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Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone

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Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone

Jessie Allen[1]

> On the one hand, a myth always refers to events alleged to have taken place long ago. But what gives the myth an operational value is that the specific pattern described is timeless; it explains the present and the past as well as the future.
>
> Claude Levi-Strauss[2]

Blackstone's *Commentaries* is a legendary fount of learning for lawyers and statesmen in American history, but who actually reads it anymore? And who would use it to answer questions about twenty-first-century American law? The justices of the United States Supreme Court, that's who.

The *Commentaries* is undergoing a renaissance at the Supreme Court. In recent years the Court has cited Blackstone at rates not seen since the early nineteenth century. In some of those references, Blackstone's work supplies historical evidence about aspects of the British legal system that the American colonists both rejected and perpetuated. Some of the Court's uses of Blackstone, however, are more mythical than historical. One technique stands out. Identifying the *Commentaries* as the 'preeminent legal authority' for the 'founding generation,' the Court

sometimes proceeds as if the United States founders understood the Constitution to silently enact Blackstone's *Commentaries* in between or underneath the constitutional text. [3]

Blackstone in the United States Supreme Court

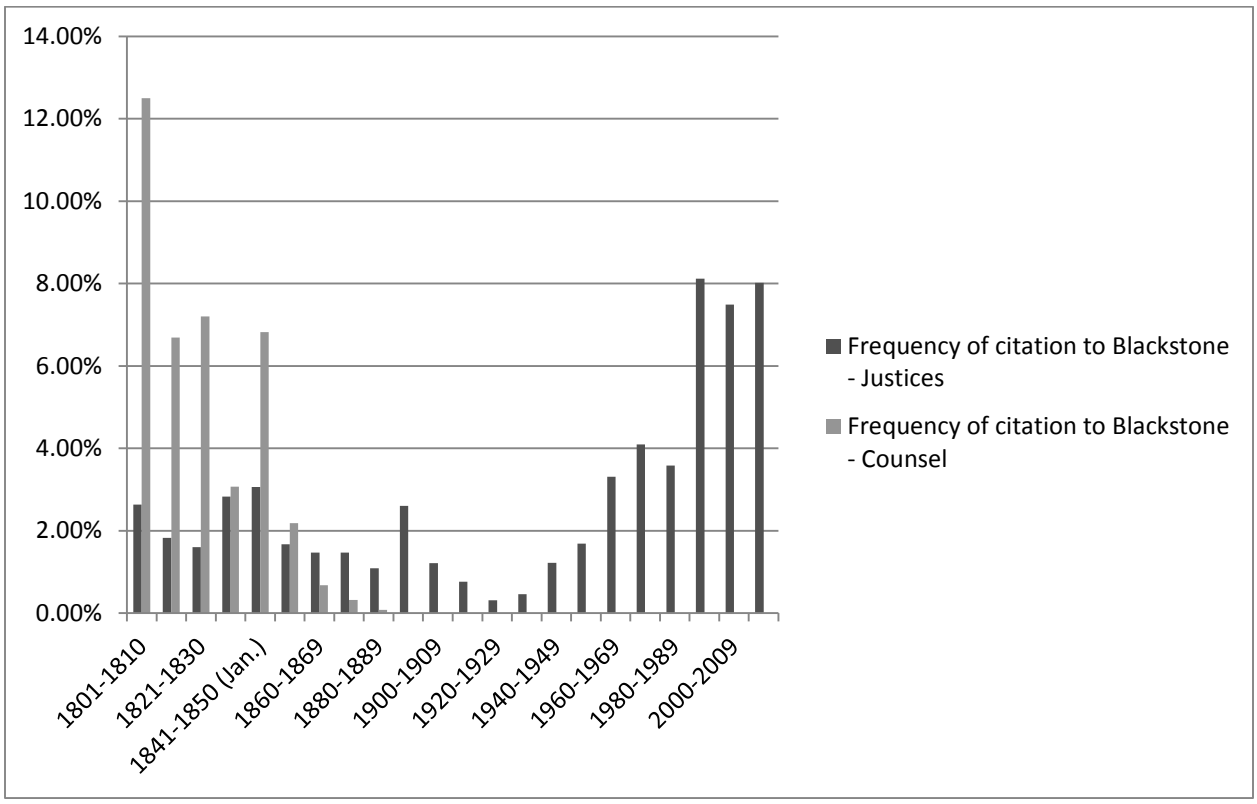
The *Commentaries* is off most lawyers' reading lists these days, and that is hardly surprising. After all, it is not as though we spend much time perusing law books from previous centuries – even those that were once highly influential. But there is a strange wrinkle in Blackstone's obsolescence. Recently, references to Blackstone in the United States Supreme Court's opinions have increased dramatically.

Blackstone has been cited often in US courts of all jurisdictions since the country's founding. That does not mean that Blackstone ever appeared in most, or even a large minority of, American judicial opinions. Dennis Nolan's study of a random sample of 471 cases from state and federal courts in the late eighteenth and early nineteenth centuries found that about 7 percent cited Blackstone, and many of those were in the arguments of counsel, not the final opinion of judges.[4] However that 7 percent– a reference in approximately 1 in every 14 cases was enough to make Blackstone's *Commentaries* the single most cited work in those early opinions.[5]

A closer look at citations to Blackstone in early United States Supreme Court cases confirms the basic picture Nolan provided. Between 1801 and 1830 there were 856 Supreme Court decisions issued with signed opinions. Of those decisions, 16, or 2 percent, included at least one reference to Blackstone by a Supreme Court justice, and 68, or 8 percent, carried references to Blackstone in the arguments of counsel that the early reporters reproduced.[6] The reason it makes sense to

count both of these numbers when gauging Blackstone's importance as a source of authority is that the justices' opinions from those early days are relatively free of citations to *any* authorities, compared with today's Supreme Court opinions. Scanning the early printed reports, one finds in the arguments of counsel the kind of citation patterns seen in both advocates' briefs and the Court's opinions today. The early justices' opinions, however, which are often just a few pages or paragraphs long, for the most part include only the occasional reference. It seems worthwhile, then, to consider the citation rates in both counsels' arguments and justices' opinions as baselines for comparison with the rates of citation in today's Supreme Court opinions. On both of these measures, there is no question that Blackstone's presence in twenty-first century Supreme Court cases is comparable to what it was in the Court's early days.

Since 1990, Blackstone has appeared in 8 percent of the US Supreme Court's signed opinions. That citation rate is higher than the rates of either Supreme Court justices or counsel at any time since 1810. Only Blackstone's appearance in 13 percent of counsels' arguments between 1801 and 1810 outstrips his current popularity now as a source of authority in the Supreme Court.[7] Moreover, Blackstone has not always maintained such a strong presence in the Court's opinions. Figure 1 shows that in the mid-nineteenth century, the Court's Blackstone references began to diminish. Then, after an upsurge at the turn of the century, citations to the *Commentaries* dropped precipitously. In the 1920s and 1930s there were quite a few years in which the Supreme Court failed to mention Blackstone at all.



Frequency is determined by dividing the total number of signed opinions of the court[1] by the number of Blackstone mentions by Justices, and by counsel[2]. It is worth noting that the year 1850 appears twice on this chart. That is because, in that year, the Court moved the start of its term from January to December, resulting in two full terms identified as 1850. Since that time, Supreme Court terms have started late in the year, and extended into the following calendar year. The result is that now most decisions identified with a particular term year are issued in the following calendar year.

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[1] Signed opinions for the term years 1801-1972 are taken from Albert P. Blaustein & Roy M. Mersky, *The First Hundred Justices: Statistical Studies on the Supreme Court of the United States* 137-141 (Hamden, Conn, Shoe String 1978). Signed opinions for the term years 1973-2009 are taken from L Epstein, J Segal, H Spaeth and T Walker, *The Supreme Court Compendium* 89-90 (Los Angeles, Sage 2012). Signed opinions for the term years 2010 and 2011 are taken from the Chief Justice's Year-End Reports on the Federal Judiciary. *2011 Year-End Report on the Federal Judiciary* (December 31, 2011), *available at* http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf; *2012 Year-End Report on the Federal Judiciary* (December 31, 2012), *available at* http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf. Signed opinions for term year 2012 are taken from a count of 2012 Slip Opinions on the Supreme Court Website. *2012 Term Opinions of the Court*, http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=12, last visited September 26, 2013.

[2] Compiled with a Westlaw Next search using search term, "(Blackstone bl england) /s (com commentaries comm tucker)", removing false positives (for instance, references to Kent's Commentaries and the effects of same on the law of England) and case-by case categorization of type.

After almost disappearing from Supreme Court opinions in the early twentieth century, however, Blackstone experienced a resurgence. Figure 1 shows that the Court's citations to Blackstone began increasing gradually through mid-century and then rose precipitously from the1990s to the current rate of about one in every thirteen decisions. Remarkably, in every one of the past 60 annual court terms, the justices have pointed to Blackstone's eighteenth-century treatise in at least one of their published opinions. It seems worth noting, moreover, that during Blackstone's previous period of popularity in the nineteenth century, there were considerably fewer authoritative legal sources of any kind. When the Supreme Court cites Blackstone now, his work is being chosen from a much wider range of potential reference points.

Table 1 shows the dramatic increase in citations to Blackstone's *Commentaries* in the Court's opinions between 1920 and the present, from a rate of 1 in 318 to 1 in 13 decisions. From 2000 to 2009 the justices of the Supreme Court issued less than half the number of decisions the Court produced from 1930 to 1939; but the number of decisions with citations to Blackstone increased more than sevenfold – from 7 to 54, producing a 1-in-13, or, 8 percent, citation rate in 2000-2009.

Table 1. Blackstone Citations in Opinions of U.S. Supreme Court 1920-2013

Decade	Decisions by signed opinions[3]	Decisions citing Blackstone [4]	Frequency of Blackstone citation
1920-1929	1906	6	1 for every 318
1930-1939	1521	7	1 for every 216
1940-1949	1314	16	1 for every 82
1950-1959	890	15	1 for every 59
1960-1960	998	33	1 for every 30
1970-1979	1294	53	1 for every 24
1980-1989	1397	50	1 for every 28
1990-1999	887	72	1 for every 12
2000-2009	721	54	1 for every 13
2010-2012	212	17	1 for every 13

Why so? Or, in a less overtly functionalist mode, what trends in United States jurisprudence and in legal culture coincide with that increase that might help us understand its meaning? Without ruling out many other possible contributing factors, it is at least causally suggestive that

[3] Signed opinions for the term years 1920-1972 are taken from A Blaustein and R Mersky, *The First Hundred Justices: Statistical Studies on the Supreme Court of the United States* 137-41 (Hamden, Conn, Shoe String 1978). Signed opinions for the term years 1973-2009 are taken from L Epstein, J Segal, H Spaeth, and T Walker, *The Supreme Court Compendium* 89-90 (Los Angeles, Sage 2012). Signed opinions for the term years 2010 and 2011 are taken from the Chief Justice's Year-End Reports on the Federal Judiciary. *2011 Year-End Report on the Federal Judiciary* (December 31, 2011), *available at* http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf; *2012 Year-End Report on the Federal Judiciary* (December 31, 2012), *available at* http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf. Signed opinions for term year 2012 are taken from a count of 2012 Slip Opinions on the Supreme Court Website. *2012 Term Opinions of the Court*, http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=12, last visited September 26, 2013.

[4] Compiled with a Westlaw Next search using search term, "(Blackstone bl england) /s (com commentaries comm tucker)" and removing false positives (for instance, references to Kent's Commentaries and the effects of same on the law of England).

Blackstone's Supreme Court renaissance coincides with the rise of 'originalism,' a mode of constitutional interpretation that looks to the 'original' meaning of the text. In particular, the figure shows a sharp spike in Blackstone citations soon after the arrival in 1986 of the Court's most vehement originalist, Justice Antonin Scalia. But which way does the causal arrow run? We should be cautious about ascribing Blackstone's recent popularity to the work of a single legal interpreter, even one as influential as Justice Scalia. [8]

Both Figure 1 and Table 1 show a steady increase in citations to Blackstone taking place over the half century *preceding* Justice Scalia's appointment. After the long lull in the early twentieth century, including quite a few years with no Blackstone citations at all, the citation rate begins to edge up – from less than 1 percent in the 1930s to just under 2 percent in the 1950s to around 4 percent in the 1970s and 1980s. Indeed, looking at the growth of Blackstone citations through the mid-twentieth century you might even say that you were watching the birth of Justice Scalia, or at least the preparation of the ground from which his fertile originalist jurisprudence later appeared. It is really quite striking to see how the Court's citations to 'the preeminent authority on English law for the founding generation,' grew slowly but surely, decade by decade, and then shot up shortly after the appointment of the judge who most militantly insists on interpreting the constitution according to that founding generation's original understanding.[9]

The Court's Blackstone Mythology

> Myth tells how, through the deeds of Supernatural Beings, a reality came into existence.
>
> Mircea Eliade[10]

Part of Blackstone's appeal as an authoritative source is the extraordinary range of legal issues and structures covered in the *Commentaries*. In just the 2012-2013 term, the United States Supreme Court cited Blackstone for (among other things) the privacy protection accorded houses and surrounding fields, the content of the Law of Nations, the doctrine of equitable tolling, the definition of extortion, and the historical role of judicial discretion in criminal sentencing.[11] Across their multifarious subject matter, however, the Court's Blackstone citations can generally be grouped into two categories: (1) evidence of facts about legal history, and (2) evidence of the way eighteenth-century Americans understood the legal principles, doctrines and structures implicitly incorporated in the United States Constitution. Both uses are susceptible to a problematic shift from factual reference to mythic narrative. [12]

Obviously, an eighteenth-century text on the 'laws of England' can provide historical evidence about eighteenth-century English law. The trouble is that the Supreme Court's ostensibly historical references to Blackstone sometimes slip into ahistorical assertions of timeless legal principle. And while there is wide agreement that American lawyers at the time of the founding were generally familiar with the *Commentaries*, references that equate Blackstone's text with the 'founding generation's' view of common law are problematic because they ignore contemporary criticisms of Blackstone that were undoubtedly familiar to at least some of the men who wrote, ratified and produced the first judicial interpretations of the United States Constitution.

Justices of the Court do sometimes use Blackstone to support narrowly contextualized statements of legal-historical fact. For example, Justice Scalia recently cited the *Commentaries'* chapter on corporations, first published in 1765,, as proof that corporations were a familiar legal structure

when the First Amendment to the Constitution was adopted in 1791. To be sure, this careful legal-historical use of Blackstone is a building block in a larger argument. The reference is part of Justice Scalia's concurrence in the notorious *Citizens United* decision, which struck down limits on corporate spending for political advertisements as a violation of the First Amendment's free speech guarantee.[13] Blackstone's discussion of corporations means the 'lack of a textual exception for speech by corporations cannot be explained on the ground that corporations did not exist or did not speak' when the Amendment was written.[14] Justice Scalia concludes that the Amendment's silence on the subject should be taken to mean that its guarantee of free speech extends to corporate speech. Ultimately, then, this reference to the *Commentaries'* authority doesn't remain limited to history. Nevertheless, the actual proposition Blackstone is called upon to authorise is a factual claim about law within a specific historical context. As a matter of judicial practice, that seems unexceptionable–the standard lawyer's inferential technique of using multiple limited authorities to build an argument that is rhetorically greater than the sum of its parts.[15]

At other times the Court has cited Blackstone to contrast an old doctrine with the current trend,[16] or made use of Blackstone's own accounts of historical changes in the common law. In the famous case of *Roe v Wade*, for example, in the 1970s, Justice Blackmun noted Blackstone's assertion that 'while abortion after quickening had once been considered manslaughter (though not murder), 'modern law' took a less severe view'.[17]There are even (rare) cases in which a justice has been willing to contradict Blackstone on his own eighteenth-century terrain. So, for instance, in a 1947 case, Justice Rutledge argued that Blackstone was wrong to assert that contempt of court cases were dealt with summarily without the usual procedural safeguards of a

criminal trial. Rutledge, citing secondary sources, attributes what he considers Blackstone's mistaken understanding of contempt procedure to 'private communication' with Chief Justice Sir John Eardley Wilmot. According to Rutledge, Wilmot's erroneous views on the subject thereby 'found their way . . . into the four volumes of the famous Commentaries'.[18]

Some of the Court's references to the *Commentaries*, however, are not so rigorously contextualized. Instead of building a case that law maintains some eighteenth-century aspect noted by Blackstone, the Court sometimes uses Blackstone as an authority on law *both* then and now. Citations that ostensibly anchor factual propositions about legal history slip over into ahistorical assertions of truths about the nature of law that justify current legal structures. This dual relationship to time is characteristic of myths. Like the motifs the anthropologist Claude Levi-Strauss observed in the mythic narratives of aboriginal cultures, the Court treats the *Commentaries* as simultaneously 'belonging to the past,' describing law at a specific time and place in history, and yet revealing 'a timeless pattern which can be detected in contemporary' law.[19]

Consider a 2012 majority opinion by Justice Roberts citing Blackstone for the claim that 'Sheriffs executing a warrant were empowered by the common law to enlist the aid of able-bodied men of the community in doing so.'[20]The reference comes in a decision holding that a private attorney who participated in a public corruption investigation is entitled to the same immunity government officials enjoy under the relevant federal statute, which was enacted in the late nineteenth century. Justice Roberts begins by locating a historic context that is admirably specific: 'Under our precedent, the inquiry begins with the common law as it existed when Congress passed Section 1983 in 1871.'[21]The problem is that the nineteenth-century American

context he identifies is a hundred years and an ocean away from Blackstone's eighteenth-century English text. And Justice Roberts offers no explanation for how the *Commentaries* fits into the historical framework he has set up.[22]Without that explanation, it appears that 'the common law' of the *Commentaries* is a matter of static, universally applicable, principles.

Anyone even slightly familiar with the section of the *Commentaries* being used to authorize this view will recognize how much at odds that timeless perspective is with Blackstone's own approach. The *Commentaries'* discussion of sheriffs is both historical and attentive to differences from county to county, let alone across countries. So, for instance, Blackstone begins by noting that originally sheriffs were the deputies of earls, but 'the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden' so that now the sheriff is an independent officer of the king.[23] Blackstone also traces at length the development of the practice of electing sheriffs, from ancient custom and early statute, noting, however, that in some places, including Scotland, the county of Westmoreland, and the city of London, the sheriffdom was an hereditary office.[24]In the process he points to the influence of various specific events, individuals and statutes and also notes disagreements among 'some of our writers' about those practices.[25]It seems quite strange, then, to interpret Blackstone's present-tense description of the English sheriff's power to deputise civilians as referring to a universal practice with relevance to the law of immunity a hundred years later in the United States.

To be sure, the Court does not rely on Blackstone's authority alone to support its ruling. Justice Roberts cites contemporary United States cases to support the claim that in the late nineteenth century, when the relevant civil rights statute was passed, civilian deputies were entitled to the same immunity as sheriffs. But why, if relevant contemporary authorities are available, does the Court think it necessary, or desirable, to cite Blackstone at all? Why add the eighteenth-century *Commentaries* to a ruling that a twenty-first century civilian investigator is immune to prosecution under a nineteenth-century statute? [26]The implication seems to be that the *Commentaries* is a work so universally accepted that it adds authority to practically any legal argument.

Sometimes Blackstone is cited by the Court not as direct authority for the content of common law, eighteenth century or otherwise, but rather for the way the 'founding generation'of the United States *understood* the common law at the time the Constitution was adopted. [27] For instance, the *Commentaries* have been cited to support, *inter alia*, claims about the American founders' views on the existence of an individual right to bear arms, the correct approach to statutory interpretation, whether at the time the U.S. was founded courts had any power of eminent domain, and parental control of children (and thus whether 'freedom of speech' includes an unqualified right to speak to minors).[28]The basic idea behind all these references is that the Constitution should be understood according to its 'original meaning' and that meaning incorporates Blackstone's views of the 'common law', because Blackstone was the 'preeminent authority' on common law at the time of the founding.[29]

For instance, Justice Thomas explains that Blackstone's 100-page discussion of the 'regular and ordinary method of proceeding in the courts of criminal jurisdiction', not only informs but

practically defines, and limits, the 'original meaning' of the words 'criminal prosecution' in the Sixth Amendment.[30] Likewise, Justice Scalia, in his dissent in *Hamdi v Rumsfeld*, quoted Blackstone at length to argue that the Due Process and Suspension Clauses express the 'two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned.'[31]Again, I do not mean to claim that the Court cites only Blackstone for the legal interpretations of the constitutional founders. Other sources are also employed – the Federalist Papers, English and colonial caselaw and early Supreme Court opinions, the founders' own papers, and other classic legal texts (including Bracton, Coke and Kent). But the frequency of citations to Blackstone and the unqualified way the Court's opinions often link Blackstone's view and those of the founders makes his role as a reference extraordinary, if not unique.

Beyond explaining that a specific section of the *Commentaries* was 'well known to the Founders,'[32] the Court has repeatedly affirmed that Blackstone's work 'constituted the preeminent authority on English law for the founding generation.'[33] Occasionally justices even go farther. In a rather startling assertion of the creative power of Blackstone's text, Justice Scalia has claimed that 'the Framers . . .were formed by Blackstone.'[34]

That formative influence is rarely questioned by anyone on the twenty-first century Supreme Court. The justices may sometimes criticise a particular reference to Blackstone, but usually not by attacking the idea that Blackstone's text shapes the meaning of the particular constitutional principle at stake. Instead, the opposing opinion writer reinterprets the *Commentaries'* quotation, or chooses a different section of the *Commentaries* on which to rely. So, for example, Justice

Stevens criticized Justice Scalia's use of Blackstone to interpret the rights conferred by the Second Amendment, contending that Blackstone's assertion of 'the right of bearing and using arms for self-protection and defence' refers specifically to Article VII in the English Bill of Rights and is inapplicable to 'interpreting the very differently worded and differently historically situated Second Amendment'.[35] Justice Stevens however, put forward a different passage from the *Commentaries* to illuminate the meaning of the Second Amendment: 'What *is* important about Blackstone is the instruction he provided on reading the sort of text' at issue, including the fact that Blackstone's interpretive approach 'gave far more weight to preambles than the Court allows.'[36] Rather than question the role of the *Commentaries* in the original meaning of the Constitution, the justices generally prefer to fight Blackstone with Blackstone.

There are certainly reasons to consider Blackstone's text uniquely important for lawyers in the early days of the United States. There is an unchallenged historical consensus that the *Commentaries* was the most widely read law book in late eighteenth-century America.[37] Moreover, while Blackstone was widely available to lawyers, judges and law students, case reports from British and colonial American courts were scarce. Even if Blackstone was not always right about the structure and content of eighteenth-century common law, so the argument goes, he was 'the oracle of the common law in the mind of the American Founders'.[38] Therefore, to the extent that the founding generation understood the Constitution to be predicated on English common law, the constitution reflects Blackstone's representation of that law.[39]

But the extraordinary popularity and influence of the *Commentaries* does not mean the U.S. founders understood the Constitution to uncritically enact Blackstone's version of every common

law structure not explicitly contradicted in the constitutional text. Beyond the kinds of difficulties frequently associated with the pursuit of the 'original meaning' of constitutional rights and structures, there is a particular problem with equating Blackstone's text with that meaning, which again relates to the Court's mythic treatment of the text. That problem is the assumption that eighteenth-century lawyers, judges, legislators, voters and constitution framers viewed Blackstone's text as an objective, politically neutral description of the common law of their time.

Even if we believe that the founding generation–broadly or narrowly defined–was familiar with the *Commentaries*, on what basis can we assume that they took Blackstone's work as accurately describing a universally applicable common law, or even as an objective rendering of eighteenth-century English law? In the first place, the title announces something quite different. The work is not called, 'The Laws of England,' but *Blackstone's* Commentaries *on the Laws of England*. What part of 'commentaries' don't the originalists understand? In the second place, some vehement eighteenth-century critiques of the *Commentaries* were doubtless well known to those United States founders who were familiar with Blackstone. Jeremy Bentham published the most famous of these attacks in 1776–the year the United States declared independence.[40] What is more, records of some founders' views of Blackstone's work include both praise and criticism, and, unsurprisingly, indicate that they understood the *Commentaries* to be shaped by Blackstone's political perspective, which they identified as antagonistic to their own.

Thomas Jefferson, for one, did not receive Blackstone's work as an objective account . To the contrary, he found the *Commentaries* politically tendentious: it was 'making Tories of these

young Americans whose native feelings of independence do not place them above the wily sophistries of a Hume or a Blackstone'.[41] Jefferson explicitly rejected the idea that Blackstone's work captured all the ins and outs of the common law. He conceded that the *Commentaries* were 'the most elegant and best digested of our law catalogue*'*. But as a source for deep legal understanding, the work was insufficient. He complained that 'a student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book, he is master of the whole body of the law'[42]. Moreover, according to Jefferson, the inadequacy of lawyers who relied on Blackstone was 'well understood even by the unlettered common people, who,' he pointed out, 'apply the appellation Blackstone lawyers to these ephemeral insects of the law'. [43] So much for the notion that Blackstone was the legal be-all and end-all for every member of the 'founding generation'.

Nor was Jefferson the only influential founder to criticise Blackstone in print. Justice James Wilson's opinion in *Chisholm v Georgia* (1793) rejected Blackstone's views on sovereign immunity and made it plain that the legal principles set out in the *Commentaries* were politically objectionable, jurisprudentially wrong and incompatible with the legal structures adopted by the United States Constitution.[44] According to Wilson, Blackstone's common law doctrines of immunity cannot be part of the Constitution because they are underwritten by the principle "that all human law must be prescribed by a superior," a principle Wilson found contrary to "the basis of sound and genuine jurisprudence". Moreover, the theory of sovereign immunity explicated by Blackstone was part of a larger legal scheme, 'upon which a plan of systematic despotism has been lately formed in England…'.[45] For Wilson, Blackstone was not merely the reporter of that

despotic system, but an active proponent: 'Of this plan, the author of the Commentaries was, if not the introducer, at least the great supporter.'[46]

Sceptical views of Blackstone in eighteenth-century America were not restricted to presidents and supreme court justices. The report of a 1788 case from the Pennsylvania Supreme Court contains a description of an argument by one Mr. Lewis, a lawyer and member of the Pennsylvania General Assembly, in support of a prison sentence meted out to a newspaper publisher for libel.[47] Lewis's speech 'referred to the celebrated Commentaries in support and illustration of his sentiments upon liberty'.[48] But apparently he could not presume that his audience would share his own good opinion of Blackstone's work. Before drawing on that authority, he first 'rescued Sir William Blackstone from the stigma of being a courtly writer, by showing the enthusiasm of that author in favor of the trial by jury'. [49]

The Court's avowals of the United States founders' uncritical faith in the *Commentaries* is mythmaking, not only in the sense that it conflicts with parts of the historical record but in another more interesting sense as well. Rather than treating the *Commentaries* as no more than a source of information about past legal practices, the Court treats the text as a venerable but still-active legal influence. I am not claiming that Blackstone's text exerts a causal effect on the Supreme Court's legal determinations. It may–or it may be that the justices go to Blackstone to support outcomes they have already chosen for altogether other reasons. Either way, in the legal culture that emerges from the Court's opinions, Blackstone lives on as a powerful legal ancestor. You might even say that as the 'preeminent' source of the American founders' legal understanding, Blackstone is not just a secondary authority but in a sense the author of a host of

legal constructs that the Court reads between the lines of the Constitution. Blackstone's text indeed takes on a constitutive quality not unlike that of the Constitution itself.

If the Court's use of Blackstone exemplifies the dual temporal quality that Levi-Strauss observed of mythic narratives, the presentation of the *Commentaries* as the founders' legal gospel recalls another of Levi-Strauss's teachings. The focus of this observation is not myths per se, but the relationship between 'primitive' myths and the modern scholars who analyse them. A fundamental insight of critical and structural anthropology has been that portraying other cultures as credulous believers in myths that appear obviously fictional to modern eyes is a way of establishing the triumphant sophistication of modern cultures. Thus Levi-Strauss explained that to regard 'primitive' people as believing in a direct, natural relationship between clans and their animal totems was to 'project[] outside our own universe, as though by a kind of exorcism, . . . mental attitudes' judged incompatible with modern thought.[50] From this perspective, theories about totemism in aboriginal cultures revealed less about the cultures being interpreted than the interpreting scholars, who sought 'consciously or unconsciously, and under the guise of scientific objectivity,' to make the people studied 'more *different* than they really are.'[51]

A related phenomenon seems to be at work when the Court presents Blackstone as the 'oracle of the law in the mind of the American framers'.[52] By presenting mythmaking cultures as naieve believers in those myths, anthropologists distanced themselves from the cultures they studied and highlighted their own critical rationality. Likewise, when the Court today portrays the eighteenth-century originators of the Constitution as uncritical adherents of Blackstone's version of the common law, the founders' simple faith in Blackstone's authority contrasts with the

sophisticated legal analyses of the modern Court's opinions. This contrast allows the justices citing Blackstone for the original meaning of the Constitution to have their cake and eat it too. The Court's analysis gains the kind of rule-of-law certainty that comes from relying on the *Commentaries* as a canonical text. But presenting that text as authoritative through the eyes of the 'founding generation,' avoids the accusations of legal primitivism that would certainly accompany avowals that the current justices themselves viewed Blackstone's text as *the* definitive source of all common law structures implicitly incorporated in the Constitution.

The irony, of course, is that taken seriously, the Court's approach turns the legendarily sagacious American founders into legal simpletons. Or rather, that would be the result if the Court's view of Blackstone's role for the founders were taken as *fact*. But that must not be what the Court really means. For one thing it would be too much at odds with another American legal myth – namely, the view of the United States' founders as visionary ancestors whose extraordinary legal and political wisdom remains a continuing resource through the Constitutional text. In addition, insisting on the founders' uncritical belief in Blackstone is at odds with the political and historical context. It is hard to believe that, having just fought a war for independence from Britain, the revolutionary American generation would approach uncritically a text written by a man avowedly opposed to American independence. And as we have seen, that view conflicts with some of the founders' own expressed views. Then there is the text itself. Whatever one's view of Blackstone's project, it is hardly debatable that he sometimes minimized legal contradictions and rationalised legal history in order to argue for the continuing legitimacy of the English common law system.[53] Moreover, it seems eighteenth-century readers were less likely than we are today just to dip into Blackstone here and there to confirm some particular point

about legal doctrine. Lawyers of the 'founding generation' apparently absorbed Blackstone's four-volume work as a whole, sometimes more than once. John Marshall, the early influential Chief Justice of the United States is said to have read the *Commentaries* four times. [54] That kind of extended familiarity with the work tends to bring out Blackstone's distinctive authorial voice and projects. Cover-to-cover readers would be far less likely to adopt an uncritical belief in the revealed truth of a text as manifestly creative as the *Commentaries*.

In my own reading of the *Commentaries*, I have been struck by the way Blackstone's individual voice comes through, much more clearly than I expected in such a canonical academic work. At times his tone is almost personal, and quite different from the distanced voice of legal advocacy and scholarship today. In his introduction, Blackstone uses the first person. He says "I think" and "I hope" and "Far be it from me."[55] Although much of the work is more formal, the voice seems to come out when Blackstone wants to emphasize his affiliation with his subject. So, for instance, in a discussion of future estates, Blackstone expresses his admiration for the craft on display in this notoriously intricate doctrinal area: 'the student will observe how much nicety is required in creating and securing a remainder'. Then he shifts into the first person: 'I trust he will in some measure see the general reasons upon which this nicety is founded'. [56] At other times the voice is critical. In one passage of likely interest for eighteenth-century American readers, Blackstone observes dryly that England's 'American plantations'were acquired by treaty, conquest 'and driving out the natives (with what natural justice I shall not at present inquire)'.[57]

Blackstone the Mythmaker

In substance as well as style, Blackstone's work bears his personal stamp. Extended readers can hardly fail to notice that Blackstone has some stories to tell, and, reading these stories, it is practically impossible to see Blackstone as the neutral reporter of an objective view of English common law. Indeed, if the Supreme Court mythologises Blackstone, it is equally true that Blackstone himself was engaged in something of a mythmaking project.

For instance, the *Commentaries* includes a creative retelling of the Norman Conquest, in which an apparently disruptive historical event winds up being the link that connects present-day legal structures with an ancient past. Without this revision, the Conquest would pose real problems for Blackstone's overarching account of common law's evolution from ancient English origins. If, as Blackstone asserts, modern English property law is built on feudal foundations, and if European feudalism was imposed on a defeated English people by William the Conqueror, that hardly seems to validate Blackstone's story of the ancient and uniquely British origins of common law property rights. How can a legal system whose sine qua non is *private* property be squared with the 'grand and fundamental maxim of all feudal tenure' that 'all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown'?[58] Responding to this challenge, Blackstone sets out to show that the received view of feudalism in England is all a 'strange historical mistake.'[59]

Blackstone weaves a tale of a Danish invasion some years after the Conquest, before which, 'the military constitution of the Saxons being then laid aside, and no other introduced in it's stead, the kingdom was wholly defenceless'.[60] The foreign army the king brought over to repel the Danes made apparent the advantages of a feudal system for raising a domestic army. Accordingly, 'all

the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person,' and feudal land tenures were formally introduced into English law.[61] Theirs was a formal agreement, however, that at the time 'probably meant no more than to put the kingdom in a state of defence' by obliging themselves to defend the king's territory '*as if* they had received their lands from his bounty upon these express conditions'.[62] The whole deal was fictional, and thus becomes the basis of a canny claim based on contract law principles. Because the nobles already owned the land the king was ostensibly granting to them, they were 'by no means beneficiaries' and so could not be expected to *really* provide everything they promised in exchange.[63]

So, in Blackstone's version of the story, when eventually the English landholders 'rise up in arms' against the 'rigours of the feudal doctrines,' they have the law on their side.[64] They don't fight for 'mere infringements of the king's prerogative' but to restore the rights of Englishmen under the ancient Saxon law that predated the Conquest and were never revoked under the legally correct interpretation of the gentlemen's agreement that the Normans misconstrued.[65] They fight, as it were, *inside* the law.

Here is a legal myth if ever there was one–the story of the hero law. In Blackstone's Conquest, the twists and turns in the descent of property law from ancient norms take place within the legal system. Legal rituals, not force, accomplish the evolution from ancient Saxon law through feudalism up to contemporary property structures. Even when property rights were corrupted, during the bad old feudal days, it was not so much the fault of a megalomaniac king or bloodthirsty soldiers, but of those crafty *lawyers* who can make and remake rights and

obligations in the forms they choose. Law is by far the most effective, powerful, and socially influential actor on this stage. For better or worse, in Blackstone's world a well crafted legal argument is mightier than the sword.

Blackstone Explains the Future

I do not mean to suggest that because of his mythologising tendencies, we cannot gain real insight from Blackstone. It might be problematic to present the *Commentaries* as an untroubled universal source of eighteenth-century American legal norms, and still possible to find in this storied text harbingers of twenty-first century legal and social structures. But before I offer an example of how the *Commentaries* might be read to illuminate law and society in the United States today, let me point out an obstacle to this kind of reading. I have criticised the Supreme Court for presenting eighteenth-century American readers of Blackstone as less legally sophisticated than the current Court—in effect, 'totemising' the American founders. If the current Court tends to flatten and oversimplify the attitudes of Blackstone's eighteenth-century American audience, however, it is easy to adopt a similar attitude regarding Blackstone's eighteenth-century English subject matter. We may be too quick to view Blackstone's text as depicting a world—and ways of thinking about that world—too different from our own to shed any light on twenty-first-century legal culture.

With that problem in mind, consider chapter 12 of the *Commentaries*' first volume, the subject of which is 'the civil state' or,'[t]hat part of the nation which . . includes all orders of men, from the highest nobleman to the meanest peasant'.[66] Blackstone's method here of representing civil society is strikingly categorical and status bound. It consists of listing the hierarchy of titles and

ranks available in eighteenth-century Britain, along with brief descriptions of their origins, privileges and customary duties. Initially, Blackstone's typology of British civil society, with its emphasis on ritual and formal hierarchy, seemed stilted and wholly at odds with fluid twenty-first-century Western relations. Indeed Blackstone's 'degrees of nobility and honour'[67] at first struck me as so different from the social structure of my own world that it put me in mind of the elaborate clan and kinship diagrams reproduced in ethnographies—earls and marquesses as the turtle and kingfisher totems of the British monarchy!

Moreover, I was quick to ascribe to the practitioners of this 'traditional' social hierarchy an inability to look beyond or through its internal boundaries. Just as the Supreme Court's references sometimes obscure the critical faculties of Blackstone's eighteenth-century American audience, I was discounting Blackstone's own sceptical intelligence and that of his subjects. When I read Blackstone's descriptions of the formal degrees of nobility that articulated the eighteenth-century British state, I imagined that the citizens who either were or were not the dukes, earls, knights and peasants would not perceive the contingency of those categories. I imagined that their society was at once more artificial than ours and more natural from the perspective of the people who composed it. But on second thoughts, I could see the totemism at work in my first impressions of Blackstone's world.

Levi-Strauss read the patterns inscribed in myth as expressions of a common structure across cultures. Approaching the *Commentaries* as a potential source of familiar social patterns, how exotic really is the place-for-everyone-and-everyone-in-his-place approach Blackstone describes? Consider, for example, the way academic credentials denominate the different ranks

of professional life in the United States today. We may think academic letters stand for more substantial, experiential differences than the degrees of nobility Blackstone describes. After all, university degrees are not inherited. But a glance at the demographics of who receives JDs, LLMs, BAs, MBAs, PhDs and MDs in the United States reveals that family history plays a large part. About 8 in 10 Americans whose parents hold college degrees enroll in college after high school, compared with only about half of those whose parents did not finish college, and less than 4 in 10 whose parents who did not finish high school.[68] Of course that does not mean that the divide in the United States today between those with and without college education is strictly comparable to the traditional British system of aristocrats and commoners But viewing the *Commentaries*'civil ranks as a system that might have analogues in my own time and place makes it possible to see the persistence of hereditary status in our avowedly egalitarian world.

Unlike the ranks Blackstone describes, the marks of status created by education in the United States today are not formally reflected in legal doctrine. But that does not mean they are without legal significance. For instance, as Paul Butler has pointed out, there is a strong correlation in the United States today between educational attainment and criminal incarceration.[69] Put bluntly, prison is largely reserved for those who are academically untitled. Butler reports that only 13 percent of incarcerated Americans have any post-secondary education, and among state prisoners, 70 percent never graduated from high school. On the other hand, a college degree has a remarkable immunizing effect against the criminal law: Only 0.1 percent of those with bachelor's degrees are incarcerated, compared with 6.3 percent of high school drop outs.[70]

Another familiar structure in the United States today that recalls Blackstone's social ranks is the hierarchy embodied in a dizzying array of plastic credit cards. The combinations of gold, platinum, and black cards and familiar graphics and designations – 'preferred rewards' 'centurion' -- even oddly recall aristocratic family crests and mottos. If you doubt that credit cards meaningfully structure social mobility beyond an individual's access to cash, consider that most hotels will not accept guests who do not present credit cards. Ostensibly a way to protect against guests who raid the mini-bar and then abscond without paying for those exorbitantly overpriced smoked almonds, the hotel credit card prerequisite serves as a de facto social filter. Americans without credit cards are categorically excluded from a particular, legally recognized relationship to real property—that of being a hotel guest. Lacking this visible sign of 'personal credit', one lacks access to public accommodation, not because of an inability to pay, but for want of a crucial badge of identity conferring access to that 'estate'. This was brought forcefully home to me when a national organisation I worked for held a conference to which we invited community organizers, some of whom had no credit cards. It was quite an undertaking to get the hotel to accept these effectively untitled folks, even with an organization willing to guarantee any excess room charges with its own AmEx gold card. They might leave home without it, but they certainly weren't going to be staying in any major hotel chain overnight. Credit status, and the cards that enact it, thus confers and withholds access to liberty and property in ways that recall the 'original . . .several degrees of nobility'[71] and 'names of *dignity*'[72] that structured eighteenth-century British subjects' legal rights and privileges.

Recognizing the *Commentaries'* reflections in twenty-first-century American culture can reflect back on one's reading of Blackstone's text. Once we give up the notion that the eighteenth-

century British subjects Blackstone describes had a radically different approach to social hierarchy than we do, it is possible to imagine that, like us, they were sceptical about the way law structured their society. Blackstone certainly suggests that he regarded the categorical assignments of British social status as something other than transparent indicia of intrinsic nobility. In the *Commentaries,* the designations of nobility sound decidedly positivistic, not to say completely arbitrary. Blackstone explains, for instance, that new peers are created by formal acts and documents and that existing nobles 'must suppose either a writ or a patent made to their ancestors; though by length of time it is lost'.[73]There is also a discussion of the relative merits of acquiring a peerage by writ (which includes heirs 'without any words to that purport') as against patent (whereby the subject is ennobled even if he never takes his seat in the House of Lords).[74] Reading this chapter with an eye toward its contemporary relevance draws attention to Blackstone's decidedly realistic tone about the hierarchy he describes. One gets the impression that Blackstone views British titles as reflecting innate or essential superiority of character to about the same extent that we believe modern academic credentials reflect pure intellectual meritocracy and think that offers of new credit cards are a sign of one's objective credit worthiness.Indeed, if critiquing the Supreme Court's story of the founding generation's credulous faith in Blackstone's neutrality brings out his text's mythic qualities, considering how his text can illuminate current legal culture tends to highlight the pragmatic aspects of his approach.

If the Supreme Court treats Blackstone as an immortal ancestor whose legal ideas continue to shape the United States Constitution, others see him as a legal primitive, a fussy antiquarian too firmly embedded in a distant time and place to have real relevance today. But Blackstone's work

is neither a timeless source of universal legal norms nor an archaic relic of an exotic legal culture. Blackstone argues for the role of common law in modern society both through valorising myths—for instance, the story of how ancient English property rights outsmarted and eventually prevailed over foreign military force—and by modeling with his own sceptical, historical approach how traditional legal structures might be understood to influence and be influenced by changing social structures. In contrast, the Supreme Court's recent references advance a less convincing account of Blackstone's continued relevance in United States law. The Court offers the *Commentaries* as an untroubled source of practically every aspect of the eighteenth-century founders' legal understandings and thus of law today to the extent the constitution perpetuates those original understandings. That is not a legal myth we can take seriously. It too blatantly ignores the political context of Blackstone's work in the early United States and the critical perspectives some of the United States founders expressed toward Blackstone's project. Moreover, the Court's insistence on the founding generation's credulous acceptance of the *Commentaries* as timeless legal truth is in tension with the text itself. It both ignores some obviously mythical aspects of Blackstone's legal account and denies his consciously historical method.

Let me end by suggesting another mythic role for Blackstone as a cultural ancestor. What I have in mind seems at once truer to Blackstone's authorial vision and no less expansively imaginative—if considerably more antic—than the Supreme Court's treatment of the *Commentaries*. Consider how Blackstone's vision of the common law prefigures current idealised visions of the internet. The common law Blackstone describes is a system of great complexity, flexibility and responsiveness that, despite its lack of top-down order, is

mysteriously capable of promoting certain virtues and values instead of breaking down into a cacophony of competing individual interests. For all the references to God and natural rights, the common law of the *Commentaries* is an almost accidental creation – an amazingly complex and resilient bulwark of human liberty that developed through the contingencies of history, not because of some divine, or human, plan.

There is no question that to some extent this vision is a fantasy. The cumulative results of so many unconnected individual judgments must be either far less organized than the picture Blackstone presents or far more driven by political and economic interests. Doubtless both are true of the common law—and the internet. Yet in both institutions, there remains an organisational and communicative power that seems to escape at once the noise of randomness and the deliberate control of powerful individual interests.

Blackstone celebrates common law as a quintessentially social creation and points to its potential for liberal political development. If the internet is, or ever can become, such a thing, I daresay Blackstone will be partly responsible. After all, he did as much as anyone to popularise the dream of a massive, intricate, evolving network of ideas that achieves coherence without the control of a single sovereign intelligence, a truly common system that both mirrors and drives the culture that produced it.

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[1]. Thanks are due to the participants in the University of Adelaide conference, Re-Interpreting Blackstone's Commentaries, to the Three School Colloquium at the University of Pittsburgh, and

to Bernard J. Hibbitts for thoughtful comments that improved the paper. Caroline Hall and McArdle Booker provided research assistance without which there would be no paper.

[2] C Lévi-Strauss, *Structural Anthropology* (trans. by C Jacobson) (New York, 2004) 209.

[3] *District of Columbia v Heller* 554 US 570, 593-94 (2008).

[4]D Nolan, 'Sir William Blackstone and the New American Republic: a Study of Intellectual Impact' (1976) 51 *New York University Law Review* 731, 753.

[5] Ibid. Donald S Lutz examined the citation frequency of a number of well known authorities in the work of various founding political figures in America from 1760 to 1800. D Lutz, *the Origins of American Constitutionalism* (Baton Rouge, 1988) 142-46. Among secular authorities, Blackstone was second only to Montesquieu, with Montesquieu being cited 8.3% of the time and Blackstone 7.9%; the next closest was Locke at 2.9%.

[6] Frequency of citation was determined by dividing the total number of signed opinions of the Court by the number of cases that carried Blackstone mentions by justices or counsel. The number of signed opinions for the term years 1801-1830 comes from A Blaustein and R Mersky, *The First Hundred Justices: Statistical Studies on the Supreme Court of the United States* (Hamden, Conn., 1978) 137-41. Blackstone citations were compiled through a *Westlaw Next* search, '(Blackstone bl england) /s (com commentaries comm tucker),' followed by a case by case review to remove false positives (for instance, references to Kent's *Commentaries* in relation to the law of England).

[7] The calculations begin in 1801 because in the Court's first decade, 1790-1800, the decisions issued are so few and the opinions reported so different in form from current Court's practice, that comparisons did not seem appropriate.

[8] Of course there could be many reasons for the fall and rise of Supreme Court citations to Blackstone. It is possible, for instance, that the low rates in Blackstone citations through the early twentieth century are part of a more general practice of avoiding citations to 'secondary' legal sources. It is also possible that the recent rise of Blackstone citations is part of a broader trend toward citing "'classical"' common law sources, including not only Blackstone, but also, eg, Coke and Bracton. Do the justices think it is rhetorically advantageous to demonstrate a mastery of such arcane authorities? Is the Court becoming more academic in its analyses? Does the shift have something to do with the late-twentieth-century practice of employing recent law-school graduates as clerks to the justices? More work needs to be done to understand the significance of the citation trends.

[9] *Heller* 554 US at 593-94. Although Justice Scalia has the highest rate of Blackstone citations on the current Court, he is not the only justice citing Blackstone. For instance in the 2012-13 term, Blackstone appears in 4 of the 24 (or 1/6) opinions Justice Scalia wrote. Justices Thomas and Roberts ran a close second, having cited Blackstone in 3 of 25 and 2 of 17 opinions, respectively, for a rate of approximately 1/8. Justice Alito cited Blackstone in 2 of his 21 opinions (1/10) and Justice Breyer used Blackstone in 1 of 18 opinions. Justices Ginsburg, Kennedy, Sotomayor and Kagan did not cite Blackstone this term, but they all have done so in the past (though it should be noted that Justice Ginsburg's citations to Blackstone are very few

and far between). Indeed, the only member of the current court who has never referred to Blackstone in an opinion is Justice Kagan, who has been on the Court for only three terms so far.

[10] M Eliade, *Myth and Reality* (trans. by W Trask) (New York 1975) 5.

[11] *Florida v Jardines* 133 S Ct 1409 (2013) (Scalia, J) (privacy); *Kiobel v Royal Dutch Petroleum* 133 S Ct 1659 (2013) (Breyer, J, concurring) (Law of Nations); *McQuiggen v Perkins* 133 S Ct 1924 (2013) (Scalia, J, dissenting) (equitable tolling); *Sekhar v United States* 133 S Ct 2720 (2013) (Alito, J, concurring) (extortion); *Alleyne v United States* 133 S Ct 2151 (2013) (Thomas, J) (sentencing).

[12] The diversity of subject matter for which Blackstone has been cited recently does not, of course, mean that there are no patterns to be found in the content of the Court's use of his authority. Future analysis may reveal more about the way the doctrinal and political content of references to the *Commentaries* have changed over time.

[13] *Citizens United v Federal Election Commission* 558 US 310, 385-93 (2010).

[14] Ibid 388.

[15] See also, *Vermont Agency of Natural Resources v United States* 529 US 765, 768 (2000) ('The phrase [*qui tam*] dates from at least the time of Blackstone. Citing 3 Bl. Comm.160).

[16] See, e.g., *Clark v Arizona* 548 US 735, 766 (2006) ('Before the last century, the *mens rea* required to be proven for particular offenses was often described in general terms like 'malice,' see, *e.g.*, *In re Eckart*, 166 U.S. 481, 17 S.Ct. 638, 41 L.Ed. 1085 (1897); 4 W. Blackstone, Commentaries *21 ('[A]n unwarrantable act without a vicious will is no crime at all'), but the modern tendency has been toward more specific descriptions'). See also, *McMillian v Monroe*

County, Alabama 520 US 781, 804 (1997) (Ginsberg, J, dissenting) (disputing the majority's reliance on Blackstone for the state, as opposed to local, identity of Alabama sheriffs because 'the English sheriff, as Blackstone described him, was far closer to the crown than his contemporary counterpart is to the central state government'); *New York Central & Hudson River Railroad Company v United States* 212 US 481, 492 (1909) ('In Blackstone's Commentaries, chapter 18, S 12, we find it stated: 'A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities.' The modern authority, universally, so far as we know, is the other way'); *Carpenter v Winn* 221 US 533, 538-39 (1911) ('Blackstone defines 'trial' to be the examination of the matters of fact in issue . . . . But the word has often a broader significance').

[17] *Roe v Wade* 410 US 113, 135 (1973).

[18]*United States v United Mine Workers of America* 330 US 258, 366 n. 32 (1947) (Rutledge, J, dissenting).

[19] C Lévi-Strauss, *Structural Anthropology* (trans. by C Jacobson)(New York, 2004) 209.

[20] *Filarsky v Delia* 132 S Ct 1657, 1664 (2012).

[21] Ibid 1662.

[22] One possible explanation would be that at the time the statute was passed, American lawmakers continued to read the *Commentaries* as an authoritative legal text. There is certainly plenty of evidence that late-nineteenth-century American lawyers read Blackstone. What is missing is the argument and evidence that they were reading Blackstone as an authoritative source of nineteenth-century American law.

[23] 1 Bl. Comm. 328.

[24] Ibid 328-29.

[25] Ibid 330.

[26] Other recent examples of this kind of temporally transcendent use of the *Commentaries* include a dissent by Justice Sotomayor, offering Blackstone as authority for the proposition that the bar on retrial after acquittal is 'the most fundamental rule in the history of double jeopardy jurisprudence,' *Blueford v Arkansas* 132 S Ct 2044, 2053-54 (2012), and the majority opinion by Justice Scalia in, *Stop the Beach Renourishment, Inc. v Florida Department of Environmental Protection* 130 S.Ct. 2592, 2598 (2010), which uses Blackstone to define coastal property rights 'at common law.'

[27] *District of Columbia v Heller* 554 US 570, 594 (2008).

[28] *Heller* 554 US at 593-95 (Scalia, J) (arms); Ibid 665 (Stevens J, dissenting) (statutory interpretation); *Stop the Beach Renourishment, Inc. v Florida Department of Environmental Protection* 130 S.Ct. 2592, 2616 (2010) (Kennedy, J concurring) (eminent domain); *Brown v Entertainment Merchants Association* 131 S Ct 2729, 2757-59 (2011) (Thomas, J dissenting) (speech).

[29] *Heller* 554 US at 593.

[30] *Rothgery v Gillespie County, Texas* 554 US 191, 219-22 (2008) (Thomas, J, dissenting).

[31] *Hamdi v Rumsfeld* 542 U.S. 507, 554-56 (2004).

[32] Ibid 555 (noting that 'Hamilton quoted from this very passage in The Federalist No. 84)'.

[33] *Heller* 554 US at 593-94, quoting *Alden v Maine* 527 US 706, 715 (1999).

[34] *Rogers v Tennessee* 532 U.S. 451, 477 (2001). See also *Brown v Entertainment Merchants Association* 131 S Ct 2729, 2757 (2011) ('Blackstone's Commentaries was 'a primary legal authority for 18th and 19th-century American lawyers',' quoting *Washington v Glucksberg* 521 US 702, 712, (1997)); *Green v United States* 355 US 184, 187 (1957) (Blackstone's Commentaries 'greatly influenced the generation that adopted the Constitution').

[35] *Heller* 554 US at 665 (2008) (Stevens, J, dissenting).

[36]Ibid.

[37] According to Albert Alschuler, a thousand copies of the *Commentaries* had sold in the American colonies before the first of several American editions was published in 1772. A Alschuler, 'Rediscovering Blackstone' (1996) 145 *University of Pennsylvania Law Review* 1, 5. On a list of 1400 subscribers to the first American edition, Dennis Nolan finds 16 signers of the Declaration of Independence, 6 delegates to the 1787 Constitutional Convention, a president (John Adams) and an early Chief Justice of the Supreme Court (John Jay). Nolan, D, 'Sir William Blackstone and the New American Republic: a Study of Intellectual Impact' (1976) 51 *New York University Law Review* 731, 743-44.

[38] *Gertz v Robert Welch, Inc.*418 US 323, 381 (1974).

[39] See *Schick v United States* 195 US 65, 69 (1904) ('Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more

copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it').

[40] See R Posner, 'Blackstone and Bentham' (1976) 19 *Journal of Law, Economics and Policy* 569, 569-70.

[41] H Washington (ed), *6 The Writings of Thomas Jefferson* (1861) 335. Quoted in A Alschuler, 'Rediscovering Blackstone' (1996) 145 *University of Pennsylvania Law Review* 1, 11.

[42] Ibid 66.

[43] Ibid.

[44] *Chisholm v Georgia* 2 US 419, 458 (1793); see also A Alschuler, 'Rediscovering Blackstone' (1996) 145 *University of Pennsylvania Law Review* 1, 10.

[45] Ibid.

[46] Ibid.

[47] *Respublica v Oswald* 1 US 319, n* (1788).

[48] Ibid.

[49] Ibid.

[50] C Lévi-Strauss, *Totemism* (trans. by R Needham) (Boston, 1963) 3.

[51] Ibid 1.

[52] *Gertz v Robert Welch, Inc.*418 US 323, 381 (1974).

[53] On some earlier occasions, Supreme Court justices have taken advantage of Blackstone's legitimizing approach to give special credibility to Blackstone's *criticism* of traditional English common law structures. For instance, upholding the return of forfeited property, Justice Harlan observed, 'Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism.' *United States v United States Coin and Currency* 401 US 715, 720-21(1971).

[54] D Nolan, 'Sir William Blackstone and the New American Republic: a Study of Intellectual Impact' (1976) 51 *New York University Law Review* 731, 757.

[55] 1 Bl. Comm. 5.

[56] 2 Bl. Comm. 172.

[57] 1 Bl. Comm. 105.

[58] 2 Bl. Comm. 53.

[59]Ibid 48.

[60] Ibid.

[61] Ibid 49.

[62] Ibid.

[63] Ibid.

[64] Ibid 52.

[65] Ibid.

[66] 1 Bl. Comm. 384.

[67] Ibid 385.

[68] SP Choy 'Students Whose Parents Did not Go to College: Post-Secondary Access, Persistence and Attainment', in Nat Ctr for Ed Statistics, US Dept Ed, The Condition of Education, Washington DC (2001) 3.!!'

[69] P Butler, 'Poor People Lose: Gideon and the Critique of Rights' (2013) 122 Yale Law Journal 2176, 2181-82.

[70] Ibid 2182.

[71] 1 Bl. Comm. 388.

[72] Ibid 393.

[73] Ibid 388.

[74] Ibid 388-89.