendar, is dated by Blackstone to the previous year. Tables of statutes at the end of each volume provide a chronological listing of charters and parliamentary legislation mentioned in the text and footnotes. In the text, original pagination is indicated by numbers placed in the margins, next to the line on which the page began in the first edition. In the footnotes, Blackstone's own cross-references are retained, but supplemented by editorial cross-cross references keyed to the pagination of this edition.

Wilfrid Prest

[6] Thus in the first chapter of Book III the initial footnote letter sequence runs j, i, … v, u, w, whereas neither j or v occur in the footnotes for the next two and most successive chapters. Similar anomalies occur in all four Books.

[7] For example, Blackstone cites the first edition of *Reports of Cases Argued and Determined in the High Court of Chancery … Collected by William Peere Williams*, 2 vols. (1740), whereas *English Reports* uses the sixth edition, which is differently paginated; so his reference at III. 289, note o, to the 1734 case of Cowper *v* Cowper (2 P. W^{ms}. 685, 686), does not work with the *English Reports* version.