

Blackstone and His Critics

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INTRODUCTION

ANTHONY PAGE AND WILFRID PREST

... a bigotted or corrupt defender of the works of power, becomes guilty, in a manner, of the abuses which he supports: the more so if, by oblique glances and sophistical glosses, he studies to guard from reproach, or recommend to favour, what he knows not how, and dares not attempt to justify.

—Jeremy Bentham¹

Bentham ... don't you feel now and then some compunction at the thought of the treatment your Fragment gives to Blackstone? Of all men that ever sat on a Westminster Hall bench, he is perhaps the only one that ever attempted any thing that had the good of the people or the improvement of the law for its object, independently of professional interest or party politics.

—George Wilson²

From the first appearance of its four volumes between 1765 and 1769, William Blackstone's *Commentaries on the Laws of England* was a best-seller, among lawyers and laymen alike. Presenting the notoriously complex common law and England's idiosyncratic political constitution as a rational system of government and jurisprudence, the *Commentaries* also stands as a significant manifestation of 'conservative Enlightenment'.³ Yet however widely lauded, then and later, Blackstone and his *Commentaries* have never escaped adverse comment, censure, and disapproval. Adding to recent scholarship on Blackstone's life and writings, the following chapters introduce and discuss some of the leading critics and criticisms. Here we survey Blackstone's early career and its implications for his later reputation, examine initial reactions to the *Commentaries*, and outline the ground covered by the contributors to this volume.

¹ J. Bentham, *A Fragment on Government*, ed. JH Burns and HLA Hart (Cambridge, 1988) 9.

² J Bentham, *A Comment on the Commentaries and A Fragment on Government*, ed JH Burns and HLA Hart (London, 1977) 543.

³ Under the general editorship of Wilfrid Prest Oxford University Press published a modern scholarly edition of Blackstone's *Commentaries* in 2016. JGA Pocock 'Clergy and Commerce: The Conservative Enlightenment in England' in RJ Ajello (ed), *L'età dei Lumi: Studi Storici sul Settecento Europeo in Onore di Franco Venturi*, 2 vols (Naples, 1985) vol 1, 523–62 and idem 'The Re-Description of Enlightenment' (2004) 125 *Proceedings of the British Academy* 101–17; for an early claim that the *Commentaries* was 'a work of the Enlightenment' see I Doolittle, 'Sir William Blackstone and his *Commentaries on the Laws of England* (1765–69): A Biographical Approach' (1983) 4 *OJLS* 108.

I. Before the Commentaries

Today Blackstone's standing, and that of his *Commentaries*, may seem essentially one and the same. But while the *Commentaries* now constitutes Blackstone's major claim to our attention, the final volume of that work did not appear in print until 1769, when its author had reached the age of 46. He was by then a Crown law officer and member of Parliament; well-published, with a national and international readership, he had previously held the world's first common law professorship, and made his name as academic administrator, politician, and reformer. So there is good reason to begin with a discussion of Blackstone's early reputation.⁴

For all his youthful academic triumphs, including the silver medal won before leaving school for his verses on Milton, his scholarship to Oxford's Pembroke College, and his All Souls College fellowship, Blackstone only began to acquire a profile visible beyond his immediate family, colleagues, and friends after reaching his mid-twenties and attempting to establish a practice at the London bar. His leadership within All Souls became evident in the later 1740s as he supervised completion and furnishing of the massive new Codrington Library, even installing its book stock 'according to a systematical method' of his own devising.⁵ At the same time he played a major role in the College's persistent if unsuccessful attempts to overturn the provision mandated in its foundation statutes favouring fellowship candidates descended from the family of its fifteenth-century founder. But Blackstone's detailed statement of that case, in *An Essay on Collateral Consanguinity* (1750), was published anonymously, as three years before had been his poem *The Pantheon: A Vision*. According to an admiring college contemporary, this work was likewise 'less noticed than it deserved'.⁶ The two architectural treatises he had also compiled in the 1740s still remain in manuscript. Not until after mere effluxion of time enabled him to take out the higher degree of doctor of laws in April 1750, thereby gaining admission to Convocation, the university's legislative assembly, did Blackstone begin to cut a figure in academic affairs beyond the walls of his own college.

He began by managing Sir Roger Newdigate's successful campaign for election as one of the university's two representatives in the House of Commons. Newdigate stood for the 'Old Interest', as Oxford's opponents of the Whig administrations which had held power since the first Hanoverian monarch came to the throne in 1714 were known. Thanks both to his connection with Newdigate over the next thirty years and personal involvement in subsequent electoral contests,

⁴ Unless otherwise noted, biographical details here and below are derived from W Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford, 2008).

⁵ R Graves, *The Triflers* (London, 1806) 56.

⁶ *ibid* 54.

Blackstone's political coloration was henceforth firmly identified as Tory. This party-political label very likely prevented his subsequent appointment to a vacant chair in civil or Roman law, and hence led indirectly to the private lecture course on the laws of England which he began to offer undergraduates from 1753. That said, the precise significance of the label 'Tory', and his relationship to it, became increasingly unclear during his lifetime. More immediately, besides continuing to busy himself with the administration of his own college, sit as judge of the vice-chancellor's court, and organise the university's reception of a collection of classical marble statuary presented by the Countess of Pomfret, Blackstone now turned his formidable energies to the task of reforming the university's printing and publishing house.

This last agenda soon brought him into direct conflict with the oligarchic gerontocracy of college heads which constituted the university's governing executive. The reaction of one of their number is captured in his account of a 'troublesome dispute' over the powers of the vice-chancellor, brought on (as he claimed) by Blackstone, 'an active, enterprising Genius of this place. ... If that Genius be not suppress'd, there's an end of Government here!'⁷ In ensuing controversies over the administration of the university press, the foundation of the Vinerian chair in English law to which Blackstone was eventually elected unopposed (although it was 'thought advisable by his friends, to guard against a surprise' from 'his supposed [and 'sullen'] opponents'),⁸ and the discharge of his professorial responsibilities, such resentments were by no means confined to his academic superiors. Further antagonism was aroused by Blackstone's devious role in a disputed election for the university's chancellorship. Ill-feeling swelled so far that Blackstone suffered defeat in a contested election within his own college. Hence an informed correspondent could claim that All Souls was split between two parties

distinguished by the names of Blacks and Whites. The First of these will convey no very good Idea to you; nor indeed ought you to conceive a very good one of the Leader, since he has made himself from the Darling to the most disliked of the University, by his so greedily assuming to himself (as Professor) almost the whole Income of Viner's Foundation.⁹

Whatever the extent of Blackstone's fall from academic grace, his reputation outside Oxford showed no such decline. On the contrary, the success of his lectures and associated publications, especially the expanded syllabus which had first appeared in print as *An Analysis of the Laws of England* in 1756 (with five further Oxford editions, a pirated Dublin edition and a later French translation), spread Blackstone's name very widely. So did the *Discourse on the Study of the Law*, an

⁷ Northamptonshire Record Office, D (F) 88: Theophilus Leigh to Sir William Dolben, 21 May 1756.

⁸ *Letters of Richard Radcliffe and John James ... 1755–83*, ed M Evans (Oxford, 1888) xxx.

⁹ Morrab Library, Penzance, MOR/Bor/2E: Peter Sherwin to William Borlase, 3 June 1759.

‘introductory lecture’ delivered in October 1758 as his first official presentation in the capacity of Vinerian Professor, which was extolled in the *Annual Register* as ‘a solid, judicious and elegant oration.’ Across the Atlantic a future US President viewed ‘the first copy of Blackstone’s Inaugural Oration and Analysis, which ever appeared in America ... It was much admired.’¹⁰ Closer to home the courtier and future Prime Minister John Stuart, earl of Bute, then tutor to the Prince of Wales, commissioned Blackstone to provide copies of his lectures for the royal pupil’s benefit, an initiative very likely encouraged by favourable reports from aristocratic undergraduates like William Petty, Lord Fitzmaurice, who as an Oxford student reportedly ‘attended Blackstone’s lectures with great care.’¹¹

Two further publications of 1759 addressed very different audiences. The *Treatise on the Law of Descents in Fee-Simple*, which appeared in an English, an Irish and an American edition (thus becoming Blackstone’s first American imprint) was a brief and inexpensive student guide to a fundamental element of land law, prefaced by a disarming authorial avowal: ‘Perspicuity and precision are the only things endeavoured at: the subject is incapable of ornament.’ Nevertheless this pamphlet was also greeted with remarkable enthusiasm: according to one review, ‘Notwithstanding the learned author assumes, in this performance, no higher character than compiler, the reader will easily trace the hand of a master.’¹² Also published that year was his critical scholarly edition of Magna Carta, *The Great Charter and Charter of the Forest*, where for the first time King John’s original charters were clearly distinguished from all subsequent versions.¹³ On the strength of this finely-printed scholarly volume, Blackstone was elected to fellowship of the Society of Antiquaries, despite having rejected as inauthentic a charter owned by Charles Lord Lyttelton, one of the society’s leading lights. Even before that elevation he was characterised by the poet William Shenstone (a fellow alumnus of Pembroke College) as ‘having raised himself to a very eminent figure indeed in the world of letters.’¹⁴ Quite apart from his books and lectures, in the five years before the first volume of the *Commentaries* appeared Blackstone came to public notice as putative appointee to the chief justiceship of Ireland,¹⁵ solicitor-general to Queen Charlotte, the holder of a royal patent of precedence at the bar (equivalent to a KC’s silk gown) and a member of Parliament brought in by Bute’s administration, with at least the ‘approbation’ of King George himself.¹⁶ By any reckoning

¹⁰ *The Annual Register, 1758* (London, 1759) 453; *The Diary and Autobiography of John Adams* ed LH Butterfield (Cambridge MA, 1961) vol 3, 286; from the 3rd (1758) edition, the *Analysis* included Blackstone’s introductory Vinerian lecture.

¹¹ E Fitzmaurice, *Life of William, Earl of Shelburne* (London, 1875) vol 1, 19.

¹² *Critical Review* (October 1760) vol 10, 326; see also *Monthly Review* (January 1760) vol 22, 35–38.

¹³ W Prest, ‘Blackstone’s Magna Carta’ (2016) 94 *North Carolina Law Review* 1497–1500.

¹⁴ W Shenstone, *The Works in Verse and Prose ... Containing Letters ... 1739 to 1763* 2nd edn (London, 1769) vol 3, 315.

¹⁵ *London Chronicle*, 28–31 March 1761.

¹⁶ Shenstone, *Works* vol 3, 324–25.

his reputation had already spread well beyond the groves of academe, seemingly untouched by the antagonism he had lately encountered there.¹⁷

II. First Reactions to the Commentaries

The ‘liberal and judicious method’ of Blackstone’s law lectures and associated publications, ‘unit[ing] the study of polite Learning and Antiquity with that of Law’, had aroused high expectations.¹⁸ These were not disappointed by the successive appearance of the four books of the *Commentaries*, which received extensive attention in the rival literary journals of the day, Ralph Griffiths’s *Monthly Review* and Tobias Smollett’s *Critical Review*. The barrister Owen Ruffhead took some 17 pages of the *Monthly Review* to ‘give our Readers such an abstract of so able a performance as, we think, must necessarily induce them to peruse the work at large’.¹⁹ Even further inflated by the customary inclusion of long passages of direct quotation, an anonymous notice in the *Critical Review*, extending over more than 25 pages, characterised Book I as ‘learned, elaborate, spirited, and judicious’, while disavowing ‘minute examination of its merits or demerits’, which would require ‘more knowledge in the law than we possess’.²⁰ Edmund Burke’s *Annual Register* for 1767 included an encomiastic 21-page summary of Books I and II combined, drawing liberally on Ruffhead’s *Monthly Review* notice.²¹ Other metropolitan journals printed occasional extracts bearing on issues of the day, as for example the discussion in Book II of literary property or copyright, reproduced by the *London Magazine* ‘[f]or the satisfaction of all gentlemen who have any regard for learning or ingenuity, as well as for all honest booksellers’.²² Blackstone’s name was sufficiently synonymous with didactic legal learning for him to be credited with *An Introduction to the Knowledge of the Law and Constitution of England* (1771), which had first appeared seven years before as the work of an anonymous ‘Gentleman of the Middle-Temple’. Writing from New York a future loyalist bishop of Nova Scotia even attributed the current shortage of clergy both in England and

¹⁷ In a satirical depiction of Oxford University politics, John Wilkes’s famous anti-ministerial journal even depicted Blackstone as the honest ‘lawyer Keene’, who singlehandedly brought financial mismanagement of the university press to public notice: *The North Briton*, 29 (18 December 1762).

¹⁸ T Phillips, *The History of the Life of Reginald Pole* (Oxford, 1764) vol 1, 17.

¹⁹ *Monthly Review* (February & May 1766) vol 34, 107–110 at 108, 378–92; see also vol 35 (November 1766) 356–63; vol 36 (January 1767) 29–36; vol 39 (November–December 1768), 329–44, 461–68; vol 41 (October 1769) 292–304.

²⁰ *Critical Review* (December 1765) vol 20, 425–36 & (January 1766) vol 21, 1–13; see also vol 22 (October–November 1766) 241–49, 321–30; vol 25 (June 1768) 401–10; vol 26 (July 1768) 29–36.

²¹ *Annual Register for the Year 1767* (London, 1768) 286–307; see also *Annual Register for the Year 1768* (London, 1769) 269–72.

²² *London Magazine*, vol 35 (1766) 544–45; *ibid.*, 3; see also *London Chronicle*, 24–26 March, 14–16 April, 12–14 May, 2–4 June 1768.

America to Blackstone's *Commentaries* having 'made the Study of the Law easy and agreeable, instead of being dry, disgusting & intricate as formerly. So that Numbers of young Gentlemen at the Universities chuse to study the Law instead of going into Orders.'²³

Yet while the fame of the *Commentaries* spread rapidly on first publication, even the most eulogistic reviewers tempered their plaudits with occasional caveat or criticism. Thus Ruffhead questioned Blackstone's definition of 'law' in Book I, as likewise his treatment of the relationship between natural law and human laws, and rejection of Locke's insistence on the peoples' right to dissolve a tyrannical government. His notice of Book IV began by asserting 'The reputation of this work is so well established ... that it is altogether unnecessary, at present, to add anything to the praises already bestowed upon it', but then took strong exception to Blackstone's treatment of Protestant Dissenters, as well as his 'attachment to what are called High Church principles'. Ruffhead also drew readers' attention to the 'very pertinent and spirited observations' of Joseph Priestley on Blackstone's text, to Blackstone's published reply to Priestley's *Remarks*, and to Priestley's response.²⁴

Dissenters were not the only objectors to Blackstone's ecclesiastical politics. The obscure if prolific low-church Anglican clergyman John Jones published a number of tracts on religious topics, both under his own name and anonymously. Among the latter was *An Objection Drawn from the Act of Union, Against a Review of the Liturgy and other Ecclesiastical Reforms Considered ... The whole now submitted to the impartial After-thoughts of William Blackstone, Esq.*²⁵ Evidently compiled soon after the first book of the *Commentaries* appeared, although not published until 1770, this work disputed Blackstone's claim that any alteration to the constitution of either the Church of England or the Church of Scotland would imperil the union of the two kingdoms, a point also addressed by Priestley. Jones maintained that Blackstone had misrepresented the purpose of the original treaty and 1707 Act of Union, which sought only to preserve the independence of each national church. Blackstone's version, according to Jones, 'so egregiously defaulted' as to constitute 'a slur upon his character as professor in so reputable a station'; indeed 'it is generally thought, by knowing and disinterested persons, that *party-views* and *connections*', together with other unspecified 'attachments', were responsible for perverting his judgment.²⁶ In a postscript dated October 1769, Jones noted

²³ Library of Congress, Manuscripts Division: Charles Inglis to Sir William Johnson, 28 March 1770; thanks to Jeffrey M Flannery for this reference.

²⁴ *Monthly Review*, vol 41, 295, 298–301; see also Anthony Page's Ch 5 in this volume. Further instances of reviewers' criticisms are cited in the volume editors' introductions to the 2016 Oxford edition of the *Commentaries*.

²⁵ For Jones, see *Oxford Dictionary of National Biography* and JCD Clark, *English Society 1660–1832* (Cambridge, 2000) 370; his responsibility for *An Objection Drawn* is established by a notice of his death in the *Public Advertiser*, 13 August 1770.

²⁶ *An Objection Drawn* 'Advertisement', 4, 9, 20–21, 31, 78–80.

that Blackstone's *Reply to Dr. Priestley's Remarks* still sought to maintain that the liturgy could not be altered, despite admitting Parliament's capacity to remodel both national churches. Yet while seemingly endorsing the suggestion that Blackstone's apparent concessions were mere 'equivocation, or playing upon words', Jones's final paragraph marked something of a retreat, welcoming Blackstone's 'candid declarations' of error as doing 'more to retrieve and recommend his character ... to impartial judges, than any less justifiable passages in his commentaries'.²⁷

During the following decade such critical responses to Blackstone's religious stance were echoed by a young Cambridge freethinker and James Burgh, the better-known Dissenting schoolmaster and publicist. Burgh raised several further issues, including the relationship of MPs to their constituents, while castigating Blackstone's tendency 'to persuade, that *everything is right*, when there is *so much requiring redress*'.²⁸ Other specific points on which various writers disputed the *Commentaries* included the legality of impressing seamen, the omniscient sovereignty of Parliament, and the attorney-general's power of filing informations *ex officio*.²⁹

Such criticism had limited resonance, as compared to more general and radical indictments. Drafted after 'a third perusal of Blackstone's *Commentaries*', Edward Gibbon's 'copious and critical abstract' remained in manuscript until 1814; while welcoming Blackstone's 'rational System of the English Jurisprudence', the studious Gibbon deprecated his 'metaphysical enquiry into the nature of laws in general' and 'uncommon respect' for 'the old common law', wishing 'Mr Blackstone has talked a little less of Egbert, and of a right suspended from Edward the Confessor to James I'.³⁰ Gibbon later saw Blackstone as a quasi-comic figure, '[t]he elderly lady in a male habit ... one Sir William Blackstone, whose name you may possibly have heard'.³¹

Little if any levity characterised Jeremy Bentham's exposure of his former teacher's intellectual and moral failings. Even his first sallies in the facetious

²⁷ *ibid* 95–97. A favourable review of Jones's book appeared in the *Monthly Review*, vol 42 for February 1770, 124–31.

²⁸ C Crawford, *Letters from Academicus to Eugenius on Various Subjects* (London, 1772, 1773) 19–24; J Burgh, *Political Disquisitions* (London, 1774–5) vol 1, 185–86, 371; vol 2, 39; vol 3, 285–86, 303.

²⁹ ['Nauticus'], *The Rights of Sailors Vindicated* (London, 1772); J Lind, *Remarks on the Principal Acts of the Thirteenth Parliament of Great Britain* (London, 1775) 61–63; C Sheridan, *Observations on the Doctrine Laid Down By Sir William Blackstone, Respecting the Extent of the Power of the British Parliament, Particularly in Relation to Ireland* (Dublin, 1779); [D.], *An Interesting Address to the Independent Part of the People of England, on Libels ... and a Candid Refutation of the Doctrine of Informations, as laid down in Blackstone's Commentaries* (1777); W Osgoode, *Remarks on the Laws of Descent* (London, 1779). The *Monthly Review*, vol 42 (March 1770) 245–46 briefly notices an anonymous *Letter to Dr Blackstone, occasioned by a Passage in his Commentaries concerning the Character of the Ecclesiastics of the present Age*, rebutting Blackstone's optimistic portrait of the Anglican clergy, as 'unblemished in their lives and conversation'; no copy of this work has been located.

³⁰ *The Miscellaneous Works of Edward Gibbon, Esq.* ed J Holroyd, Lord Sheffield (London, 1814) vol 1, 214, vol 5, 545–57.

³¹ *ibid* vol 1, 301 (letter to John Holroyd, Lord Sheffield, 9 September 1789).

preface to *The White Bull* have a sharp edge: thus ‘Dr Blackstone seems to think, so far as he allows himself to *think*, it’s the worst trick a man can get when he reads *law*. For which reason he has done all he can to break us of it.’³² Two years later Bentham’s *Fragment on Government* spent five chapters dissecting seven of Blackstone’s introductory pages, after a prefatory ‘Critique on the Work at Large’. Contemporary reaction was both mixed and muted. The Inner Templar Manasseh Dawes referred to ‘Judge Blackstone, whose name must be handed down to posterity with honor, as illustrated involuntarily by the superingenuous writer of a fragment on government’, characterised in an accompanying footnote as ‘a very labor’d pamphlet lately publish’d’.³³ Another critic assumed that the anonymous author ‘will make but few converts to his way of thinking’. Yet the *Monthly Review* believed the attack was supported by ‘proper authority’ and ‘remarks sufficiently shrewd and severe’, while regretting that it had not appeared before, since ‘the reputation of Blackstone’s commentaries is now so generally established that, whatever reason or argument he [Bentham] may have on his side, they will hardly get the better of the prejudice and preposition, that have so powerfully got hold on the public.’³⁴

During and after Blackstone’s lifetime the reputation of the *Commentaries* was inevitably influenced by readers’ perceptions of its author’s character, as well as by more obvious qualities of the text itself. This was not solely a matter of party and sectarian politics. Blackstone’s prominence within Oxford University during the 1750s had generated conflicting public images; so he was both hailed as an energetic reformer and opponent of institutional corruption, but also condemned for the devious and avaricious promotion of his own interests. During the 1760s his tenure of a Crown law office and a seat in the House of Commons tended to strengthen the latter view, which gained further reinforcement from his stance in the heated Middlesex election controversy of 1768–69 centring on the controversial figure of John Wilkes. Publication of the *Commentaries* also made it possible to identify apparent inconsistencies between printed statements on the page and subsequent public pronouncements by their author, creating opportunities famously exploited by the politician George Grenville, the anonymous writer ‘Junius’ and like-minded attackers of his resistance to Wilkes’s return as MP. Back

³² [J Bentham and F-M Voltaire], *The White Bull, An Oriental History* (London, 1774) vol 1, xxxiv; see also xli–xlii, lxii–lxiii.

³³ M Dawes, *A Letter to Lord Chatham, on American Affairs, And Wherein the Doctrine of Judge Blackstone, in his Celebrated Commentaries on the Laws of England, is opposed to the present System of Politicks* (London, 1777) 16 [misnumbered 61]; the passage quoted occurs on the same page of the first (1776) edition, which has a slightly different title. See also M Dawes, *An Essay on Intellectual Liberty* (London, 1780) 83–85 for a more comprehensive attack on Bentham’s *Fragment*, contesting Blackstone’s alleged championship of religious intolerance and opposition to ‘civil reform’.

³⁴ *Morning Chronicle and London Advertiser*, 6 July 1776. *The London Review of English and Foreign Literature* (July 1776) 1–7. See also [Anon.], *An Interesting Address ... on Libels* (London, 1777) 51: ‘Judge Blackstone ... against whose errors the author of the fragment on government properly warns the admiring student’.

in Oxford, where Blackstone still continued to dabble in university politics, one partisan protested that

I cannot understand his conduct. He was once a leader of a party here ... His influence now reaches no further than the gates of All Souls, and is not general even there. His books shew that he is not a Tory in principle, and what the object is to which he thinks it worth his while to sacrifice truth and honour, I am at a loss to conceive.³⁵

Promotion to the judiciary in 1770 brought further accusations of double-dealing, insincerity, and subservience to court interests. Even before his appointment to the bench became public, a London newspaper nominated ‘The Time-Server, Memoirs founded on facts, by W. B—k—ne, Esq’ among a fictitious list of books and pamphlets ‘to be sold in Westminster-Hall’.³⁶ An orphan and very much a self-made man, lacking the independence that went with broad acres, while displaying little ease or grace in social situations, Blackstone was peculiarly vulnerable to such imputations.

III. Blackstone’s Critics

The chapters in this volume discuss in detail some of the ways Blackstone and his *Commentaries* attracted both praise and criticism during his lifetime and beyond. Michael Lobban begins with an analysis of the *Commentaries* in the context of other law books. It was the ‘form of the work and its style’ that was original rather than its content, he observes, as Blackstone aimed to provide ‘a new narrative form which explained both the shape and working of the law as a whole’ (6–7). In doing so, Blackstone cited and distilled material from existing technical guides to the common law. Yet while he succeeded in providing an elegant and accessible introduction to the general structure of English law, Blackstone’s work was of less use on particular ‘tricky or developing areas of law’ (22).

Blackstone was no original theorist, and Lobban notes that in his efforts to make the English legal system appear coherent he drew on a mix of theoretical positions that were in tension, if not contradictory. At times praising John Locke’s *Two Treatises of Government* and notions of natural law, Blackstone also made Hobbesian declarations about Parliament’s ‘sovereign and uncontrollable authority’ and ‘despotic power’. In his eclectic use of theory, Blackstone was very much a man of his times, when it was common to assume a happy alignment between English rights, natural rights and utility.³⁷ So while the *Commentaries* generally

³⁵ British Library, Additional MS 38457 fo 122, William Markham to Charles Jenkinson, 5 February 1768.

³⁶ *Gazeteer and New Daily Advertiser*, 26 January 1770.

³⁷ See, eg, I Hampsher-Monk, ‘British Radicalism and the Anti-Jacobins’, in M Goldie and R Wokler (ed), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge, 2006) 660.

bolstered a conservative reading of the constitution in church and state, Blackstone could also be selectively cited in support of political reform.³⁸ This naturally left him open to criticism for inconsistency, not least by his Irish critics, as discussed by Ultán Gillen in Chapter 6 of this volume.

Famously, the young Jeremy Bentham tore into Blackstone's efforts to provide a systematic and rational account of the English laws for enlightened readers. While his contemporary impact was limited, Bentham's subsequent fame has cast a lingering shadow over the *Commentaries*. Bentham figures prominently in Chapters 2 and 3 of this volume. The youthful Bentham's anonymous preface to *The White Bull* (1774) and *A Fragment on Government* (1776) launched a life-long attack on his former teacher as an influential champion of the established constitution in church and state; the latter text claimed that the progress of reform and 'the welfare of mankind' required the 'downfall of his works'.³⁹ Philip Schofield casts further light on this campaign in discussing a neglected essay written by the elderly Bentham. Having become a democrat in the early years of the nineteenth century, this work (which still remains in manuscript) was intended to further the goal of discrediting England's legal system in the eyes of the people. Bentham aimed to show how Blackstone and common lawyers generally 'pretended that the law was different from what it really was and what it ought to be' (28). Jessie Allen takes a fresh approach to this criticism in Chapter 3, drawing on scholarship about the nature and significance of ritual. She argues that Blackstone did not believe the common law was underpinned by 'some transcendent master plan', but rather that judges should nevertheless pretend to be 'finding' as distinct from 'creating' law—'for Blackstone the performative means a court used to reach its results were as important as the substantive result' (55). Allen's thesis gains support from the pervasive importance of ritual in eighteenth-century society, as attested by scholarship on crowds and electoral behaviour.⁴⁰ While the rationalist Bentham saw corruption everywhere crying out for reform, Blackstone saw reason in the rituals of law and society.

Chapters 4 and 5 examine the theme of religion and politics in the context of Blackstone's Oxford and English Protestant Dissent. Following JGA Pocock's concept of multiple enlightenments, Ian Doolittle argues that Blackstone was part of an 'Oxford Enlightenment'. Discussing Thomas Winchester, the Oxford tutor famously maligned in Edward Gibbon's *Memoirs*, Doolittle emphasises similarities between Gibbon, Winchester and Blackstone as supporters of an established national Church.⁴¹ Developments at Oxford, and the popularity of the

³⁸ RJ Smith, *The Gothic Bequest: Medieval Institutions in British Thought, 1688–1863* (Cambridge, 1987) 94.

³⁹ J Bentham, *A Fragment on Government*, ed JH Burns and HLA Hart (Cambridge, 1988) 4.

⁴⁰ EP Thompson, *Customs in Common* (London, 1991); F O'Gorman, *Voters, Patrons, and Parties: The Unreformed Electorate of Hanoverian England 1734–1832* (Oxford, 1989).

⁴¹ See also JGA Pocock, 'Anglican Enlightenment and Christian Revelation: The Reception of Gibbon's Decline and Fall', Centre for Intellectual History, University of Sussex, 2 March 2010, <<https://vimeo.com/16085824>>.

Commentaries were part of the rise of a ‘new right’ that culminated in the nineteenth-century Conservative Party.⁴² Vigorous defence of the privileges of the established Church of England was an important part of that process, and so it is not surprising that Protestant nonconformists were quick to sense danger in Blackstone’s influential exposition and justification of England’s discriminatory religious laws. According to Book IV of the *Commentaries*, first published in 1769, failure to conform to the Church of England remained a crime, since the Toleration Act of 1689 had only suspended penalties for orthodox Protestant nonconformists—it was effectively an act of indulgence that could be withdrawn at any time. In light of Dissenting criticisms Blackstone revised his language in subsequent editions, but did not change his fundamental interpretation and defence of England’s legal limits to religious toleration. Anthony Page argues that the clash with Blackstone played an important role in motivating Dissenters to campaign for greater religious liberty in the late eighteenth century. This early argument between a leading figure of the conservative ‘Anglican Enlightenment’ and a ‘Rational Dissenting Enlightenment’ prefigured the 1790s debate between Edmund Burke and radical reformers over the French Revolution.

Blackstone’s *Commentaries* were also seen as a formidable defence of the status quo in Ireland. There, as Ultán Gillen shows in Chapter 6, Catholics took the lead in criticising Blackstone’s defence of the penal laws on religion. Yet the primary focus of criticism, from a variety of writers, was directed at Blackstone’s support for the sovereignty of the Westminster Parliament over Ireland. Once the Irish Parliament gained independence in 1782, however, there were fewer references to Blackstone until after the failed rebellion of 1798, when the *Commentaries* again became a source selectively cited by both sides of the debate leading up to the Act of Union in 1801.

Our focus then shifts to family matters. In Chapter 7, Tim Stretton discusses the medieval exclusion of ‘half bloods’ from inheritance, which persisted until 1833. That antiquated provision did not cause widespread problems in the eighteenth century, if only because most propertied families prepared wills. Blackstone, however, ‘fully endorsed the half blood rule’ and groped for ‘a unifying logic that simply did not exist’ (118, 131). This has puzzled some, and can provide evidence that Blackstone was a rigid apologist for all established laws. Stretton observes, however, that the *Commentaries* were so named because they aimed to comment ‘on the law as it was, not as it should be’ (129). Moreover, Blackstone did occasionally praise legislation that had improved obsolescent common law doctrines. On the half-blood rule he went so far as to provide some specific points for parliamentarians to consider, but stopped short of advocacy: ‘how far a private inconvenience should be submitted to, rather than a long established rule should be shaken; it is not for me to determine’ (129).

⁴² JJ Sack, *From Jacobite to Conservative: Reaction and Orthodoxy in Britain, c. 1760–1832* (Cambridge, 1993).

Blackstone formulated a strong definition of the law of coverture, whereby ‘the very being and legal existence of the woman is suspended during marriage, or at least incorporated and consolidated into that of her husband’.⁴³ Viewed as an agent of England’s patriarchal establishment, Blackstone’s definition has been widely cited by feminists and other scholars as evidence of the depressed status of women under the common law. In Chapter 8 Carolyn Steedman criticises these critics, however, through a careful analysis of Blackstone in context: his definition of coverture was more nuanced than is often represented, the *Commentaries* was not widely cited on marriage until the twentieth century, and the actual experience of women in the eighteenth century was far more varied than Blackstone’s account of the law might suggest. As she concludes, although Blackstone on coverture has been highlighted by modern historians and campaigners for women’s rights, he ‘may be no good guide at all, to uncovering ordinary people’s criticism of the law in the past’ (152).

Whatever Blackstone’s impact on the legal status of women, his broader influence on the training of lawyers in the common law countries is hard to overstate. David Lieberman’s Chapter 9 focuses on the role of Blackstone in debates over the academic teaching of law. As inaugural Vinerian Professor, Blackstone was also the first official university lecturer on England’s common law. A century after his death, however, his efforts to promote England’s universities as the best place to study law could be judged to have failed to overcome the prevailing view that the law was best learned in courts and chambers. Blackstone was variously cited by admirers and critics in the course of debate over legal education, while the *Commentaries* remained in use as an introductory text for trainee legal practitioners.

Blackstone had a much larger impact in North America, and especially the US, where it is estimated that his *Commentaries* have been cited in over 10,000 judicial opinions.⁴⁴ Our volume draws to a close with two chapters on late nineteenth-century American responses to Blackstone. David Rabban in Chapter 10 discusses the influential historical school of American jurisprudence through an exploration of the extensive critical annotation included in William Gardiner Hammond’s innovative 1890 edition of the *Commentaries*. Hammond advocated a ‘science of law inductively obtained by studying the facts of history’, and left behind a very large but unfinished manuscript history of the common law that, if completed and published, would have outshone any similar volume of its time. Yet all was not lost, as much of this material informed the ‘copious notes’ of his edition of the *Commentaries*. In this form, Rabban observes, more readers may have been exposed to the historical school and its findings ... than through the works of any other

⁴³ W Blackstone, *Commentaries on the Laws of England, Book I: Of the Rights of Persons*, ed D Lemmings and W Prest (Oxford, 2016) vol 1, 284.

⁴⁴ M Hoeflich, ‘American Blackstones’, in W Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Oxford, 2009) 171.

American scholar' (191). As John Orth notes in Chapter 11, 'Blackstone's *Commentaries* formed part of the mental furniture of American lawyers'. And for this reason, Walter Clark, a Progressive judge on the North Carolina Supreme Court from 1889–1924, blamed Blackstone for fostering conservatism among American lawyers. His 'silken smoothness' had 'thrown a glamour around the common law', and Clark was enraged that Americans continued to study 'so inaccurate a writer whose views are so entirely at variance with the equality of all ranks' (197–98).⁴⁵ Yet while Judge Clark railed against the influence of Blackstone in various publications, Orth shows that he frequently cited the *Commentaries* in court. It was Blackstone's complacent tone and opposition to radical reform that enraged this Progressive jurist, while at the same time he found the *Commentaries* a clear exposition of the common law for a working judge.

Wilfrid Prest's survey of the ebbs and flows of Blackstone's posthumous reputation in Chapter 12 brings this volume to a close. Multiple editions of the *Commentaries* were published in England and Ireland in the half-century following Blackstone's death, but that publishing activity waned with the flood of new legislation in the decades following the Great Reform Act of 1832. Hence Blackstone's work entered a phase of relative neglect, caricatured as rigidly conservative and obsolete, and to a large extent supplanted by Henry Stephen's *New Commentaries on the Laws of England (partly founded on Blackstone)*. It was the reverse case in the US, where few new editions appeared before 1830, but 15 were published in the following two decades—owing in part to the far more prominent role of universities and private law schools in American legal training. In the twentieth century the *Commentaries* lost their former place in legal education, but gradually gained much more careful and respectful attention from scholars. Today the *Commentaries* continue to be cited as an authority in the courts of common law jurisdictions, by discussants, journalists and conservative polemicists, and by scholars pursuing various lines of academic research. Among the latter, historians of the eighteenth century often find themselves correcting distorted depictions of 'unreformed Britain' handed down by reforming Victorians—and this has certainly been the case for William Blackstone, one of England's leading voices in the Age of Reason.

⁴⁵ Like other Southern Democrats, Clark's concern for equality did not extend to African-Americans—born into a slave owning family, as a teenager Clark served in the Confederate army during the Civil War.