



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 94 | Number 5

Article 6

6-1-2016

Blackstone's Magna Carta

Wilfrid Prest

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Wilfrid Prest, *Blackstone's Magna Carta*, 94 N.C. L. REV. 1495 (2016).

Available at: <http://scholarship.law.unc.edu/nclr/vol94/iss5/6>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

BLACKSTONE'S MAGNA CARTA*

WILFRID PREST**

INTRODUCTION	1495
I. BLACKSTONE'S VISIONARY TEXT: <i>THE GREAT CHARTER</i> ..	1497
II. FORM AND FUNCTION	1500
III. ANTIQUARY OR HISTORIAN?	1502
IV. BLACKSTONE'S MAGNA CARTA	1506
V. MAGNA CARTA VIS-À-VIS BLACKSTONE'S <i>COMMENTARIES</i>	1511

INTRODUCTION

The year 2015 saw a veritable plethora of notable historical anniversaries, from the octocentenaries of Magna Carta and the Fourth Lateran Council, to the battle of Waterloo and the first centenary of the landing by the Australian and New Zealand Army Corps at Gallipoli. Much less remarked, but arguably no less worthy of notice, was the 250th anniversary of Book I of William Blackstone's *Commentaries on the Laws of England*.¹ Since first appearing in November 1765, the *Commentaries* have remained continuously in print, with nearly 200 subsequent editions published in England, Ireland, and America, to say nothing of the myriad abridgments, extracts, other derivative works, and translations into Polish,² French, German, Italian, Russian, Japanese, and Chinese.³ Nowhere have Blackstone's *Commentaries* been more influential than in the United States, where they formed the basis of legal education for well over a century and continue to be cited by counsel and judges

* © 2016 Wilfrid Prest.

** Professor Emeritus, University of Adelaide.

1. 1 WILLIAM BLACKSTONE, *COMMENTARIES* (Oxford, Clarendon Press 1765).

2. See generally 1 WILHELMA BLAKSTONA, *PRAWO KRYMINALNE ANGIELSKIE* (Teodor Ostrowski & Andrzej Rostworowski trans., 1786).

3. See generally 1 BLACKSTONE, *supra* note 1; ANN JORDAN LAEUCHLI, *A BIBLIOGRAPHICAL CATALOG OF WILLIAM BLACKSTONE*, at xii, 308, 412–27 (James E. Mooney ed., 2015). The first translation of the *Commentaries* into modern simplified Chinese only appeared within the past decade: Weilian Bulaikesitong (威廉·布莱克斯通), *Yingguo Fa Shiyi* (英国法释义) (You Yunting (游云庭), Miao Miao (缪苗) trans., Shanghai Renmin Chubanshe (上海人民出版社) 2006).

in federal and state jurisdictions up to the present day.⁴ The massive impact and pervasive presence of the *Commentaries* tend to overshadow not only the character and life history of its author, but also his numerous other literary productions—or, in modern academic-managerial bureaucratese, “outputs.” That observation applies with special force to Blackstone’s edition of *The Great Charter and Charter of the Forest* (“*The Great Charter*”),⁵ recently and justly characterized as “a neglected work.”⁶

There are some signs to suggest that the undeserved neglect of Blackstone’s *Magna Carta* may be nearing an end—not least the British Library’s 2015 blockbuster, “*Magna Carta: Law, Liberty, Legacy*,” claimed to be the largest exhibition ever devoted to *Magna Carta*.⁷ Some medieval historians of my acquaintance expressed disappointment with the content and presentation of an exhibition that, in the words of its catalogue, “takes us on a journey from the charter’s medieval origins to an exploration of what it means to people around the world today.”⁸ But, perhaps precisely because I am not a medievalist, it seemed to me that the British Library and its curators put together an accessible, inventive, and instructive overview of the Great Charter’s long history, following King John’s famously reluctant sealing of the document at Runnymede in June 1215. Needless to say, I was particularly pleased at the prominent place accorded to William Blackstone and his scholarship. Indeed, the three-quarter-length Tilly Kettle portrait of Blackstone, on loan from Oxford’s Bodleian Library, stood out as one of the largest objects in the whole exhibition. Blackstone is depicted in formal court dress (doubtless reflecting his 1763 appointment as Solicitor-General to George III’s consort, Queen Charlotte),⁹ surmounted by the scarlet robes of a doctor of civil laws, with his right hand resting on a copy of

4. Indeed, the *Commentaries* are currently “undergoing a renaissance at the Supreme Court.” Jessie Allen, *Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone*, in RE-INTERPRETING BLACKSTONE’S COMMENTARIES 215, 215 (Wilfred Prest ed., 2014).

5. WILLIAM BLACKSTONE, *THE GREAT CHARTER AND CHARTER OF THE FOREST* (Oxford, Clarendon Press 1759).

6. Linda Colley, *Empires of Writing: Britain, America and Constitutions, 1776–1848*, 32 LAW & HIST. REV. 237, 242 (2014).

7. *Magna Carta: Law, Liberty, Legacy*, BRITISH LIBR., <http://www.bl.uk/events/magna-carta--law-liberty-legacy> [<http://perma.cc/Q49S-Y7BK>].

8. BRITISH LIBRARY, *MAGNA CARTA: LAW, LIBERTY, LEGACY* (Claire Breay & Julian Harrison eds., 2015) (quoting front-inside dust jacket).

9. WILFRID PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 200* (Oxford Univ. Press 2012) (2008) [hereinafter PREST, LAW AND LETTERS].

The Great Charter. (The titles on the spines of two other leather-bound volumes depicted at his elbow cannot be made out; they possibly represent Books I and II of the *Commentaries*, which appeared in 1765 and 1766 respectively, even though from their size they look more like folios than quartos.)¹⁰

I. BLACKSTONE'S VISIONARY TEXT: *THE GREAT CHARTER*

The pioneering achievement of Blackstone's historical scholarship in *The Great Charter* is generally acknowledged.¹¹ As the author himself pointed out in his introduction to his edition: "There is not hitherto extant any full and correct copy of the charter granted by king John,"¹² other than an engraving made in 1733 from two original manuscripts collected by Sir Robert Cotton in the seventeenth century and subsequently acquired by the British Library.¹³ But John Pine's engraving, as Blackstone went on to point out, because "of the antiquity of its character [i.e., as a facsimile of the original handwritten document,] is not fitted for general perusal . . ." ¹⁴ Blackstone was indeed the first scholar who clearly distinguished King John's original charter from the numerous subsequent reissues and revisions of that same document. He also printed the first accurate version of the 1215 charter's text, relying on Pine's engraving, cross-checked against an early copy preserved in the Red Book of the Exchequer.¹⁵ Although previous printed renditions of the charter's continuous prose divided its text into numbered articles, clauses, or chapters, it was Blackstone who established the numbering scheme still used by scholars today.¹⁶ With an ingenious system of marginal Arabic and Roman numerals, he sought to track every change of substance in the successive thirteenth-century versions of both Magna Carta and the

10. John Hamilton Baker, *Iconography I Likenesses: Portraits and Engravings*, in BLACKSTONE AND HIS *COMMENTARIES: BIOGRAPHY, LAW, HISTORY* 229, 229–30 (Wilfrid Prest ed., 2009).

11. See BRITISH LIBRARY, *supra* note 8, at 168.

12. BLACKSTONE, *supra* note 5, at i.

13. See *Engraving of the Burnt Magna Carta*, BRITISH LIBR., <http://www.bl.uk/collection-items/engraving-of-the-burnt-magna-carta> [<https://perma.cc/FBC8-NL5J>].

14. BLACKSTONE, *supra* note 5, at i.

15. BRITISH LIBRARY, *supra* note 8, at 169. In his 1762 reprint of *The Great Charter*, Blackstone noted that another version of the 1215 document, also in the Cottonian collection, had been collated with Pine's engraving "since the quarto edition was published, by the obliging care of the learned doctor Morton, secretary to the royal society, and librarian of the British Museum [i.e., Charles Morton (1716–1799)], the material various readings are inserted in the present edition." 2 WILLIAM BLACKSTONE, *LAW TRACTS*, at xxviii, n.t (1762).

16. RALPH V. TURNER, *MAGNA CARTA THROUGH THE AGES* 167–68, 173 (2003).

Charter of the Forest, beginning with the articles presented to John by the insurgent barons, including Henry III's authoritative redaction of 1225 and concluding with Edward I's confirmation or "*inspeximus*" copy of 1297, the first to be enrolled as statute law.¹⁷ In this task of clarification he was largely successful; as W. S. McKechnie remarked early in the last century, "[p]rior to Sir William Blackstone's work, extraordinary confusion seems to have prevailed concerning the various Charters of Liberties . . . [as] even the best informed writers on English history laboured under much confusion in regard to the various charters"¹⁸

Yet in more recent times there has been an inclination to downplay the originality and significance of Blackstone's work on Magna Carta. This tendency may perhaps be attributed to R. J. Smith's intellectual history of medievalism from the Glorious Revolution to the mid-nineteenth century, an erudite if rather cryptic monograph first published in 1987.¹⁹ Smith mentions Blackstone's *Great Charter* only in passing as stimulating a revival of "polemical interest" in Magna Carta. Yet Smith offers no evidence that interest, whether polemical or not, had indeed waned from the later seventeenth century onwards, and hence stood in need of reawakening.²⁰ Rather, his discussion concentrates on the *Commentaries* and the view of the English past propounded therein.²¹ Smith finds this analysis far from novel or original, leading him to conclude that even though Blackstone recognized the realities of feudalism, constitutional change, legal development, and progress generally, his "work, despite a substantial debt to Continental scholars, especially of the Gothic school, was a growth of the English legal stock, embellished, but no more, with Enlightenment phraseology."²²

Smith's negative judgment of Blackstone has influenced other scholars. Rosemary Sweet's study of eighteenth-century

17. 1 THE STATUTES AT LARGE (Eng. 1297); see JOHN HAMILTON BAKER, SELECTED READINGS AND COMMENTARIES ON MAGNA CARTA 1400–1604, at xxxix–xl (Selden Society 2015); see also BRITISH LIBRARY, *supra* note 8, at 98, 169.

18. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 168, 176 (1914).

19. ROGER JOHN SMITH, THE GOTHIC BEQUEST: MEDIEVAL INSTITUTIONS IN BRITISH THOUGHT 1688–1863, at 91 (1987).

20. *Id.* ("The publication in 1759 by Blackstone of the first scholarly edition of Magna Carta and its surrounding texts was a major stimulus to the revived polemical interest in the Great Charter visible at this time.")

21. *Id.* at 93.

22. *Id.*

antiquarianism cites Blackstone's *Great Charter* as exemplifying the "valuable contributions . . . to medieval studies" in this era and a "major stimulus to polemical interest in the Great Charter . . ."²³ However, she characterizes his edition as "of a piece with the antiquarian traditions of seventeenth-century scholarship, drawing heavily on the researches of Henry Spelman."²⁴ Her brief overview concludes with the comment that Blackstone's *Great Charter* "was essentially a continuation of the traditions of legal antiquarianism, with an additional polish of enlightenment phraseology."²⁵

Regrettably, my own 2008 biography of William Blackstone echoes Sweet's characterization of the pedigree of Blackstone's *Great Charter*, albeit with a qualifying reference to "more contemporary cultural and intellectual influences" (as distinct from what Smith and Sweet represent as a mere superficial veneer of fashionable Enlightenment verbiage).²⁶ The catalog of the recent British Museum exhibition follows a broadly similar line.²⁷ Yet further consideration and closer examination of Blackstone's text leads to a very different conclusion. Far from merely perpetuating the traditions established by the papers of the short-lived Elizabethan & Jacobean Society of Antiquaries,²⁸ Sir Edward Coke's *Institutes*,²⁹ William Prynne's antiquarian writings,³⁰ and those of Sir Henry Spelman,³¹ Blackstone's *Great Charter* embodied an approach to historical scholarship with more of the Rankean³² future than the Cokean³³ past in its veins.

23. ROSEMARY SWEET, ANTIQUARIES: THE DISCOVERY OF THE PAST IN EIGHTEENTH-CENTURY BRITAIN 234–35 (2004).

24. *Id.* at 235.

25. *Id.*

26. PREST, LAW AND LETTERS, *supra* note 9, at 166; *see also* SWEET, *supra* note 23, at 234–35.

27. BRITISH LIBRARY, *supra* note 8, at 169.

28. SWEET, *supra* note 23, at 82–83.

29. EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND (London, 1628–1644).

30. William Lamont, *Prynne, William*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/22854?docPos=1> [<https://perma.cc/V6HK-V3ZN>].

31. Stuart Handley, *Spelman, Sir Henry*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/26104> [<http://perma.cc/TR94-BW8D>].

32. Leopold von Ranke was the founding father of modern historical scholarship. *See* Rudolf Vierhaus, *Leopold von Ranke*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/biography/Leopold-von-Ranke> [<http://perma.cc/76AB-MKZ5>]; *see also* Colin Campbell, *Ranke's Place in (Writing) History*, N.Y. TIMES (Nov. 19, 1986), <http://www.nytimes.com/1986/11/09/us/ranke-s-place-in-writing-history-the-key-is-what-actually-happened.html> [<http://perma.cc/FL8B-M2NW>].

33. Sir Edward Coke, author of the *Institutes and Reports*, chief justice and parliamentarian. *See* Allen D. Boyer, *Coke, Sir Edward*, OXFORD DICTIONARY OF NAT'L

II. FORM AND FUNCTION

The most strikingly obvious difference between Blackstone's edition of *Magna Carta* and the publications of previous generations of lawyer-antiquaries is one of physical appearance, or indeed aesthetics. With reference to *The Great Charter*, Blackstone's brother-in-law and biographer James Clitherow maintained that "the external Beauties in the printing, the Types &c. reflected no small Honour on him, as the principal Reformer of the *Clarendon Press*, from whence no Work had ever before issued equal, in those particulars, to this."³⁴ In point of fact, *The Great Charter* was privately printed as an author's book at the University of Oxford's printing house in the Clarendon Building, by permission of Blackstone's fellow delegates or board members.³⁵ Hence he was able to exercise full control over the book's design and production, matters on which he had accumulated a wealth of expertise, having "made himself Master of the mechanical part of Printing" since his election as a delegate in 1755.³⁶ A less immediately interested authority, the clergyman and local historian John Watson, characterized Blackstone's edition as "one of the finest books ever printed in England."³⁷ Printed on heavy "royal paper" stock, with quarto-sized pages, wide margins, engraved initials, and tailpieces, Blackstone's *Great Charter* is far removed from the cramped, black-letter typography and narrow, abbreviation-crammed margins of the typical early-modern English law text or legal-antiquarian treatise.³⁸ Its presentation as an aesthetic object suggests a conscious attempt to appeal to a wider general audience—polite, discriminating, Latinate, well-educated and well-to-do (given the fifteen shilling price tag)—

BIOGRAPHY, <http://www.oxforddnb.com.libproxy.lib.unc.edu/view/article/5826> [http://perma.cc/HLU4-MSM8].

34. James Clitherow, *Preface* to 1 WILLIAM BLACKSTONE, *REPORTS OF CASES DETERMINED IN THE SEVERAL COURTS OF WESTMINSTER-HALL*, at xiv (London, 1781).

35. University of Oxford Archives, SED/7/1 (Minutes of the Delegates to the Press, Apr. 4, 1759) ("That Dr Blackstone have Leave to print an Edition of *Magna Carta* at ye University Press.").

36. Clitherow, *supra* note 34, at x.

37. 1 JOHN WATSON, *MEMOIRS OF THE ANCIENT EARLS OF WARREN AND SURREY, AND THEIR DESCENDANTS TO THE PRESENT TIME* 184 (Warrington, William Eyres 1782).

38. The appearance and typography of English printed books generally tended towards greater clarity and simplicity during the early eighteenth century, in sharp contrast with the previous mode, especially for law texts such as Coke's *Institutes*. See generally, COKE, *supra* note 29. But the older style also persisted, as for example in Danby Pickering's 1759 edition of Henry Finch's *Law, Or a Discourse Thereof* and Edmund Gibson's 1722 translation of *Britannia* by William Camden.

than the antiquaries and practitioners who might have been attracted by the subject matter alone.³⁹

Such readers were likely to appreciate not only the fine design and typography of Blackstone's edition, but also its substantive aim. In seeking to sort out for the first time the chronological sequence and textual variations of the Great Charters and Charters of the Forest, Blackstone was pursuing an entirely characteristic agenda. By 1759 he had already established a significant track record of successful endeavors to clarify and rationalize complexity and disorder. His energies extended across a wide range of activities, from expounding the rules of architecture⁴⁰ to completing and fitting out the unfinished shell of the Codrington Library at All Souls College,⁴¹ as well as the wine cellars beneath the library.⁴² He also reorganized the college's accounts and estates management, and outside the college's walls he reformed the University's Clarendon Press and the University's own governing statutes. Finally, he reformed, or at least re-thought, the common law itself. An Oxford friend and contemporary later recalled:

When he had been about two years at the Temple . . . I asked him how he liked the law? He said it was a very dry study; 'but,' added he, 'I have made myself pretty well master of it.' What! [I]n two years, I exclaimed with surprise? 'Yes, says he; I have reduced it to a system; so that I have only to read new acts of Parliament, and the different authors who have written on our laws[.]' From this system, I suppose, he formed his Syllabus . . . and afterwards, his 'Commentaries on the Laws of England.'⁴³

Ordering and systematizing bodies of knowledge to make them more readily accessible to students and laypeople, thereby subverting narrow professional monopolies, was an Enlightenment preoccupation, finding its characteristic expression in the *Encyclopédie* of Diderot and d'Alembert, and the *Cyclopedia* of

39. See Matthew Kilburn, *The Learned Press: History, Languages, Literature and Music*, in 1 THE HISTORY OF OXFORD UNIVERSITY PRESS: BEGINNINGS TO 1780, at 430, 466 (Ian Gadd ed., 2013); see generally William Blackstone, *The Great Charter and Charter of the Forest, with Other Authentic Instruments: To Which Is Prefixed, an Introductory Discourse, Containing the History of the Charters*, 21 MONTHLY REV. 481 (1759).

40. PREST, LAW AND LETTERS, *supra* note 9, at 44–46.

41. *Id.* at 75–80.

42. *Id.* at 94–95.

43. RICHARD GRAVES, THE TRIFLERS 54–55 (1806).

Ephraim Chambers.⁴⁴ But such aims were hardly a wholly novel endeavor. Renaissance humanists and rhetoricians had shared similar goals; indeed, a number of early-modern jurists engaged in the search to identify and marshal the basic underlying principles (or “reason”) of the common law for pedagogical purposes.⁴⁵ But early-modern antiquaries were generally more interested in amassing and listing collections, especially of “curious” or unique individual items, than in analyzing the material they had collected.⁴⁶ Blackstone, on the other hand, while he shared the antiquarians’ concern with establishing particular facts about the past, seems to have been committed to moving from the particular to the general, as well as correcting error and creating order where none had been before. As he explained, the “principal end” of his editorial work in *The Great Charter* was to “adjust and remedy[,] . . . as well as our remaining evidence and the distance of five centuries will allow[,]” the various “gross and palpable errors” to which “want of authentic materials, or neglect of recurring to such as might be easily had . . . has often betrayed our very best historians and most painful antiquarians”⁴⁷

III. ANTIQUARY OR HISTORIAN?

Could an edited collection of documents like *The Great Charter* be considered a work of history? Possibly not, if we think of historical writing as simply the narration of events. For Blackstone explained early in his introduction to the book that his object was merely to provide “an authentic and correct edition of THE GREAT CHARTER and CHARTER OF THE FOREST, with some other auxiliary charters, statutes, and corroborating instruments; carefully printed from the originals themselves, or (where those are not at present in being) from co[n]temporary inrollments and records.”⁴⁸ He went on to warn that, while commencing with “the original articles or heads of agreement at the congress at Runingmede in the fifteenth

44. See generally RICHARD YEO, *ENCYCLOPAEDIC VISIONS: SCIENTIFIC DICTIONARIES AND ENLIGHTENMENT CULTURE* (2001) (discussing eighteenth-century English dictionaries of arts and sciences)

45. See Wilfrid Prest, *The Dialectical Origins of Finch’s Law*, 36 *CAMBRIDGE L.J.* 326, 327–28 (1977).

46. See *SOC’Y OF ANTIQUARIES OF LONDON, 1 ARCHAEOLOGIA: OR MISCELLANEOUS TRACTS, RELATING TO ANTIQUITY*, at ii (1770) (“Here begins the province of the ANTIQUARY, who will never be deemed an unserviceable member of the community, whilst curiosity or the love of truth subsists[.]”). *But cf.* SWEET, *supra* note 23, at 345 n.17, (referring to antiquarianism as “[a] subject which defined itself by its empiricism and its attention to detail”).

47. BLACKSTONE, *supra* note 5, at i.

48. *Id.* at ii.

year of king John, whereupon his great charter was founded” and then tracing these “through their several variations and amendments . . . to their final and peaceful establishment in the twenty-ninth year of king Edward the first[,]” nonetheless

it is not in his present intentions, nor (he fears) within the reach of his abilities, to give a full and explanatory comment on the matters contained in these charters. That, properly executed, must include little less than a full and complete history of the feudal tenures, so far as they were received in this kingdom; together with an exact and extensive view of our ancient constitution in ecclesiastical matters as well as in civil government; a work, which he hopes, and has reason to believe, has long been meditated, and is in part already executed, by a gentleman whose learning, experience, and abilities are every way suited to the performance.⁴⁹

Yet Blackstone’s editorial introduction extended over seventy-six pages—only ten fewer than the transcribed documents themselves—having “swol[le]n to a greater bulk than the editor expected when first he undertook to compile it” on account of “the multitude of facts and records appealed to.”⁵⁰ Moreover, this substantial introduction largely consists of what the book’s title page terms “[a]n Introductory Discourse containing the History of the Charters.”⁵¹ That introductory discourse provides an overview of the background to each of the fourteen charters and other documents reproduced in the main body of the text (with additional transcriptions in the footnotes).⁵² The discussion commences with a detailed critical analysis of the traditional story retailed by the chronicler Matthew Paris (possibly derived from the text of Roger Wendover).⁵³ That story asserted that the document, accepted by King John in 1215, came about thanks to the “accidental discovery”

49. *Id.* As Blackstone later explained, the person here referred to was Sir Martin Wright, a justice of King’s Bench and “author of a most excellent treatise on tenures; who informed the editor, that he had made large collections with a view to the work above mentioned.” WILLIAM BLACKSTONE, TRACTS CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 284 n.a (3d ed. 1771) [hereinafter BLACKSTONE, LAWS OF ENGLAND]; see also J. H. Baker, *Wright, Sir Martin*, OXFORD DICTIONARY OF NAT’L BIOGRAPHY, <http://www.oxforddnb.com/view/article/64025> [<http://perma.cc/3ZU8-GZBQ>].

50. BLACKSTONE, *supra* note 5, at lxxv.

51. *Id.* (quoting title page).

52. *Id.* at ii.

53. On the complex relationship between the work of Matthew Paris and his predecessor at St Alban’s Monastery, Roger Wendover, see RICHARD VAUGHAN, MATTHEW PARIS 21–34 (M. D. Knowles ed., Cambridge Univ. Press 1958).

of a previous charter of liberties granted by King Henry I.⁵⁴ Despite having been “adopted by all our modern historians[,]” Blackstone had little difficulty in demolishing the chronicler’s explanation:

Yet it cannot but seem very extraordinary, that since Matthew Paris himself informs us, that copies of king Henry the first’s charter were sent (A.D. 1100) to all the counties in England, and deposited in the principal monasteries; since the same was expressly confirmed by his grandson king Henry the second, as appears from his charter below; and since the laws of king Henry the first were commanded to be observed by king John’s own authority, on the 4th of August; this charter should notwithstanding have been so totally forgotten by all the prelates and barons assembled at S. Paul’s, within three weeks afterwards, that it[s] discovery by the archbishop should be a matter of such novelty and triumph: nay, that the king himself, at Easter 1215, should want information what those laws and liberties were, that were then so earnestly demanded of him. Nor indeed, if this charter was thus uppermost in the minds of the barons, can we at all account for their forgetfulness at the congress of Runingmede; the name of king Henry the first not once occurring in the *capitula*, or rough [draft], of the great charter, nor even in the charter itself.⁵⁵

Blackstone nevertheless admits the possibility that, “though the circumstances with which it is embellished are very suspicious and improbable, . . . the story itself may . . . have a foundation in truth, that the recollection and remembrance of the charters, which the king’s predecessors had granted, might suggest . . . the propriety of demanding another[,]” especially given the “greater expedience” of a written document rather than “relying on the general terms of the oath which the king had just taken at Winchester[.]”⁵⁶ He then goes on to canvass a range of possible triggers for the action of the barons and prelates in seeking John’s formal acceptance of a written schedule of demands, including the king’s “inordinate debauchery” and his designs on the wife of a leading magnate, together with more generalized resentment towards the activities of his (foreign-born) chief justiciar.⁵⁷ A tentative conclusion follows:

Possibly indeed these motives did all of them concur to animate the conduct of the discontented barons; domestic injuries

54. BLACKSTONE, *supra* note 5, at iii–iv.

55. *Id.* at iv–vii.

56. *Id.* at vii.

57. *Id.* at vii–viii.

received from the king in person, coupled with some gross acts of national oppression by his minister, might whet their private resentment as well as rouse their public spirit, to demand a new security against such tyrannical proceedings for the future.⁵⁸

This is plainly something more than narrowly focused, fact-grubbing antiquarianism. It involves a careful weighing of evidence, context, and motive in the search for a causal explanation—in short, an undertaking readily recognizable as the practice of critical history.

Furthermore Blackstone explicitly distanced himself from the contemporary antiquarian scene in several different ways. After introducing a transcript of the 1217 charter bequeathed to the Bodleian Library by Richard Furney in 1755, he commented in a footnote that

it were much to be wished that all gentlemen, who are possessed of similar curiosities, would follow so laudable an example, by placing them in some public repository. The collecting and hoarding of antiquities, which, when confined to private amusement and self-satisfaction only, are too justly the object of ridicule, would then be of singular advantage to the public.⁵⁹

Blackstone went on to “congratulate the present age on the prospect there is of seeing the paths to these hidden treasures made sufficiently easy and commodious[.]”⁶⁰ Here he evidently refers both to the recent establishment of the British Museum, as a home for, among other things, the extensive manuscript collection brought together in the previous century by Sir Robert Cotton, and also to his own proposal to convert Oxford’s new Radcliffe Camera building into a repository for “all the MSS which are at present the property of the university, and appropriating it for the future to the reception of MSS only.”⁶¹

A more pointed rebuff of the antiquarian establishment occurs in a subsequent footnote. This mentions that

[t]he editor has also been favoured with the collation of a very curious and apparently co[n]temporary roll, containing both the great charter and that of the forest, of 9. Hen. III; which formerly belonged to the abbey of Hales-Owen in Shropshire, and is now in the possession of the right honourable the lord Lyttleton. But as the plan of this edition was confined to

58. *Id.* at ix.

59. *Id.* at xxxv n.m.

60. *Id.*

61. *Id.* at xxxv–xxxvi n.m.

charters which had passed the great seal, or else to authentic entries and enrollments of record, under neither of which classes lord Lyttelton's roll can be ranked, it's various readings were forced to be omitted.⁶²

Charles Lord Lyttleton, dean of Exeter, and about to become bishop of Carlisle, was then a leading figure in and later president of the London-based Society of Antiquaries, to which Blackstone himself would be elected as a fellow in February 1761.⁶³ Lyttleton was not among Blackstone's sponsors. They included the secretary of the Royal Society and inaugural librarian of the British Museum Charles Morton; the historian Thomas Birch; the treasury solicitor and anti-Wilkeite Philip Carteret Webb; and the law reporter James Burrow.⁶⁴ Indeed, the first of the only two papers Blackstone ever contributed to the Society's proceedings was a comprehensive rebuttal of Lyttleton's attempted "Vindication of the Authenticity" of his own document.⁶⁵ Thereafter, Blackstone appears to have attended no more than two further meetings in the course of the 1760s, before the Society's minutes ceased to include lists of attendees from April 1769 onwards.⁶⁶ So Blackstone's engagement with the institutional face of the contemporary antiquarian movement was evidently neither close nor cordial. This may help account for his highly unflattering pen portrait ("sour, morose & imperious") in the papers of the Surrey antiquary and solicitor William Bray.⁶⁷

IV. BLACKSTONE'S MAGNA CARTA

An obvious question arises at this point: how and why did Blackstone become interested in untangling the various iterations of

62. *Id.* at xlvi n.w.

63. Clitherow, *supra* note 34, at xiv–xv; Bernard Nurse, *Lyttleton, Charles*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/17305?docPos=5> [https://perma.cc/G4C8-SG4N].

64. Society of Antiquaries, London, MS minute book vii, 1757–1762, at 267 (Dec. 18, 1760); *id.* at 292 (Feb. 7, 1761).

65. *Id.* at 322 (Apr. 9, 1761). "William Blackstone Esqr. was pleased to present by the Secretary a Copy of his most beautiful Edition, in Quarto, of The Great Charter and Charter of the Forest, . . . & at the same time to communicate a Paper containing an Answer to the Memoir laid before the Society the 8th of January 1761 by the Bishop of Carlisle (then Dean of Exeter) which has given rise to the present Controversy." Society of Antiquaries, London, MS minute book ix, 1762–1765, at 1–7 (June 10, 1762); *see also* PREST, LAW AND LETTERS, *supra* note 9, at 167; Clitherow, *supra* note 34, at xiv–xv.

66. Society of Antiquaries, *supra* note 65, at 9 (June 24, 1762), 146 (Aug. 12, 1762); Society of Antiquaries, London, MS minute book x, 1765–1768, *passim* (Blackstone not listed as attending any meetings); Society of Antiquaries, London, MS minute book xi, 1769–1770 at 74 (attendees not listed from meeting of Apr. 20, 1769).

67. Bray Family Papers, Surrey History Centre, SHS/RC/102.

Magna Carta? The answer seems to lie in a bequest of manuscripts, which reached the University of Oxford's Bodleian Library in the summer of 1755.⁶⁸ Donated from the estate of the Reverend Richard Furney, archdeacon of Surrey and at one time schoolmaster at Gloucester Cathedral, this collection included no fewer than three confirmations of the Great Charter, from 1216, 1225, and 1301.⁶⁹ By 1755, having abandoned the London bar, Blackstone had successfully finished a second year's private course of lectures on English law and government, delivered to a fee-paying class of Oxford undergraduates.⁷⁰ This radical pedagogical experiment proved both popular and profitable, significantly augmenting Blackstone's college fellowship stipend.⁷¹ But he was also rumored to be actively looking for further preferment. One prospect in which he was thought to be interested was the endowed Camden Chair of Ancient History, held as a sinecure for the past thirty years by the aged Oxford physician Richard Frewin.⁷²

On June 2, 1756, Blackstone wrote to his scholarly acquaintance Sir John Eardley Wilmot, then still a puisne justice of King's Bench,⁷³ with transcripts of the Bodleian's new Magna Carta manuscripts, thereby fulfilling an undertaking made to the judge during the previous Lent assises in Oxford, when they had evidently inspected the documents together.⁷⁴ Blackstone noted "This would have been done sooner, but that I could not procure an Amanuensis sufficiently skilled in the Hand of the Times, & therefore was obliged to wait, till I had Leisure to transcribe it myself."⁷⁵ He also pointed out that the dating of the earliest charter to the ninth year of Henry III's reign by the chronicler Walter de Hemmingford was "manifestly erroneous, for Gualo the Popes Legate [mentioned there: *interlined*] left England in November 1218, 3. Henry 3. So that this Charter was certainly made very early in K. Henry's Reign i.e. within the first two Years of it: for his Accession was 19 Oct. 1215."⁷⁶

68. See W. D. MACRAY, ANNALS OF THE BODLEIAN LIBRARY 251–52 (2d ed. 1890).

69. *Id.*

70. PREST, LAW AND LETTERS, *supra* note 9, at 109–18.

71. *Id.* at 111–13.

72. *Id.* at 138–39.

73. James Oldham, *Wilmot, Sir John Eardley*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/printable/29624> [<http://perma.cc/2ASQ-QJ8M>].

74. THE LETTERS OF SIR WILLIAM BLACKSTONE 1755–1780, at 45 (W. R. Prest ed., 2006).

75. *Id.*

76. *Id.*

We shall never know how far Blackstone's interest in Magna Carta was influenced by the thought that a study of the Furney manuscripts might provide an ideal opportunity to polish his credentials for a tilt at Dr. Frewin's imminently vacant chair. As it happened, Frewin lived on for five more years.⁷⁷ Instead, it was the death of the wealthy Oxford alumnus and benefactor Charles Viner, just three days after Blackstone sent off his transcriptions to Justice Eardley Wilmot, that opened up the promising vista of a new endowed chair in English law—a major innovation for either English university.⁷⁸

The hard-fought political campaign within Oxford's common rooms and committees—first to establish the Vinerian Professorship in the Laws of England and then to secure the inaugural appointment—distracted Blackstone sufficiently to delay completion of *The Great Charter* for over three years.⁷⁹ But when that handsome volume did eventually appear towards the end of 1759, there could be no doubting its Oxford antecedents and affiliation. These were emphasized by a florid dedication to Lord Westmorland, the university's chancellor, as “The Assertor of those Liberties Of which his Ancestors Witnessed the Confirmation[,]”⁸⁰ together with ornately engraved initial letters depicting prominent Oxford architectural landmarks, including the University Church of St. Mary's, the newly completed Radcliffe Camera, and Nicholas Hawksmoor's north quadrangle at Blackstone's All Souls College. Common-law antiquarianism, by stark contrast, had no such academic associations; its natural habitat was legal London, the inns of court, and Westminster Hall.

While not exactly an academic monograph (that genre still lay well in the future), *The Great Charter* exhibits more than a casual concern with method and historiography. Thus, the reader is informed with regard to the original articles sealed at Runnymede that

in the printing both of this and the rest, the originals have been literally and scrupulously copied even where there was an

77. PREST, LAW AND LETTERS, *supra* note 9, at 139–40; see Jean Loudon, *Frewin, Richard*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/printable/10182> [<http://perma.cc/3AGR-HLF9>].

78. See PREST, LAW AND LETTERS, *supra* note 9, at 138–39; David Ibbetson, *Viner, Charles*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/printable/28317> [<http://perma.cc/R4AZ-NATP>].

79. PREST, LAW AND LETTERS, *supra* note 9, at 164–65.

80. BLACKSTONE, *supra* note 5 (quoting the dedication to Lord Westmorland).

apparent error; to which, and not to the carelessness of the press, must be attributed such gross faults as *pubbliche* in page 8, *sttatim* in page 12, *concessiissimus* in page 21, and the like. The editor however hath made no scruple to express at full length all such abbreviations in the originals, which are commonly known to those who are conversant in records, or where the terminations of the words were sufficiently ascertained by the grammar and sense of the context. Where they could not be so ascertained he hath left them abbreviated as he found them, by adding a comma or apostrophe at the end to denote the elision. To this account of the method pursued in this work, with a view to preserve it's accuracy, may also be subjoined, that wherever any record is vouched in these notes, the same has been examined with the records in the tower [i.e., the Tower of London] by the editor himself, unless where some other book is expressly referred to as containing it.⁸¹

In keeping with his announced concern for “accuracy and historical precision[.]” the dimensions and conditions of each manuscript were carefully specified, and verbal descriptions supplemented by engraved illustrations of the accompanying seals.⁸² Thus, we are told that the Bodleian Library's 1227 charter from the Furney collection

is in breadth seventeen inches, and in length (including the fold for the label) twenty three. It has the following endorsement on it in a co[n]temporary hand, *Magna Carta Caps. xiiij de Lanc. te.* which seems to have been a mark denoting the capsule or drawer, wherein it was deposited at the abbey of Gloucester, to which religious house it is thought to have once belonged. In a somewhat later but very antient hand it is also thus endorsed, *Carta H. regis de libertatibus magna carte H. reg. avi nostri. Registratur W. . . . at.* There still remain affixed to it by parchment labels the seals of Gualo the legate and William Marescall earl of Pembroke, the former in white wax, the latter in green; both which are exhibited with their several imperfections in the plate, page 36 and 46.⁸³

Blackstone also took advantage of the reprinting of *The Great Charter* in the 1762 and 1771 editions of his collected “Tracts” to update and correct his earlier text, adding references to recently discovered and newly collated manuscripts in Appleby, Lincoln, and London and reporting that, although a charter supposedly from the

81. *Id.* at xvi–xvii n.m.

82. *Id.* at i–ii.

83. *Id.* at xxxv.

time of King Stephen had been claimed by the seventeenth-century antiquary Sir Simonds d'Ewes to be copied into the Red Book of the Exchequer at Westminster, "upon a diligent search [it] was not to be met with therein."⁸⁴

At the end of his introduction to *The Great Charter*, Blackstone noted that he had "been obliged to differ very frequently . . . not only from the monastic writers and such as have implicitly followed them, but also from later historians of a very different character."⁸⁵ These moderns, according to Blackstone, "were endued with more learning and industry, and wrote from more authentic materials."⁸⁶ But if such "men of great abilities"—including Robert Brady and John Selden⁸⁷—"have failed in point of accuracy through the extensiveness of the plan which they have pursued, we may conclude that the compiling and digesting of a general history of England is a burthen too heavy to be undertaken by any single man, however supereminently qualified. . . ."⁸⁸

This abrupt broadening of focus, from the documentary history of Magna Carta's first century to the history of England at large, leads to a further conclusion: that the nation's history could not be successfully written, unless "by the joint endeavours of individuals, each of them attentive to detached parts of it, which may afterwards be woven together into one uniform whole."⁸⁹ Such a "great and extensive work" of synthesis could only be accomplished by

some masterly and comprehensive genius . . . possessed of a thorough insight into the rise and gradual improvements of the constitution and laws of this kingdom, the frequent revolutions of its ecclesiastical and civil polity, the different manners of it's people at different periods of time, and it's general connexions and commerce with foreign nations⁹⁰

84. 2 BLACKSTONE, *supra* note 15, at ix, xxviii, lxxiv; BLACKSTONE, LAWS OF ENGLAND, *supra* note 49, at 287, 299.

85. BLACKSTONE, *supra* note 5, at lxxv.

86. *Id.* at lxxv.

87. Robert Brady, a leading Tory historian of the later seventeenth century, is best known for his rejection of the standard Whig account of England's supposedly immemorial "ancient constitution." See Patrick Wallis, *Brady, Robert*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/printable/3220> [<http://perma.cc/49WL-4KHT>]. John Selden, among the most learned English lawyers of all time, wrote and edited numerous works on medieval English history. See Paul Christianson, *Selden, John*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/printable/25052> [<http://perma.cc/7S JL-E5GG>].

88. BLACKSTONE, *supra* note 5, at lxxv.

89. *Id.*

90. *Id.* at lxxv–lxxvi.

Yet that prodigy must still rely on the “laborious researches of others”—among whom Blackstone plainly numbered himself.⁹¹ This emphasis on the potential strategic benefits of using coordinated research teamwork to reach a far more ambitious goal than any individual scholar might hope to achieve alone seems further to distinguish Blackstone’s mindset from those of his antiquarian predecessors and contemporaries, even those who engaged in cooperative projects and correspondence networks.

V. MAGNA CARTA VIS-À-VIS BLACKSTONE’S *COMMENTARIES*

What, finally, can we say about the relationship between Blackstone’s *Great Charter* and his *Commentaries on the Laws of England*? The general index at the end of Book IV gives the impression that the *Commentaries* paid surprisingly little attention to Magna Carta, since in effect it contains only two references to the charter and its contents.⁹² One of these comes early in Book I, where “the great charter of liberties” is said to have been the first of many endorsements of “the absolute rights of every Englishman.”⁹³ The other, summarizing Magna Carta’s provisions in some detail, occupies just under two pages in Book IV’s final chapter, “Of the Rise, Progress and Gradual Improvements, of the Laws of England.”⁹⁴ However, on closer examination it becomes clear that the index is a wholly misleading guide to the place of Magna Carta in the much revised and rewritten Oxford lectures, which eventually became the published *Commentaries*. Far from being confined to the first and fourth books, all four volumes of the *Commentaries* contain numerous references to Magna Carta.⁹⁵ Surviving student notes taken from Blackstone’s first Oxford lecture course of 1753–1754 also indicate that Magna Carta occupied a less prominent place in these early lectures than in the courses delivered after he had researched

91. *Id.* at lxxvi.

92. 4 WILLIAM BLACKSTONE, *COMMENTARIES*, “Index” *sub voce* *Magna carta*. Note that the index is not paginated and its page references are to the third edition of 1769.

93. 1 BLACKSTONE, *supra* note 1, at *123.

94. 4 BLACKSTONE, *supra* note 92, at *416–18.

95. 1 BLACKSTONE, *supra* note 1, at *23, *74, *123, *129–30, *133–34, *137–38, *252, *266, *273, *299, *332, *367, *387, *400, *466, *477; 2 WILLIAM BLACKSTONE, *COMMENTARIES*, *40, *64–65, *72, *74, *82, *134–35, *270, *283, *289, *416, *492; 3 WILLIAM BLACKSTONE, *COMMENTARIES* *38, *58, *96, *128, *195, *234, *274, *344, *350; 4 BLACKSTONE, *supra* note 92, at *69, *283, *372–73, *416–18 (this is an indicative list only.)

and published *The Great Charter* or in the corresponding passages of the *Commentaries*.⁹⁶

Student lecture notes by their very nature are unlikely to be either entirely accurate or complete, but given the absence of the lecturer's own manuscripts they provide our only guide to the detailed contents of Blackstone's early lectures. We are fortunate to possess two sets of notes taken during the first course of lectures delivered in the hall of All Souls College between Tuesday, November 6, 1753, and Saturday, July 13, 1754.⁹⁷ Both were the work of Blackstone's junior colleagues, fellows of All Souls College on the law side. Those from the papers of Alexander Popham,⁹⁸ now in the Somerset Archives and Record Office, are unfortunately incomplete, lacking the second part of the lecture course, which eventually became Book II of the *Commentaries*.⁹⁹ However, they seem to be in a more original condition, having passed through fewer hands than the heavily annotated fair copies bearing the name of "Tho[ma]s Bever LL.B"¹⁰⁰ that are now divided between the Law Society (which holds parts 1, 2, and 4) and the British Library (where parts 3 and 4 are now Harleian MS 38838).¹⁰¹ This is a significant consideration, since we cannot always distinguish text taken down verbatim by the original notetaker from material added subsequently by other owners and readers. Apart from the Bever and Popham manuscripts, there is no known surviving set of notes from Blackstone's lectures delivered before 1756, when his serious interest in Magna Carta first became apparent. There are, however, numerous later copies dating between 1758–1759 and 1766–1767 (when the last lecture course was delivered) held in various repositories on either side of the Atlantic.¹⁰² A

96. Held by The Law Society (Parts 1, 2, and 4) and the British Library (Parts 3 and 4, indexed as Harleian MS 38838).

97. *Id.*

98. Thomas Seccombe, *Popham, Alexander*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/22538?docPos=2> [<http://perma.cc/J8TA-2ULG>].

99. See Alexander Popham, *A Course of Lectures on the Laws of England by Dr Blackstone of All Souls College, Part I* manuscript lecture notes, 3–4, (1753–1754) (unpublished student notes, All Souls College) (held by the Somerset Archive and Record Service, DD/WY 183).

100. J. L. Barton, *Bever, Thomas*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/2320> [<http://perma.cc/3C4S-BUAR>].

101. See Thomas Bever, *Notes Parts 1–2, 4 (1753–1754)* (unpublished student notes, All Souls College) (held by The Law Society, London, BLA.V61A); Thomas Bever, *Parts 3–4 (1754)* (unpublished student notes, All Souls College) (held by the British Library, Add MS 38838).

102. See John Wilkinson, *Lecture Notes (1757–1758)* (unpublished student notes, Corpus Christi College, Oxford) (held by University College London, MS Add 120);

systematic collation of all references to Magna Carta in the surviving manuscript notes and the printed *Commentaries* would be a massive task. But for present purposes, the comparison of a few selected passages referring to Magna Carta will be sufficient for this Article's purposes.

In the original versions of passages in the *Commentaries* where the charter is explicitly cited, the earliest student notetakers sometimes make no reference at all to Magna Carta. For example, Popham's record of Blackstone's 1753 introductory lecture "Of the Utility of the Study of the Laws of England" simply notes a connection between the settling of the Court of Common Pleas at Westminster and the gathering of "Professors of the Common Law" at the Inns of Court and Chancery.¹⁰³ However, the corresponding introduction to the *Commentaries*, "On the Study of the Law" (a reprint of Blackstone's first public lecture as Vinerian Professor in 1759) states that "it was made an article of the great charter of liberties, both that of king John and king Henry the third, that 'common pleas should no longer follow the king's court, but be held in some certain place.'" ¹⁰⁴ More often, the Bever and Popham notes merely allude to Magna Carta in passing, while later student notes and the *Commentaries* provide distinctly fuller and more detailed content. Thus, Popham's account of the fifth 1753 lecture, on "Objects of the Laws of England[.]" includes the following sentence:

The Liberties of the People are coeval with the Constitution itself, secur'd by Magna Carta obtain'd Sword in Hand from King John and his son Henry 3d and proclaim'd in parliament

Anonymous and Incomplete Notes, Parts 1 and 4 (1757–58) (unpublished student notes) (held by the Oxfordshire Record Office, JXXVI/a/1); Anonymous Notes (1761–1762) (unpublished student notes) (held by Harvard Law School, MS 4175); John Edwards, An Abstract of the Common Law of England, Taken from a Course of Lectures Read by Doctor [afterwards Sir William] Blackstone, Principal of New Inn Hall and Vinerian Professor of the Laws of England, in Oxford, Oct. 14th, 1761, in *HARDWICKE PAPERS DCCXLV–DCCLIII* (1761–1762) (unpublished student notes) (held by the British Library, MSS Add 36093–36101); Anonymous Notes (1761–1762) [hereinafter *Codrington Library Notes*] (unpublished student notes, All Souls College) (held by Codrington Library, MS 300); Anonymous Notes (1761–1762) (unpublished student notes) (held by Law Society, London, BLA/V61A); Jeremy Bentham (1764–1765) (on file with Queen's College, Oxford, MS 401); Anonymous Notes (1766–1767) (unpublished and incomplete student notes) (held by Boston College Law School Library, KD 660 B47); Anonymous Notes, Lectures 4–11 (pre-1766) <http://nrs.harvard.edu/urn-3:HLS.LIBR:11829405> (last visited Mar. 15, 2016) (unpublished student notes) (held by Harvard Law School, MS 4196); Anonymous Notes (pre-1766) (unpublished and incomplete student notes) (held by the Hampshire Record Office, 21 M57/D33).

103. Popham, *supra* note 99, at bundle A, book 1, fol. 3.

104. 1 BLACKSTONE, *supra* note 1, at *23.

the 9th H. 3. and further confirm'd by 28 E. 1st and by several subsequent Statutes of Edw. 3d. Ric. 2d H 4th as likewise by the Petition of Right.¹⁰⁵

By contrast, an anonymous set of notes from the 1761–1762 lecture course has the following, more substantial passage:

[O]ur Liberties were Recovered sword in Hand from King John who granted the Mag: Charta. This was afterwards confirmed with some alterations by ye 9th of Hen 3d, by whom as Lord Coke observes few new grants were made but only former ones declared. In 5 Ed 1st call'd Confirmaton Chartarum farther strengthen'd Magna Charta. These Charters pronounc'd all to ye Contrary void annexed ye penalty of excommunication to ye Breach of any of them, & ordered them to be read twice every year in Churches; they were then Confirm'd by a Multitude of Statutes of Edw 1st Rich'd 2d Henry 4 & other Princes, & after a long Interval by Petition of ye Rights in ye 3 year of Chas. 1st¹⁰⁶

This is moving perceptibly closer to the equivalent paragraph in the first chapter of Book I of the *Commentaries*, although that is still longer:

[O]ur rights and liberties . . . from time to time asserted in parliament, as often as they were thought to be in danger.

First, by the great charter of liberties, which was obtained, sword in hand, from king John; and afterwards, with some alterations, confirmed in parliament by king Henry the third, his son. Which charter contained very few new grants; but, as sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum*; whereby the great charter is directed to be allowed as the common law; . . . copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed or counsel act contrary thereto, or in any degree infringe it. Next by a multitude of subsequent corroborating statutes (sir Edward Coke, I think, reckons thirty two) from the first Edward to Henry the fourth. Then, after a long interval, by the *petition of right*¹⁰⁷

105. Popham, *supra* note 99, at bundle A, book 1, fol. 3.

106. Codrington Library Notes, *supra* note 102, vol. 1, lecture 4, § 2.

107. 1 BLACKSTONE, *supra* note 1, at *123–24.

As the following three corresponding passages on the absolute rights of individuals indicate, differences between the early (1753–1754) lecture notes on the one hand and later notes or the printed text of the *Commentaries* on the other, are not always quite so large.

1753: “Every Person is to have the disposal of his own Property by Mag. Char. C. 29 and by stat 5 E. 3. C. 29. No Freeman shall be divested of his Freehold but by Law of the Land and Judgment of his Peers.”¹⁰⁸

1761: “In regard to Private Property ye Laws of England say yt no freeman shall be outlaw’d or divested of his Property but by ye Judgment of his Peers, or ye Laws of ye Land, no not even for purposes of general Utility M.C. ch 29 29 Ed 3 c 3.”¹⁰⁹

1765: “Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the lands. And by a variety of ancient statutes it is enacted, that no man’s lands or goods shall be seised into the king’s hands, against the great charter, and the law of the land.”¹¹⁰

The more usual pattern, however, is for the later notes and the printed text to expand considerably on the equivalent passages from the first lecture course. Consider the following treatments of Magna Carta’s provisions for the safe conduct of merchants, from the discussion of the king’s prerogative in the first part of the lectures, which became Book I, Chapter 7, of the *Commentaries*:

1753: “By Magna Carta C. 30 All Merchants are allowed safe Conduct to come into, tarry or go through England and Enemy Merchants are to be attached but without hurt of their Goods, till it be known how our Merchants are treated in their Countries. Montesquieu excessively commends ye Lenity of this Law”¹¹¹

1761: “The Law of England has ever paid great regard to [the *Lex Mercatoria*] Compare by Mag: Ch: C 30 All Merchants are to have safe Conduct but upon the Breaking out of a War their Goods & Persons are attached without offering them any violence, till it be known how ours are treated & then their treatment is accordingly. This Equitable Custom appears also to

108. Popham, *supra* note 99, at bundle A, book 1, fol. 23.

109. Codrington Library Notes, *supra* note 102, vol. 1, lecture 4, § 10.

110. 1 BLACKSTONE, *supra* note 1, at *161.

111. Popham, *supra* note 99, bundle A, book 1, fol. 58.

have existed among our Northern Ancestors But it is somewhat extraordinary that ye Magna Ch: should include foreign Merchants as it was properly a Claim of those Rights only which belong to ye Subjects of this Nation but ye judicious montesquieu in his Spirit b. 20 Ch 13 admires ye Humanity & good Policy of ye English in making ye protection of Foreign Merchants a part of their National Liberty.”¹¹²

1765: “Indeed the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. One I cannot omit to mention: that by *magna carta* it is provided, that all merchants (unless publickly prohibited beforehand) shall have safe conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandise, without any unreasonable imposts, except in time of war: and, if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations But it is somewhat extraordinary, that it should have found a place in *magna carta*, a mere interior treaty between the king and his natural-born subjects; which occasions the learned Montesquieu to remark with a degree of admiration, ‘that the English have made the protection of *foreign* merchants one of the articles of their *national* liberty.’¹¹³

Three final examples come from the last lecture of Blackstone’s 1754 course, entitled “A short Historical Review of the Laws of England,” and the concluding chapter of the *Commentaries*, which similarly presents an outline history “Of the Rise, Progress, and Gradual Improvements of the Laws of England”:

1754: “K. John and his son H. 3. enforced the Rigour of the Feodal Laws, which incited the Barons to frequent Insurrections and Rebellions to appease which Mag. Charta and Charta de foresta were granted, which tho’ they may now appear trifling, are of the utmost consequence, being the Foundations upon which our present Liberties are built.”¹¹⁴

112. Codrington Library Notes, *supra* note 102, vol. 2, lecture 8, § 8.

113. 1 BLACKSTONE, *supra* note 1, at *252.

114. Popham, *supra* note 99, at bundle A, book 3, fol. 133.

1762: “His successor John enforced the rigours of the Feodal Military Tenures & the Forest Laws which occasioned many Insurrections of the Barons and they at last extorted from him the Magna Charta which did not contain all the Laws of England but only or principally such as were of a more comprehensive Nature and concerned the Common Rights & Liberties of the Church, Baronage & Commonalty which were of the greatest moment & had been invaded by King John’s Father & Brother and the Charta de Foresta Anno 1215. was to restore the Excesses and Encroachments which were made especially in the reigns of Richd 1st & Hen. 2d who had made new afforestations & much extended the rigour of the Forest Laws, as also a Confirmation of them from his Son Henry the 3d”¹¹⁵

1769: “In king John’s time, and that of his son Henry the third, the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, *magna carta*, and *carta de foresta*. Of these the latter was well calculated to redress many grievances, and encroachments of the crown, in the exertion of forest-law: and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable ameracements, from illegal distresses or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights: it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern: it enjoined an uniformity of weights and measures; gave new

115. Codrington Library Notes, *supra* note 102, vol. 35, fols. 8–10 (“The Conclusion of Dr Blackstone’s lectures of the Rise and Progress of the Laws of England.”).

encouragements to commerce, by the protection of merchant-strangers; and forbad the alienation of lands in mortmain. With regard to the administration of justice: besides prohibiting all denials or delays of it, it fixed the court of commonpleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assises to be taken in the proper counties, and establishing annual circuits: it also corrected some abuses then incident to the trials by wager of law and of battel; directed the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's turn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."¹¹⁶

No doubt some of the variations in the wording of the student notes can be attributed to differences in the conscientiousness and interests of the notetakers and also perhaps to variations in the content of the lectures that they heard. But it seems clear that overall, Magna Carta gained a much higher profile in Blackstone's presentations once he had undertaken his edition of *The Great Charter*, and that this same experience also informed his treatment of Magna Carta in the *Commentaries*.

Yet of course it was the *Commentaries*, both in their original form and in multifarious subsequent editions, abridgments, adaptations, and translations, that provided the main vehicle for conveying Blackstone's views, on Magna Carta and other subjects, to a very large readership both within and beyond his native land. For the influence of Blackstone's great book is by no means confined to Anglophone classrooms and courthouses. Indeed, it remains to this day an authority on the institutions and practices of government in the Westminster tradition, not least where human rights and the rule of law as epitomized by Magna Carta still exist largely in the realm of

116. 4 BLACKSTONE, *supra* note 92, at *416–17.

2016]

BLACKSTONE'S MAGNA CARTA

1519

aspiration. If Blackstone's scholarly edition of the texts of the Great Charter is by contrast comparatively unknown, its indirect influence, as transmitted by the *Commentaries*, has been far from insignificant.

