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***RE-INTERPRETING BLACKSTONE'S COMMENTARIES:
A SEMINAL TEXT IN NATIONAL AND
INTERNATIONAL CONTEXTS***

EDITED BY WILFRID PREST

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I INTRODUCTION

Re-Interpreting Blackstone's Commentaries is the second volume of essays edited by Wilfrid Prest (and published by Hart) to address the impact and influence of William Blackstone's *Commentaries on the Laws of England* (1765–69) on the common law world and their reception elsewhere. The first volume — *Blackstone and his Commentaries: Biography, Law, History* — appeared in 2009.¹ The core essays in both volumes had their origins as contributions to Adelaide symposia held in 2007 and 2012, respectively, so readers can likely anticipate that a third volume on *Blackstone and his Critics* will appear in 2017, given that a further Adelaide symposium of that name took place in December 2015.

Blackstone's *Commentaries* are hardly untrodden turf, which means that a project like Prest's is haunted by the possibility that it is actually quite difficult to tell readers anything they don't already know. The first volume hovered a little uncertainly between the historical and the legal. Essays dealt with a variety of subjects: Blackstone's life and character; the nature and sources of the jurisprudence on display in his *Commentaries*; reactions to the *Commentaries* at home (notably from the acerbic Jeremy Bentham, who has the volume's second longest index entry after Sir William himself) and overseas (the United States, France and Germany); and the long half-life of the *Commentaries* in juridical usage. It concluded with two short essays on bibliographic and iconographic sources. By comparison, the second volume has tried quite hard to stake out a different and more focused terrain, which one might best describe as '*beyond ...*'. In matters of interpretation, essayists move *beyond* legal analysis and legal history to literary criticism and art history. In assessing the *Commentaries*' dissemination and impact, they pursue Blackstone *beyond* the usual

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¹ Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009).

concentration on the British Atlantic world into new, less familiar climes — the French Atlantic (Louisiana and Quebec) and Australasia. In charting the *Commentaries*' influence, finally, they move *beyond* the history of common law adjudication to the distinctly contemporary subject of American constitutional originalism and its genealogy. It is perhaps inevitable in any collection of essays that the results are mixed, but for the most part *Re-Interpreting Blackstone's Commentaries* is both instructive and enjoyable, which, given apparent circumstance — an exceptionally familiar work written by a 'conventionally dull' man² — is no small achievement.

After two volumes of essays, it is worth asking whether the Adelaide Blackstone project has an 'agenda'. If any, it appears to be to dispute both the familiarity of the work and the dullness of its author. The latter is perhaps the more formidable task. After ten years work on his own biography of the man, it is not altogether surprising that Prest himself should have undergone something of a conversion experience.³ Prest's opening essay in *Blackstone and his Commentaries* even proposed that 'Blackstone's life story would be well worth attention even if the *Commentaries* had never been published'.⁴ But this is hard to accept, for without the *Commentaries* Blackstone is no more memorable than any other minor scion of the mid-Hanoverian elite. He is an educated man, not unaccomplished as an academic, a competent college bureaucrat

² Gareth Jones, *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England* (University of Toronto Press, 1973) xii. See also Stanley N Katz, 'Introduction to Book I' in William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (4 volumes) (University of Chicago Press, 1979) vol I, iii. Plucknett wrote, wearily (or warily), in 1939:

There probably ought to be a life of Blackstone; but it is a very difficult life to write. There is little incident in it, anecdotes are scarce, even the portraits are unattractive ... nor was his rise rapid enough, nor his early struggles severe enough to make a conventional 'success story.' If his life shows anything at all, it is that a great book may sometimes proceed from a man who personally has little of the ordinary signs of greatness about him...

Theodore F T Plucknett, 'Book Reviews' (1939) 52 *Harvard Law Review* 721. For reasons the significance of which will become apparent, the first two biographies of Blackstone (the occasion for Plucknett's review) were by American lawyers: Lewis C Warden, *The Life of Blackstone* (The Michie Company, 1938), and David A Lockmiller, *Sir William Blackstone* (University of North Carolina Press, 1939). No competing biography appeared until a self-published work by Ian Doolittle, *William Blackstone: A Biography* (2001). This was followed by Wilfrid Prest's definitive study: Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford University Press, 2008).

³ Compare Prest's hesitancy at the outset, observing in 1999 that 'the very nature of Dr Blackstone's life "seems at first — or even second — glance, neither particularly colourful nor eventful"': Wilfrid Prest 'Blackstone and Biography' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 3, with the effusions of the finish-line, hoping that biographer had not become 'so blindly enamoured' of his subject 'as to overlook altogether his failings and shortcomings': Prest, *William Blackstone*, above n 2, 12.

⁴ Prest, 'Blackstone and Biography', above n 3, 13.

and university politician, a lawyer and judge whose career is untouched by notoriety, a Tory member of parliament, a canny bibliophile, and throughout careful, cautious, and at least publicly somewhat aloof.⁵ He marries quite late (at age 38) and dies quite young (at age 56), ‘obese and testy’.⁶ It would be interesting to know more about his wealth, for he started life with little and seems to have accumulated (or borrowed) handsomely, certainly enough to acquire and support a comfortable country house on the Thames at Wallingford, even before the multiple editions of the *Commentaries* began fattening his purse.⁷ We can allow that he led a full life and contributed to his surroundings, but by itself this is hardly enough to justify so much attention. Without the *Commentaries*, comparisons to Edward Gibbon and Adam Smith would seem absurd.⁸

So our reason for attention to the man has to be the work for which he is famous throughout the Anglophone common-law world (and beyond). Here, the accumulating output of the Adelaide project indeed broadens our understanding by ‘de-familiarising’ the *Commentaries* in several distinct ways, thereby opening Blackstone’s work to new and varied uses.

II WORDS AND VISIONS

First, how were the *Commentaries* composed? In the initial volume of essays Carol Mathews called attention to the centrality of architecture to Blackstone’s life, and to the place of architectural and spatial metaphor in the *Commentaries*.⁹ Christina Martinez deepens the engagement in the second volume in her essay, ‘Blackstone as Draughtsman: Picturing the Law’. One of three contributors addressing Blackstone’s

⁵ See generally Prest, *William Blackstone*, above n 2; Norma Aubertin-Potter, “‘A Might Consumption of Ale’”: Blackstone, Buckler and All Souls College, Oxford”, in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 35–46; and Ian Doolittle, “William Blackstone and William Prynne: An Unlikely Association?” in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 47.

⁶ Prest (ed), *Blackstone and his Commentaries*, above n 1, 1.

⁷ Blackstone’s father, a London textile merchant, died in debt, hampering his wife, who also died in straitened circumstances. William became dependent upon the largesse of his maternal family. Prest provides some details of his income in the pre-*Commentaries* years, but not systematically. Beginning his life with essentially nothing, Blackstone’s estate at his death was worth £25 000 in 1781, or approximately US\$4.2 million in current money (A\$6.0 million). In 1761, when he acquired the house, it appears he was already worth some £1500 (US\$310 000 current, A\$440 000). See generally Prest, *William Blackstone*, above n 2, 69–70, 80–1, 111, 113, 120, 122, 139, 149, 163, 178–9, 186–7, 193, 217–19, 303–4, 315–16. For conversion of historical sterling currency values to current US dollars see: Eric Nye, *Pounds Sterling to Dollars: Historical Conversion of Currency* <www.uwyo.edu/numimage/currency.htm>.

⁸ Prest, *William Blackstone*, above n 2, 10.

⁹ Carol Matthews, ‘A “Model of the Old House”’: Architecture in Blackstone’s Life and *Commentaries*’, in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 15.

'Words and Visions' (the title of part one of the volume), Martinez argues that Blackstone was committed to a deeply visual conception of orderliness expressed initially in youthful architectural drawing (and verse¹⁰) and transposed to the *Commentaries* through tabular arrangement of topics, classification schemes and schematic diagrams. 'Blackstone strove to render law's connections visible, connections which, to this point, had remained mostly visible and unseen'.¹¹ But his aesthetic was that of the artist rather than the common lawyer, leading him to sacrifice detail ('the law as it really was'¹²) that might complicate or otherwise spoil the overall image he desired to create. It was, moreover, a decidedly rule-bound aesthetic:¹³ one will not encounter Hogarth's sinuous 'line of grace' in Blackstone's architectonics.¹⁴

In 'Blackstone's *Commentaries*: England's Legal Georgic?', Michael Meehan offers additional and telling aesthetic insights on the composition of the *Commentaries* by drawing attention to the literary form of the English georgic, contemporary with the *Commentaries* and interwoven with their more mundane legal taxonomy.¹⁵ Associated with John Dryden, but in particular with Joseph Addison and Alexander Pope,¹⁶ the georgic, says Meehan, celebrated the glory of the present, an 18th century glory of 'patriotism ... Augustan peace and stability ... and nationhood' succeeding the turbulence of the 17th century and the Glorious Revolution.¹⁷

The georgic's potency is well-established. Anthony Low has stressed that the georgic is a mode of poetic composition

that stresses the value of intensive and persistent labor against hardships and difficulties; that it differs from pastoral because it emphasizes work instead of ease; that it differs from epic because it emphasizes planting and building instead of killing and destruction; and that it is preeminently the mode suited to the establishment of civilization and the founding of nations.¹⁸

¹⁰ See Prest, *William Blackstone*, above n 2, 46–8.

¹¹ Christina S Martinez, 'Blackstone as Draughtsman: Picturing the Law', in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 31, 48.

¹² *Ibid* 55.

¹³ *Ibid* 52–4.

¹⁴ On Hogarth, representation and law, see Christopher Tomlins, 'After Critical Legal History: Scope, Scale, Structure' (2012) 8 *Annual Review of Law and Social Science* 31, 43–8.

¹⁵ Michael Meehan, 'Blackstone's *Commentaries*: England's Legal Georgic?' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 59.

¹⁶ See, eg, Scott M Cleary, 'Slouching toward Augusta: Alexander Pope's 1736 "Windsor Forest"' (2010) 50 *Studies in English Literature 1500–1900* 645, 646–8.

¹⁷ Meehan, above n 15, 60.

¹⁸ Anthony Low, *The Georgic Revolution* (Princeton University Press, 1985) 12.

Annabelle Patterson has emphasised its

rather subtle contributions to the counter-revolutionary programs of the British government, promoting a conservative ideology based on the ‘georgic’ values of hard work (in others), land-ownership as a proof of worth ... and above all the premise that hardship is to be countered by personal “Resolution and Independence” rather than social meliorism.¹⁹

According to Meehan, the much-remarked literary effectiveness of the *Commentaries* lay in taking on both the style and substance of the English georgics, offering ‘a post-pastoral vision of the world in which nature must be enhanced and only fully “possessed” through human labour, and through an extension of knowledge’.²⁰ Blackstone represented law in the service of georgic achievement, labouring over centuries to restore a fallen world from ‘ignorance and fragmentation’, an ordered totality possessed of a mind and a voice of its own, a living entity whose wise and solicitous designs underpinned ‘the “present Glory” of the English legal establishment’.²¹

To this secular analysis one should add the undoubted influence of Blackstone’s deep, even fervent (in his youth at least) commitments to establishment Anglicanism.²² In their stately poise the *Commentaries*, one might argue, proclaimed Joseph Addison’s ‘great Original’, publishing ‘to every land /The work of an Almighty hand’²³ — albeit a hand bound by the mechanical perfection of what He had created rather than, as in the more remote past, imposing at will upon the profane world. In the *Commentaries*, what Ian Doolittle calls ‘that beautifully balanced construct, the English constitution’ stood in for God.²⁴

Kathryn Temple’s essay, ‘Blackstone’s “Stutter”’: The (Anti)Performance of the *Commentaries*’, completes *Re-Interpreting Blackstone’s Commentaries*’ inquiry into matters of composition. Meehan has told us that Blackstone gave law both voice and carriage, harmonious and elegant. Interesting, then, Temple argues, that Blackstone in person suffered an awkward ‘dysfluency’. In an oral and performative legal culture, Blackstone’s dysfluency ‘suggests an anti-performance as performative in its own way as any oratorically sophisticated performance could have been’.²⁵ For

¹⁹ Annabelle Patterson, ‘Hard Pastoral: Frost, Wordsworth, and Modernist Poetics’ (1987) 29 *Criticism* 67, 74.

²⁰ Meehan, above n 15, 62.

²¹ *Ibid* 64, 66.

²² See, eg, Wilfrid Prest, ‘The Religion of a Lawyer? William Blackstone’s Anglicanism’ (2004) 21 *Parergon* 153.

²³ See Arthur Quiller-Couch (ed), *The Oxford Book of English Verse: 1250–1900* (Clarendon Press, 1900) 496–7.

²⁴ Doolittle, *William Blackstone*, above n 2, 104. And see Paul Halliday, ‘Blackstone’s King’, in Wilfrid Prest (ed), *Re-Interpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 176.

²⁵ Kathryn Temple, ‘Blackstone’s “Stutter”’: The (Anti)Performance of the *Commentaries*’ in Wilfrid Prest (ed), *Re-Interpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 3, 10–11.

Temple, Blackstone's want of personal elegance is an opportunity to explore the relationship in legal culture between the printed word, of which he was master, and the spoken, of which, clearly, he was not. What Temple calls Blackstone's 'stutter'²⁶ was a symptom of his discomfort with orality, but also of his 'didactic loyalty ... to text' that 'performed the necessity of the book as a method of access to law — and implicitly of access to justice'.²⁷ Just as Alexander Pope contrasted a body deformed and stunted (by Pott's disease, a form of tuberculosis that affects the spine) to the perfection of his poetic form, Temple argues, so Blackstone 'contrasts his less than fluent speech to the perfections of writing and thus to the new dominance of print as its own sort of performance'.²⁸

In a commentary on Temple's essay, Simon Stern attempts to deflate somewhat her interpretive balloon.²⁹ One must distinguish among styles of exposition. Oral agility may impress juries but is ill-suited for disquisitions upon doctrine. By the latter standard, the speaking Blackstone may be judged appropriately measured and deliberate rather than inarticulate, a jurist who exhibits a form of fluency appropriate to his role. Stern concludes, quoting from Prest's biography, that 'whatever failing Blackstone may have had as an orator at the bar, he proved "highly effective when speaking from a prepared text, preparing his carefully arranged material in an accessible and polished fashion"'.³⁰ Were I Kathryn Temple, I might think my point made. And indeed, Stern agrees that whatever their differences might be in assessing Blackstone's dysfluency, or lack thereof, the *Commentaries* are emblematic of the way in which writing comes 'to provide the paradigmatic form of legal expression and to define the basis of legal elegance'.³¹

III BEYOND ENGLAND

The interpretive 'beyond ...' explored in the first part of *Re-interpreting Blackstone's Commentaries* is followed by the geographic, 'Beyond England', of part two. Prest's introduction to part two stresses the *Commentaries*' considerable influence outside England, but also the challenge involved in mapping their 'dissemination, reception, and impact'.³² A start was made in the first volume, where essays by

²⁶ By which she means the lack of oral agility carefully concealed by the elaborated formality of his lecturing and by his oft-remarked reticence, or diffidence, in lawyerly conduct, but exposed in inarticulate parliamentary performances, and in his awkward, almost abrasive, demeanour as judge.

²⁷ Temple, above n 25, 17, 19.

²⁸ *Ibid* 18–19.

²⁹ Simon Stern, 'William Blackstone: Courtroom Dramatist?' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 21.

³⁰ *Ibid* 29.

³¹ *Ibid*.

³² Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 71.

Michael Hoefflich, John Emerson and Horst Dippel followed Blackstone into familiar (America) and less familiar (France and Germany) climes. Hoefflich stressed how the *Commentaries*' practical utility in the 19th century United States had come to depend upon extensive textual glossing, but also upon their convenience as an ur-text of the 'rudiments' of Anglophone law.³³ Emerson recorded 'lukewarm' Gallic appreciation for Blackstone as not much more than a facile scribbler 'peripheral to the French legal and political system', yet simultaneously a certain admiration for his intelligent synthesis of centuries of law, which no French jurist had managed.³⁴ Dippel found considerable regard for Blackstone's constitutionalism among German liberals during the first half of the 19th century, but less among those of the second half, for whom, in Rudolph von Gneist's words, 'the interpolation of Blackstone's *Commentaries*' meant that 'no modern English constitutional law can come into being', for where a 'complete correlation with the past is missing, it will also be missing for the future'.³⁵

Re-interpreting Blackstone's Commentaries adds four new and distinctive slices to the record of Blackstone abroad. In 'Blackstone in the Bayous: Inscribing Slavery in the *Louisiana Digest* of 1808', textual comparison allows John Cairns to spot Blackstone lurking amid the provisions of the first Louisiana Civil Code (in full *The Digest of the Civil Laws Now in Force in the Territory of Orleans*), enactment of which in 1808 enables us to call Louisiana America's "'civil law" state'.³⁶ Cairns argues that the *Commentaries* appealed to the code's compilers not for their adumbration of English common law but because they belonged 'to the European genre of institutional writing'. Blackstone 'had composed an institutional work, heavily influenced by natural law'.³⁷ That said, Cairns finds that Blackstone was particularly useful when it came to Louisiana slavery because of his attention to the 'rights and duties [of persons] in private oeconomic relations'³⁸ in English law. The code's compilers — following institutional tradition — desired to assimilate slavery to the law of persons, but could not use the French *Code civil* for this purpose because the *Code* ignored slavery. Blackstone's title 'Of Master and Servant' solved their problem. Blackstone's title, says Cairns, 'discussed slavery relatively extensively'. Even though in its original substance the relevant passage declaimed against slavery, the title itself 'fitted into the first book of the *Digest*, with some of [Blackstone's] text adapted to fit the second chapter of the title'.³⁹

³³ Michael Hoefflich, 'American Blackstones' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 171, 181.

³⁴ John Emerson, 'Did Blackstone get the Gallic Shrug?' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 185, 193.

³⁵ Horst Dippel, 'Blackstone in Germany' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 199, 209–10.

³⁶ John W Cairns, 'Blackstone in the Bayous: Inscribing Slavery in the *Louisiana Digest* of 1808' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 73, 74.

³⁷ *Ibid* 94.

³⁸ Blackstone, above n 2, vol I, 410.

³⁹ Cairns, above n 34, 93. For the passage in question see Blackstone, above n 2, vol I, 411–13.

In a commentary on Cairns' essay, Stephen Sheppard finds Cairns' argument 'state of the art', and adds information on the rising incidence of citation of Blackstone in antebellum Louisiana reported opinions.⁴⁰ How does one reconcile this with the Francophile claim of Louisiana's civilian exceptionalism from the rest of the common law United States? The claim, Sheppard concludes, overstates its case — the civilian claim has camouflaged legal-cultural reality, 'which is one of quiet common law integration'.⁴¹

Michael Morin's essay on 'Blackstone and the Birth of Quebec's Distinct Legal Culture 1765–1867' finds in Quebec something of the same civil law/common law admixture on display in Louisiana, albeit one that emerged out of different circumstances and that has retained a distinct expression. Notwithstanding disavowal of 'the Laws and usages established for this country' in favour of Crown supremacy in the terms of capitulation of New France to the English in 1760, French private law continued in practical effect alongside English criminal law, surviving even the terms of the royal proclamation of 1763 creating the province of Quebec under English law.⁴² After ten years of debate over the implementation of the royal proclamation, the *Quebec Act 1774* (Imp) 14 Geo III c 83 formally 'reinstated the rules relating to property and civil rights applied in New France', while also providing for the continuation of English criminal law. The *Quebec Act* also safeguarded Catholic civil and religious rights, subject to an oath of allegiance intended to preserve the supremacy of the Crown. Morin points to this overall outcome — 'freedom of belief and worship for Catholics' alongside royal supremacy over spiritual and temporal affairs — as in accordance with Blackstone's ideas; an acknowledgement, in effect, of the familiar contention that 'in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God'.⁴³ Quebec's subsequent history through Confederation in 1867 and beyond shows consistent adherence to a hybrid legal culture — the civil law tradition in private law and the common in administrative and criminal law. Morin argues on the basis of bibliographic evidence that in the development of the hybrid the *Commentaries* became, even before translation, 'a very useful tool ... a standard reference work on the political system of England and its criminal laws'.⁴⁴ But Blackstone, says Morin, was mobilised even in the initial debates over the royal proclamation and 'may well have influenced the final drafting of the Quebec Act'.⁴⁵

⁴⁰ Stephen M Sheppard, 'Legal Jambalaya' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 95.

⁴¹ *Ibid* 96, 102.

⁴² Michael Morin, 'Blackstone and the Birth of Quebec's Distinct Legal Culture 1765–1867', in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 105, 106.

⁴³ *Ibid* 106–7.

⁴⁴ *Ibid* 108.

⁴⁵ *Ibid* 123.

Thus, he concludes, Quebec's hybrid was nurtured from the outset 'by an unexpected and strategic use of the *Commentaries* and their luminous prose'.⁴⁶

John Orth's essay, 'Blackstone's Ghost: Law and Legal Education in North Carolina', returns us to the familiar reaches of the common law Atlantic, where it traces the *Commentaries*' place in the education and practice of lawyers in one American state. Orth's examination of North Carolina confirms the conventional wisdom that during much of the 19th century the *Commentaries* were accorded near reverential status by both bar and bench in the United States when it came to learning the law. Other texts slowly appeared in North Carolina, as elsewhere, such as the anonymously authored (and beautifully illustrated)⁴⁷ *Tree of Legal Knowledge, Designed as an Assistant to Students, in the Study of Law*, published in 1838 by the Raleigh N.C. booksellers Turner and Hughes. But as the *Tree*'s subtitle proclaims — *in which the Admirable System as Laid down by Blackstone in his Commentaries is Preserved* — it was intended as an exposition of the *Commentaries* rather than a replacement. Blackstone began to fade from the world of pupillage at the end of the century, but only because pupillage was itself fading before the comparatively newer world of the law school classroom. Law students tutored on the *Commentaries* and their local derivatives continued to populate the North Carolina bar and bench throughout the 20th century. Orth finds that they can still be detected turning to Blackstone as an authority on the state's largely uncodified criminal law. Whether mediated educationally by North Carolina law professors and the derivative texts they produced, or doctrinally 'through a daisy chain of prior cases', Blackstone's 'ghostly influence on North Carolina law and legal education continues' to the present.⁴⁸

Wilfrid Prest himself contributes the final essay in part two, entitled simply 'Antipodean Blackstone'. One might imagine that the 'British Pacific' would manifest the same 19th century attachment to Blackstone as the British Atlantic, but Prest finds this is not the case. Physical encounters with Blackstone in the Antipodes vary according to which side of the Tasman one inhabits: the man has a visible commemorative presence in 19th and 20th century Australian legal iconography that has no parallel in Aotearoa/New Zealand. The iconographic proves a reasonable guide to incidents of usage. Newspaper advertisements and announcements attest to the presence of the *Commentaries* in early New South Wales; references to the *Commentaries* pepper early colonial case law. As 19th century English and imperial circumstance departed from the 18th century *Commentaries*, the text was not abandoned. Rather (as in the United States) derivative editions retrofitting the original became common. Henry John Stephen's *New Commentaries on the Laws of England (Partly Founded on Blackstone)* published in 1841 by Butterworth, for example, 'became the standard examination text for admission to legal practice', and was increasingly preferred to

⁴⁶ Ibid 124.

⁴⁷ See John V Orth, 'Blackstone's Ghost: Law and Legal Education in North Carolina' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 125, 132 (Figure 2), 136 (Figure 3).

⁴⁸ Ibid 138.

the original by university law lecturers.⁴⁹ Prest can tell us far less about Blackstone in New Zealand in good part because Blackstone's spoor is so much fainter, whether in legal education or in recorded citation. But he also observes that whichever may be one's side of the Tasman, Blackstone simply does not have the same resonance in Antipodean legal culture as in North America, either in legal education or in practice. 'Australasian judges, lawyers, and legal academics may not have been mere passive recipients of English law, [but] until at least the middle of the twentieth century they were more influenced by British than American modes of legal education and theory'.⁵⁰ The result is that Bentham and Austin likely played a more important role in Antipodean legal culture than they did in North America. Prest recognises that Blackstone appears to enjoy some resonance in Australia and New Zealand as a sort of common law cultural monument — 'an authoritative source of constitutional and legal assumptions, conventions, definitions, and principles, scarcely less accessible to the general public than to practicing lawyers'.⁵¹ Thus, he concludes, 'we still await Blackstone's antipodean demise'.⁵² But his essay seems clearly to show that — except in one singular aspect, to be explored further below — Blackstone's antipodean shadow is substantially shorter than appears to be the case in his North American redoubts, where, as Thomas Cooley put it in his 1871 edition of the *Commentaries*, the original text of the *Commentaries* is taken to represent 'the law in something near the condition in which our ancestors brought it to America, leaving us to trace in our statutes and decisions its subsequent changes here' uncluttered by irrelevant later English reforms — 'parliamentary legislation which in no way concerns us'.⁵³

IV LAW AND POLITICS

Just how much Blackstone continues to reign in North America — or rather, to be fair to Canada, in the United States — is the focus of the four essays comprising the third and final part of *Re-Interpreting Blackstone's Commentaries*. Entitled 'Law and Politics', part three is the volume's final gesture to the theme of 'beyond ...' in that it focuses on the distinctly contemporary phenomenon of American constitutional originalism.

⁴⁹ Wilfrid Prest, 'Antipodean Blackstone' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 145, 153, 154, 155–7. On the United States, see, in addition to Hoeflich, above n 33, Kunal M Parker, 'Historicising Blackstone's *Commentaries on the Laws of England*: Difference and Sameness in Historical Time' in Angela Fernandez and Markus Dubber (eds), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Hart Publishing, 2012) 22–42.

⁵⁰ Prest, 'Antipodean Blackstone', above n 49, 160.

⁵¹ Ibid 165.

⁵² Ibid 161.

⁵³ Thomas M Cooley (ed), *William Blackstone, Commentaries on the Laws of England* (Callaghan & Cockcroft, 1871) vi.

In ‘Blackstone’s *Commentaries* and the Origins of Modern Constitutionalism’, Horst Dippel addresses the extent to which Blackstone’s ghost was a (benign) presence at Philadelphia’s feast of creation. Dippel reminds us of the considerable attention given the *Commentaries* during the epoch of the American Revolution, attention won at least as much by the *Commentaries* as an artefact of constitutional as of common law thinking. To separate the one from the other would be as artificial as it would be anachronistic: Americans who studied the *Commentaries* ‘took Blackstone as an undifferentiated whole’,⁵⁴ his work acquiring in the provinces a subversive quality less obvious in the imperial metropolis (though remarked upon by Edmund Burke)⁵⁵ with which the provinces were locked in conflict. It does not do to forget that Revolutionary America was very much a common law culture and the *United States Constitution* a common law constitution.⁵⁶ ‘Blackstone was as much an authority on constitutional matters’ at the Philadelphia convention and during the subsequent state ratification debates ‘as he had been in the years of outright conflict with Britain’.⁵⁷ Dippel’s conclusion explicitly echoes Daniel Boorstin’s, reached 75 years earlier: ‘In the history of American institutions, no other book — except the Bible — has played so great a role as Blackstone’s *Commentaries on the Laws of England*’.⁵⁸

⁵⁴ Horst Dippel, ‘Blackstone’s *Commentaries* and the Origins of Modern Constitutionalism’ in Wilfrid Prest (ed), *Re-Interpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 199, 200.

⁵⁵ Edmund Burke, ‘Speech on Conciliation with the Colonies’ (22 March 1775), in Philip B Kurland and Ralph Lerner (eds) *The Founders’ Constitution* (University of Chicago Press) vol 1, ch 1 <press-pubs.uchicago.edu/founders/documents/v1ch1s2.html>.

⁵⁶ On which see the many works of John Phillip Reid: see, eg John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Law* (University of Wisconsin Press, 1993), and John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (Northern Illinois University Press, 2005). See also Christopher L Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge University Press, 1993) 32–4, 70–3.

⁵⁷ Of course he had his detractors. Thomas Jefferson ‘would uncanonise Blackstone, whose book, altho’ the most elegant & best digested of our law catalogue, has been perverted more than all others to the degeneracy of legal science’: Letter from Thomas Jefferson to John Tyler, 17 June 1812, <founders.archives.gov/documents/Jefferson/03-05-02-0112>. James Wilson observed, more judiciously (as was his wont),

‘I cannot consider him as a zealous friend of republicanism. One of his survivors or successors in office has characterized him by the appellation of an antirepublican lawyer. On the subject of government, I think I can plainly discover his jealousies and his attachments ... As author of the *Commentaries*, he possessed uncommon merit ... He deserves to be much admired; but he ought not to be implicitly followed’.

James Wilson, *Lectures on Law, Delivered in the College of Philadelphia* (1790–91), part 1 chapter 1, in Kermit L Hall and Mark David Hall (eds) *Collected Works of James Wilson* (Liberty Fund, 2007) 443–4.

⁵⁸ Dippel, ‘Blackstone’s *Commentaries*’, above n 54, 214. Daniel J Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone’s Commentaries* (University of Chicago Press, first published 1941, 1973 ed) iii.

If Dippel's point is that Blackstone was 'also there at the creation',⁵⁹ Jessie Allen's 'Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone' is an attempt to account for Americans' enduring juridical fascination with the *Commentaries* that, in the process, cautions the reader against too generous an acceptance of Dippel's arguments. Reporting citation rates in US Supreme Court cases unparalleled since the early 19th century, Allen associates the Court's current crush on Blackstone with Justice Antonin Scalia's originalist jurisprudence.⁶⁰ Supreme Court justices had become accustomed to treating Blackstone as 'the preeminent authority on English law for the founding generation'⁶¹ long before Scalia, but Allen distinguishes between two juridical uses made of the *Commentaries* — the factual, in which Blackstone is employed as a primary source for statements about the law prevailing in England at the time of the rupture in the British Atlantic empire (or 'then'), and the mythical, in which justices treat the *Commentaries* as eternally valid, proceeding 'as if the United States' founders understood the Constitution to silently enact Blackstone's *Commentaries* in between or underneath the constitutional text'.⁶² It is the latter use, in which 'then' continuously and seamlessly becomes 'now', that is so marked a characteristic of current constitutional exposition.

Allen reads the Court's slippages from contextualised factual narrative to 'timeless legal principle' through Claude Lévi-Strauss's commentary on myth in *Structural Anthropology*.⁶³ Mythic narratives merge two temporal registers: they reference events that have taken place long before the moment of narration, but use them to explain not just the past but also the present and the future. 'What gives the myth an operational value is that the specific pattern described is timeless'.⁶⁴ But just as important as the mythic narrative itself in Lévi-Strauss's analysis is the way its acceptance is deployed by the modern observer, who attributes unquestioning belief in what is in modern eyes obviously mythic to the credulous primitive. When the modern Supreme Court presents the *Commentaries* as conclusive authority in the minds of American founders, it is in effect presenting the founders as credulous primitives whose uncritical acceptance of Blackstone as oracle cemented the *Commentaries* into the *United States Constitution* as the lens through which all the constitution's

⁵⁹ Gary B Nash, 'Also There at the Creation: Going Beyond Gordon S Wood' (1987) 44 *William & Mary Quarterly* 602.

⁶⁰ Allen quotes Justice Scalia's 'rather startling assertion of the creative powers of Blackstone's text', namely his claim (see *Rogers v Tennessee*, 532 US 451, 477 (2001)) that 'the Framers ... were formed by Blackstone'. Jessie Allen, 'Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 215, 225.

⁶¹ Allen, above n 60, 225, quoting *Alden v Maine*, 527 US 706 (1999). And see, eg, *Schick v United States*, 195 US 65, 69 (1904).

⁶² Allen, above n 60, 215.

⁶³ Claude Lévi-Strauss, *Structural Anthropology* (Claire Jacobson and Brooke Gundfest trans, Anchor Books, 1967).

⁶⁴ Allen, above n 60, 215.

relevant parts should be read. By presenting Blackstone's text 'as authoritative through the eyes of the "founding generation"', the contemporary Court bolsters its originalist certainties while avoiding 'the accusations of legal primitivism that would undoubtedly 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'.⁶⁵

Even usage of the *Commentaries* as an empirical sourcebook of the law as it was 'then', Allen argues, is controversial. After all, Blackstone's were quite literally 'commentaries' on the laws of England rather than reproductions. In the process of organising and synthesising he engaged, quite busily, in the creation of legal and historical mythology.⁶⁶ Even if Blackstone were a preeminent authority for lawyers and judges during the era of the Revolution and the Early Republic (and of course he was not treated as such by all, by any means),⁶⁷ that cannot be taken to signify their universal, uncritical acceptance of his text as 'an objective, politically neutral description of the common law of their time'.⁶⁸ And of course one may take the matter of the factual still further, for the legal culture of the early United States was formed by the quotidian habits and customs of the crowd at least as much as by the imaginings and practices of the comparatively tiny establishment of legal elites.⁶⁹ The *Commentaries* may have helped to convey Roscoe Pound's 'taught legal tradition' from one side of the ocean to the other, but one must be deeply sceptical of any attempt to represent a work entitled '*Commentaries on the Laws of England*' as empirically authoritative when it comes to the inestimably plural legal cultures of Revolutionary and Early Republican America.⁷⁰

The distinction drawn in Jessie Allen's essay between myth and fact points not to a divergence between representation and reality, words and things, but rather to two distinct realities both created by text. After all, in the *Commentaries* both 'the factual' and 'the mythical' are facets of textual representation. Historians usually invoke context to distinguish between a text's truth content and its mythic content,

⁶⁵ Ibid 229.

⁶⁶ Ibid 227, 231–2.

⁶⁷ See above n 57. For generalised antagonism to the reception of English common law in the Early Republic, see Tomlins, *Law, Labor, and Ideology*, above n 56, 101–2, 133–40, 191–2.

⁶⁸ Allen, above n 60, 226.

⁶⁹ See, variously, Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (Cambridge University Press, 2010); Laura F Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (University of North Carolina Press, 2009); Christopher Tomlins, 'Republican Law', in Edward G Gray and Jane Kamensky (eds), *The Oxford Handbook of the American Revolution* (Oxford University Press, 2013) 540–59.

⁷⁰ Compare Roscoe Pound, *The Formative Era of American Law* (Little, Brown and Co, 1938) with James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (University of Wisconsin Press, 1956).

but context does not assist us in distinguishing the oracular Blackstone from the rapporteur in situations in which — as in the genealogy of originalism — the text is treated as an authoritative guide to its context (English common law culture) rather than vice versa. Paul Halliday notes the quandary in his essay, ‘Blackstone’s King’. For over 200 years, he says, we have treated the *Commentaries* like ‘some kind of jurisprudential inkblot’⁷¹ into which virtually anything can be read precisely because the *Commentaries* are self-authorising. Halliday does not respond by attempting to contextualise the *Commentaries*. Rather, his approach is to treat them as what they are — a text created by an author who, ‘ever the poet, attentive to the plasticity of words’, was actively engaged in the making of meaning.⁷²

Halliday’s muse in the exercise is what the *Commentaries* had to say about the king. He argues that Blackstone’s poetics of kingship are self-consciously ironic, invoking Hayden White’s description of irony as ‘catachresis (literally “misuse”), the manifestly absurd Metaphor designed to inspire Ironic second thoughts about the nature of the thing characterized’ that presupposes ‘the reader or auditor already knows, or is capable of recognizing, the absurdity of the characterization’.⁷³ One pauses to wonder whether Temple’s dysfluent Blackstone would have risked irony in lecture — irony is often lost on a live audience — but Halliday’s focus here is on the text of the *Commentaries*, susceptible to repeated readings. His particular focus is the *Commentaries*’ trope of the king’s sacredness. His argument is that Blackstone knowingly cast before his readers a figuration of the king that was ‘not a description of the centre of their legal-political world’ but rather a means by which claims about that centre could be criticised and its realities understood. ‘Blackstone presented a sacred king only to disembody him, reducing him to acting through a metonym of himself: through a “crown” that had entirely absorbed those attributes once associated with the “king”’.⁷⁴ How was this reduction undertaken? By law. It was the law that ascribed sacredness to the king, that invested in the king ‘supreme executive power’ with all the rights and prerogatives of sovereignty, and to which the king in performance of his duties to care for and protect the community was subservient. Halliday’s point is that Sir Edward Coke’s king, whose natural body was that to which natural subjects were bound in allegiance, had been entirely absorbed into his immortal body politic, ‘framed by the policy of man’, renamed ‘the crown’, and bound by law.⁷⁵

⁷¹ Paul D Halliday, ‘Blackstone’s King’, in Wilfrid Prest (ed), *Re-Interpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 169.

⁷² Ibid 170.

⁷³ Ibid 171; Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Johns Hopkins University Press, 1973) 37.

⁷⁴ Halliday, above n 71, 172.

⁷⁵ Ibid 172, 173. See *Calvin’s Case* (1608) 7 Co Rep 1a; 77 ER 377. See, generally, Ernst Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 1997).

If law was what bound, words (text) were law's signifying force. Blackstone's argument 'was not simply that the prerogative, in his own age, had "limits" and that those might be discussed. Rather, he understood that acts of discussion, including his own, constituted those limits. His pen drew the bounds around the king'.⁷⁶ So doing, Blackstone gave the controlling law textual body. As the King's natural body evaporated into 'the crown', words reshaped the crown into the 18th century constitutional mixture of legislative and executive: the ministry sitting in parliament, office-holders and bureaucracy, army: 'the political-legal order in its entirety', or in other words the state, the collective 'being through which law now thought, felt, and acted'.⁷⁷ Halliday detects a certain anxiety in the 'republican' Blackstone that in absorbing the king, and in the process becoming the fountain of the law that had evaporated the king, the crown had corrupted itself, that it would not care for the community as the unbound king had done.⁷⁸ Was Blackstone's lost king a patriot king? Halliday does not say, at least not directly.⁷⁹ What he *does* say is that the king of the *Commentaries* is Blackstone's creation, a product not of any context described as such, but of 'Blackstone's poetics'. His challenge lies in this assertion, and in its underlying claim that 'all political-legal arguments, like historical arguments, are at bottom imaginative constructions, bodied forth in words'.⁸⁰

The final essay in part three is a commentary on Paul Halliday's essay, but really it is a coda to the entire group — Dippel and Allen as well as Halliday. In 'Modern Blackstone: the King's Two Bodies, the Supreme Court and the President', Ruth Paley offers a distinctly disenchanting response to the phenomenon of the American reception of Blackstone. Paley's position is resolutely historicist.⁸¹ Consequently, she is deeply sceptical of Halliday's attempt to write about text outside context. Her rejoinder is to point to Halliday's footnotes, where he does battle with the attempt of John Yoo and other current American constitutional theorists to enlist 'the supreme executive power' of Blackstone's English monarch to unbind the 21st century

⁷⁶ Halliday, above n 71, 177. This is not per se an innovation. Common lawyers had been drawing bounds around the king for hundreds of years. See, for example, J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975) 9–19 (discussing Sir John Fortescue's *De Laudibus Legem Angliae*); Donald W Hanson, *From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought* (Harvard University Press, 1970).

⁷⁷ Halliday, above n 71, 181, 187.

⁷⁸ *Ibid* 183–4, 185.

⁷⁹ See, however, *ibid* 178 (note 45). See also Henry Saint John, 1st Viscount Bolingbroke, *The Idea of a Patriot King* (1738).

⁸⁰ Halliday, above n 71, 170, 187.

⁸¹ By historicist, I mean a position dedicated to the proposition that 'a social practice or a document is a product of the preoccupations of its own time and place'. The definition is Robert Gordon's: see Robert W Gordon "'Critical Legal Histories Revisited": A Response' (2012) 37 *Law & Social Inquiry* 200, 200. I discuss historicism in 'After Critical Legal History', above n 14.

presidency from constitutional convention.⁸² Here, Paley says, is a context for Halliday's ostensibly contextless essay. But Paley's larger target is Blackstone's 'honorary member[ship]' in the American pantheon of godlike founders.⁸³ Nowhere else in the Anglophone common law world, she avers, is Blackstone so profoundly mythologised. And for no good reason: for the *Commentaries* were not written 'to enlighten legal practitioners'. They are nothing more than 'an undergraduate text', a work of synthesis by an author whose claim to fame lay in his ability 'to organise and categorise what had once seemed a rambling edifice of arcane knowledge'.⁸⁴ Paley is bluntly incredulous that

in the United States senior, highly-trained jurists of the Supreme Court and political theorists discussing the powers and role of the president are deeply — perhaps increasingly — influenced by their perceptions of what Blackstone wrote for undergraduates 250 years ago.⁸⁵

The *Commentaries* are 'a text designed to help gentlemen understand an important part of their society and fit them for a role in life that might require them to serve as unpaid officers of the law, perhaps as a justice of the peace or a jurymen'.⁸⁶ They were not written to train lawyers 'still less to serve as a reference work for judges'. Blackstone wrote to educate amateurs. Is it not, then 'both extraordinary and intellectually lazy' that the elite American legal establishment should treat this 'introductory guide ... to eighteenth-century English law and constitutional thought' as an immemorial monument to the legal culture of the Atlantic world at the moment of the American founding?⁸⁷

Ruth Paley's incredulity is a memorable English commentary on an American legal-constitutional preoccupation. Yet what survives her amazement at those who 'use an undergraduate text as adequate evidence to back up their assertions', who 'cherry-pick' the *Commentaries* 'for sentences and phrases that seem to support a particular point of view',⁸⁸ is the sheer fact that in current American constitutional jurisprudence the *Commentaries* are being used, and no doubt will continue to be used (if we are to treat Jessie Allen's citation counts as good evidence of trends)⁸⁹ in precisely the fashion she deprecates. In other words, Paley's context-driven, impeccably historicist, impeccably professional critique of the profoundly erroneous, utterly amateurish uses made of Blackstone's *Commentaries* by 'senior,

⁸² Halliday, 'Blackstone's King', above n 71, 169 n 3, 170 n 4, 172 nn 14 and 15, 185 n 78.

⁸³ Ruth Paley, 'Modern Blackstone: the King's Two Bodies, the Supreme Court and the President' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 188.

⁸⁴ *Ibid* 192, 194.

⁸⁵ *Ibid* 194.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* 194, 197.

⁸⁸ *Ibid*.

⁸⁹ Allen, above n 60, 216–20.

highly-trained jurists' will have zero impact on that use.⁹⁰ Lawyers — or at any rate these lawyers — are not historicists in the way they think about law. Their conception of what law was, or is, or will be, owes little or nothing to the historicist's context. In this, indeed, they are like Blackstone himself, whose 'didactic loyalty to precedent [and] to text' as judge forbade yielding "the variation of a single letter" to context lest he expose the realisation of a larger legal harmony to "a hundred altercations".⁹¹ It follows that historicism cannot grant us much in the way of purchase on the ways lawyers — these lawyers — think about history.

V USE BEYOND HISTORY

If historicism cannot help us, what can? The question returns us, by way of conclusion, to Prest's essay in the most recent collection and also to Thalia Anthony's essay, 'Blackstone's *Commentaries* on Colonialism: Australian Judicial Interpretations', published in the preceding volume, *Blackstone and his Commentaries*.⁹²

Both Prest and Anthony remark on the rising incidence of resort to Blackstone in the closing decades of the 20th century in Australian High Court opinions, notably in native title cases. Blackstone was, of course, used as authority in early New South Wales for claims to a legal basis for English colonising on the grounds that his dictum that land 'desart and uncultivated' was open to appropriation ('occupancy') by a coloniser ('peopling them from the mother country') referred to the condition of the land itself rather than to the question whether or not it was already inhabited.⁹³ Absence of the appearance of cultivation or settled habitation meant, therefore, that indigenous inhabitation went unrecognised. Colonial courts adhered to this convenient interpretation of Blackstone's text in order to justify retrospectively Crown claims of sovereignty and possession, to validate land tenures and titles, and to apply criminal (also family and tax) law.⁹⁴ But they also noted independently that in fact Crown appropriation of New South Wales and the resulting dispossession of its inhabitants had been a matter not of law but of 'history'.⁹⁵ This would become an

⁹⁰ For the inspiring suggestion that amateurism is a constituent element of contemporary American legal culture I am indebted to Annelise Riles.

⁹¹ Temple, above n 25, 17, 13-16 (citing positions taken by Blackstone as judge in *Onslow v Horne* (1770)). See also Emily Kadens, 'Justice Blackstone's Common Law Orthodoxy' (2009) 103 *Northwestern University Law Review* 1553.

⁹² See Prest, 'Antipodean Blackstone', above n 49; Thalia Anthony, 'Blackstone's *Commentaries* on Colonialism: Australian Judicial Interpretations' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 129.

⁹³ Blackstone, above n 2, vol I, 104.

⁹⁴ Anthony, above n 92, 131-41.

⁹⁵ 'It is a matter of history that New South Wales was taken possession of, in the name of the King of Great Britain, about fifty-five years ago': *R v Steel* (1834) 1 Legge 65, 68 (Forbes CJ).

important point of distinction — between, as it were, text and reality — during the era of reconsideration of indigenous land claims beginning in 1971.

In the first of these cases, *Milirrpum v Nabalco*,⁹⁶ the court's opinion restated what had become the conventional wisdom since the 1820s: the law had been settled by 1788, and to all intents and purposes since the original publication of the first volume of the *Commentaries* in 1765. First, a distinction obtained 'between settled colonies, where the land, being desart [sic] and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies'.⁹⁷ And second, Blackstone's words 'desart [sic] and uncultivated' had '*always* been taken to include territory in which live uncivilized inhabitants in a primitive state of society'.⁹⁸ By the time of *Mabo v Queensland [No 2]*, the High Court, in Justice Gummow's pithy summation four years afterward, was ready to acknowledge 'that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, now shown then to have been false'.⁹⁹ But what were those assumptions of historical fact now shown then to have been false? They did not extend to the original assumption of Crown sovereignty. Notoriously, in *Mabo [No 2]* the High Court had refused to countenance any challenge 'in an Australian municipal court' to '[t]he Crown's acquisition of sovereignty over the several parts of Australia'.¹⁰⁰ The acquisition of sovereignty over foreign territory, said the High Court, was 'a prerogative act ... of State the validity of which is not justiciable in the municipal courts'.¹⁰¹ Rather, what was now shown then to have been false was the conventional wisdom used retrospectively in colonial New South Wales to validate settler tenures and titles — that by 'desart and uncultivated' Blackstone had meant uninhabited by a settled and civilised population.¹⁰² The cruel distortion of the legal text discarded, the High Court stood ready to grant the text a new truth — that the common law had become 'the common law of *all* subjects within the Colony who were equally entitled to the law's protection as subjects of the Crown', colonist and indigene alike. Hence it stood ready to grant 'recognition by our common law of the rights and interests in

⁹⁶ (1971) 17 FLR 141.

⁹⁷ Blackstone, above n 2, vol I, 104.

⁹⁸ *Milirrpum v Nabalco* (1971) 17 FLR 141, 201 (emphasis added).

⁹⁹ *Wik Peoples v Queensland* (1996) 187 CLR 1, 181.

¹⁰⁰ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 69 (Brennan J).

¹⁰¹ *Ibid* 30.

¹⁰² Blackstone's original text had endorsed:

the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants ... so long as it was confined to the stocking and cultivation of desart uninhabited countries' as 'within the limits of the law of nature'. But, he had there continued, 'how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

Blackstone, above n 2, vol II, 7.

land of the indigenous inhabitants of a settled colony’, namely Australia.¹⁰³ But not so far as would ‘fracture the skeleton of principle which gives the body of our law its shape and internal consistency’, namely common law reception itself.¹⁰⁴ What stood in the Court’s way was the obstinate reality of the ‘history’ of which ‘our law is the prisoner’, or in other words the reality of the crown’s original extinguishing claim to beneficial ownership, and all the consequences that had flowed therefrom.¹⁰⁵ That formative reality the Court would not venture to question,¹⁰⁶ or compromise.¹⁰⁷ Thus exposed, history has proven to possess a ‘tide’ against which the High Court is disinclined to swim.¹⁰⁸

¹⁰³ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 39–42.

¹⁰⁴ *Ibid* 43. To discard falsity while avoiding fracture, the High Court was necessarily driven toward metaphysics: criticising the unjust implication of prior case law that ‘the interests of indigenous inhabitants in colonial land were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest’, that ‘the common law itself took from indigenous inhabitants any right to occupy their traditional land’, the Court determined to remedy the injustice and shelter the common law from accusation by finding that in fact the common law had extended to all, settlers and indigenous alike, from first settlement. Injustice hence lay not in any common law taking of the land but rather in past failures to realise that indigenous inhabitants enjoyed ‘native title’ rights and interests at common law: at 29.

¹⁰⁵ *Ibid* 29. See also Penny Pether, ‘Principles or Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation’ (1998) 4 *Law Text Culture* 115, 116–18. On Pether’s constitutional jurisprudence and criticism see Christopher Tomlins, ‘Fierce and Critical Faith: A Remembrance of Penny Pether’ (2015) 60 *Villanova Law Review* 667.

¹⁰⁶ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 152, 154–63. For a ‘colloquial’ summary of where *Mabo [No 2]* left Aboriginal Australians, see Noel Pearson, ‘The High Court’s Abandonment of “The Time-Honoured Methodology of the Common Law” in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*’ (2003) 7 *Newcastle Law Review* 1, 3.

¹⁰⁷ *Wik Peoples v Queensland* (1996) 187 CLR 1. For a ‘colloquial’ summary of where *Wik* left Aboriginal Australians, see Pearson, ‘Abandonment’, above n 106, 3.

¹⁰⁸ In *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998), the Federal Court (at [129]) vacated the plaintiffs’ native title claim on the grounds that

[t]he evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously

Unlike the US Supreme Court's encounters with Blackstone, in which the oracle has been pressed into a supremely conservative role, in the Australian High Court's encounters Blackstone has proven subversive. By clearing him of complicity in the seizure of the continent, Australian municipal courts stripped themselves of a crucial legitimating fig leaf. This is the reason they have perforce retreated from the exposed position of *Mabo [No 2]*'s faltering attempts at compromise to the stockade of non-negotiable Crown prerogative and its latterday embodiment in judicial construction of s 223(1) of the *Native Title Act 1993* (Cth). As the High Court put it in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002), it would not do to give 'undue emphasis' to what it had said in *Mabo [No 2]* 'at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act*'.¹⁰⁹ Under cover of interpreting s 223(1) of the Act the Court then expunged recognition of native title from the Australian common law that ten years earlier had belatedly acknowledged the rights and interests in land of indigenous Australians:

To speak of the 'common law requirements' of native title is to invite fundamental error. Native title is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today. Native title, *for present purposes*, is what is defined and described in s 223(1) of the *Native Title Act*. *Mabo [No 2]* decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown's acquisition of sovereignty and radical title in Australia. It was this native title that was then 'recognised, and protected' in accordance with the *Native Title Act* and which, thereafter, was not able to be extinguished contrary to that Act.¹¹⁰

Meantime, Blackstone has been pressed into service by indigenous activists and their allies.¹¹¹ As Prest notes, in 1993 Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson concluded the introduction to his first report with an 'iconic' quotation from *Commentaries* (volume II) which presciently illuminates what in 2002 would become the High Court's naked *raison d'état* like a deer caught in the headlights:

occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title.

In all, the expression 'the tide of history' was repeated four times in the course of the judgment. The High Court affirmed the Federal Court ruling in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹⁰⁹ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 441 [38] (emphasis in original). For a 'colloquial' summary of where *Yorta Yorta* left Aboriginal Australians, see Pearson, 'Abandonment', above n 106, 4.

¹¹⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 453 [75].

¹¹¹ See, for example, Henry Reynolds, *The Law of the Land* (Ringwood 1987), 34–5.

There is nothing which so generally engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.¹¹²

Noel Pearson has effectively seconded Dodson's post-*Mabo* [No 2] attempt to underline indigenous Australians' rights in native title cases to a common law process of 'examining the reason or authority upon which those laws have been built' in trenchant critiques of the High Court's prejudicial termination of common law development in favour of peremptory statutory construction:

By treating native title as defined by section 223(1) the High Court is ruling on important questions and principles on the basis of bare assertion, rather than through what McLachlin J called 'the time-honoured methodology of the common law' whereby cases are ruled upon according to the established and developing precedents.¹¹³

Acknowledging that native title is not a common law title as such, Pearson's position is that Australian native title jurisprudence can nevertheless take advantage of the very substantial body of native title jurisprudence that the Anglophone common law world has produced.¹¹⁴ Pearson's ultimate objective is to have native title treated as a 'recognition concept', existing as such neither in common law nor in Aboriginal law but as 'the space between the two systems', where they meet and where common law recognises title under Aboriginal law.¹¹⁵ Here, he argues, lies the true meaning of the words of s 223(1) of the *Native Title Act 1993* (Cth).¹¹⁶ Thalia Anthony agrees. 'Given widespread agreement that Indigenous laws predated colonization, and in some instances currently co-exist with Anglo-Australian legal rights, there should be greater capacity for recognition of Indigenous laws', extending both to rights

¹¹² Prest, 'Antipodean Blackstone', above n 49, 164; Blackstone, above n 2, vol II, 2.

¹¹³ Pearson, 'Abandonment', above n 106, 12. Pearson here refers to the dissenting opinion of Justice Beverley McLachlin in *R v Van der Peet* (1996) 137 DLR (4th) 289, 377.

¹¹⁴ Pearson, 'Abandonment', above n 106, 13.

¹¹⁵ Noel Pearson, 'The Concept of Native Title at Common Law' (1997) *Australian Humanities Review*, <<http://www.australianhumanitiesreview.org/archive/Issue-March-1997/pearson.html>>.

¹¹⁶ *Ibid*; Pearson, 'Abandonment', above n 106, 13–14. See also Shaun McVeigh, 'Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law' (2014) 4 *UC Irvine Law Review* 471; Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) 107–11.

and interests in regard to land and waters, and beyond. And once more Blackstone becomes subversive.

Blackstone wrote that the application of English law is qualified by the “condition of the infant colony”. Where Indigenous laws still operate as a surviving aspect of the “condition of the infant colony”, Blackstone’s qualification challenges the Parliament (if not the courts) to provide a workable coexistence of Indigenous laws and Anglo-Australian law.¹¹⁷

One might find reason to believe that even the High Court accepts native title as a ‘recognition concept’. After all, *Yorta Yorta* held that the *Native Title Act 1993* did not create new rights or interests in relation to land or waters which it named ‘native title’. Rather ‘the Act has as one of its main objects “to provide for the *recognition* and *protection* of native title”, which is to say those rights and interests in relation to land or waters with which the Act deals, but which are rights and interests finding their origin in traditional law and custom, not the Act’.¹¹⁸ The problem lies, however, in the nature of the High Court’s concept of recognition, versus Pearson’s. And in this it remains quite consistent with its earlier self. *Mabo [No 2]* had found ‘that the establishment of British colonial sovereignty in Australia only brought with it radical title to the lands of the colony [and] that some further disposition had to take place before an absolute beneficial ownership of such lands was ... brought into existence’, extinguishing native title, such as a ‘dealing with the land inconsistent with the existence of native title’.¹¹⁹ *Mabo [No 2]* thus rewrote Australian common law ‘to recognise a law predating it and persisting alongside it’. But simultaneously it declared that other law to be its inferior, ‘always subject to subordination’ and indeed to irrevocable extinguishment by it. The judgment’s schizophrenia lay in its refusal to fracture skeletal principle and address Crown sovereignty.¹²⁰ That refusal has persisted.

¹¹⁷ Anthony, above n 92, 149–50.

¹¹⁸ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 453 [76] (emphasis added).

¹¹⁹ Pether, ‘Principles or Skeletons’, above n 105, 117.

¹²⁰ Ibid 117, 118. See also Stewart Motha, ‘As If: Law, History, Ontology’ (2015) 5 *UC Irvine Law Review* 327; Christopher Tomlins, ‘Foreword: “Law As . . .” III – *Glossolalia*: Toward a Minor (Historical) Jurisprudence’ (2015) 5 *UC Irvine Law Review* 239, 247–51. As Blackshield and Williams put it:

In *Mabo* ... the High Court did not accord [the diverse patterns of belief and power expressed through the traditions and practices of Indigenous peoples] any legal force of its own. Through recognition by the common law, this older tradition was acknowledged as an embodiment of inherent and judicially cognizable bonds between Indigenous peoples and their ancestral lands. However, by formulating it as “native title” depending on common law recognition, the Court avoided any suggestion of Indigenous “sovereignty”. [Rather], the High Court took care to avoid undermining the formal constituent structures of Australian governance. The Court recognized the customary laws and entitlements of Indigenous people only to the extent that they saw this as consistent with existing constitutional norms.

Blackshield and Williams, above n 106, 152.

On both sides of the Australian debate, ‘history’ escapes context. On the side of the High Court, ‘history’ does not mean the dispossession that occurred, but the crown claim that cannot be denied. On the side of its critics, the ‘history’ in which for 200 years Blackstone was a foe to be hated has in the last 20 years been enlivened by the recreation of him as an ally to be welcomed. Historicists may stand amazed but history in the hands of law is simply not stable.

Nor, I think, should it be. Prest desires to stabilise Blackstone the man by restoring him to his own time — putting history ‘beyond use,’ as it were¹²¹ — but the meaning of the *Commentaries*, the introductory text that has become holy writ, cannot be so easily controlled. We have seen that lawyers do not think that way; rather than scold them for their refusal of historicism, one might see in their refusal a different philosophy of history. One might seize hold of the sentences published in 1766 that Mick Dodson found so useful in 1993, complete them in 2015 with words that Dodson omitted, and use them to furnish the beginnings of a historical common law jurisprudence that can advance into the space between two systems, where it can engage Noel Pearson’s call to make ‘recognition’ a dynamic and continuing ideal:

We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These enquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.¹²²

Why should ‘words upon parchment’ convey dominion over land? Why should an ancestor’s success in excluding others ‘from a determinate spot of ground’ empower the descendant to continue to do so? Why should one unable any longer to maintain possession ‘of a particular field or of a jewel’ be entitled to tell ‘the rest of the world’ who might or might not have the enjoyment of it thereafter. These cannot be improper questions, if law is indeed ‘a rational science’ (and even more so if it is not). Why bury Blackstone in the 18th century just at the point when he is becoming useful to *both* sides in the argument in the 21st?

¹²¹ Prest, *William Blackstone*, above n 2, 10. On ‘beyond use’ see the Good Friday Agreement (Belfast Agreement) of 10 April 1998, decommissioning of weapons.

¹²² Blackstone, above n 2, vol II, 2.

