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Recommended Citation

Mary Sarah Bilder. "James Madison, Law Student and Demi-Lawyer." *Law and History Review* 28, (2010): 389-449.

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James Madison, Law Student and Demi-Lawyer

MARY SARAH BILDER

We think of James Madison as a political theorist, legislative drafter, and constitutional interpreter. Recent scholarship has fought fiercely over the nature of his political thought. Unlike other important early national leaders—John Adams, Alexander Hamilton, Thomas Jefferson, John Marshall, Edmund Randolph, James Wilson—law has been seen as largely irrelevant to Madison’s intellectual biography. Madison, however, studied law and, at least in one extant manuscript, took careful notes. These notes

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This essay could only have been written with the invaluable help with respect to handwriting, manuscript, and archival inquiries of Barbara Bair (Library of Congress, Manuscript Division), J. H. Baker (Cambridge University), Cecilia Brown (University of Virginia Law Library), Kathy Brown (Fauquier County Courthouse, Virginia), Dee Ann Buck (Independent Researcher), Keith Buckley (Indiana University Law Library), Hannah E. Clarke (Boston College Law Library), Gayle Cooper (Small Special Collections, the University of Virginia), Peter Drummey (Massachusetts Historical Society), Roy Haywood (Wildy & Sons), Diane Jacob (VMI Archives), Helen Lacouture (Boston College Law Library), David Lemmings (University of Adelaide), Joseph Luttrell (Meyer-Boswell Books), Marguerite Most (Boston College Law Library), Jennifer Nelson (Berkeley), Barbara Oberg (Jefferson

have been missing for over a century, and their loss contributed to the sense that Madison must not have been that interested in law. Now located, these notes reveal Madison's significant grasp of law and his striking curiosity about the problem of language. Madison's interest in interpretation is certainly not news to scholars. These notes, however, help to establish that this interest predated the Constitution and that his interest in constitutional interpretation was an application of a larger interest in language. Moreover, Madison thought about the problem of legal interpretation as a *student* of law, never from the secure status of *lawyer*. Over his lifetime, he advocated a variety of institutional approaches to constitutional interpretation, and this comfort with nonjudicial interpreters, along with a peculiar ambivalence about the proper location of constitutional interpretation, may owe a great deal to his self-perception as a law student but never a lawyer.

The Origins of a Demi-Lawyer

As an explanation for the contours of this essay—not entirely about Madison as a constitutional thinker, nor solely focused on late eighteenth-century legal education—let me begin by explaining that I did not set out to write this essay. Several years ago, I was trying to develop a list of lawyers at the Constitutional Convention.¹ At the time, I was not particularly

1. Compare James Madison Museum, <http://www.jamesmadisonmus.org/resource.htm> (listing occupation as “planter and politician”); Miller Center, University of Virginia, <http://millercenter.org/academic/americanpresident/madison> (listing career as “lawyer”); White House 101, <http://www.whitehouse.gov/about/presidents/jamesmadison> (describing him as “well-read in law”); U.S. Constitution Online, <http://www.usconstitution.net/constframedata.html> (listing occupation as a “politician”). For lists, see William Pierce, “Character Sketches of Delegates to the Federal Convention,” in *Records of the Federal Convention*, ed. Max Farrand (1911; New Haven, Conn.: Yale University Press, 1966), 3:87–97 (legal references to twenty-five

Papers), Cheryl Oestreicher (Drew University Archives), Elizabeth Prindle (Boston Public Library), Margaret Rich (Princeton, Special Collections), John Reardon (Loyola University of Chicago), Susan Riggs (Earl Gregg Swem Library, William and Mary), Amy Schindler (Earl Gregg Swem Library, William and Mary), Meredith Shedd-Driskel (Library of Congress), Phillip Seitz (Cliveden), Bill Sleeman (Thurgood Marshall Law Library, University of Maryland), Katherine Sosnoff (Boston College Law Library), Ann Southwell (Small Special Collections Library, University of Virginia), Laura Stalker (Huntington Library), James M. Storey (Boston), Anthony Taussig (London), Heather Tennes (Lancaster County Historical Society), David Warrington (Harvard Law Library), Minor Weisiger (Library of Virginia), W. Bland Whitley (Jefferson Papers), George Yetter (Colonial Williamsburg), and Georgiana Ziegler (Folger Library).

interested in Madison. I had avoided writing about early constitutional interpretation, the debates among advocates of original intent, public meaning, or original meaning, the extent of departmentalism, and the relevance of legislative nullification.² I was decidedly not a handwriting expert. I simply was curious about what it meant to be a *lawyer* and the manner in which men studied law in mid- to late eighteenth-century America.³

For this project, Madison presented a problem. He was, as Jack Rakove states, “not a lawyer.”⁴ He never joined the bar; he never had a client or a case. Although modern biographers have repeatedly mentioned that he read law, they have tended to dismiss this law study. Lack of evidence has reinforced the conclusion. Thomas Jefferson left multiple reading lists of law books; Madison left none. Other members of the Founding generation—John Adams, Hamilton, Jefferson, and Marshall—left law notes of varying lengths; Madison appeared to have taken none.⁵ Madison’s

Framers); Gore Vidal, *Imperial America: Reflections on the United States of Amnesia* (New York: Nation Books, 2004), 132 (thirty-three Framers were lawyers); Sol Bloom, “Questions and Answers Pertaining to the Constitution,” The United States National Archives and Records Administration (http://www.archives.gov/exhibits/charters/constitution_q_and_a.html) (thirty-four probably had studied law).

2. For recent overviews of the extensive debate, see R. B. Bernstein, *The Founding Fathers Reconsidered* (Oxford: Oxford University Press, 2009), 148–67; William Michael Treanor, “Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights,” *Michigan Law Review* 106 (2007): 487–543; see also Robert Natelson, “The Founders’ Hermeneutic: The Real Original Understanding of Original Intent,” *Ohio State Law Journal* 68 (2007): 1239, 1240n2 (collecting secondary source treatments of the subject); Gregory E. Maggs, “*The Federalist Papers* as a Source of the Original Meaning of the United States Constitution,” *Boston University Law Review* 87 (2007): 801–42; Louis J. Sirico Jr., “Original Intent in the First Congress” *Missouri Law Review* 71 (2006): 687–719. Discussions of Madison and constitutional interpretation have focused on his post-Convention views; see, for example, Jack N. Rakove, “Mr. Meese, Meet Mr. Madison,” in *Interpreting the Constitution: The Debate over Original Intent*, ed. Jack P. Rakove (Boston: Northeastern University Press, 1990), 179–94; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996); Donald O. Dewey, “James Madison Helps Clio Interpret the Constitution,” *American Journal of Legal History* 15 (1971): 38. One of the few studies of Madison’s writing style is Louis C. Schaedler, “James Madison, Literary Craftsman,” *William and Mary Quarterly* 3 (1946): 515–33.

3. On legal literacy, see Mary Sarah Bilder, “The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture,” *Yale Journal of Law and the Humanities* 11 (1999): 47.

4. Rakove, *Original Meanings*, 343.

5. See *Legal Papers of John Adams*, ed. L. Kinvin Wroth and Hiller B. Zobel (Cambridge, Mass.: Belknap, 1965), 1:1–25 (reprinting his student Notes c. 1758 and his Commonplace Book c. 1759); *The Law Practice of Alexander Hamilton: Documents and Commentary*, ed. Julius Goebel Jr. and Joseph H. Smith (New York: Columbia University Press, 1964), vol. 1; Thomas Jefferson, *The Commonplace Book of Thomas Jefferson*, ed. Gilbert Chinard (Baltimore: Johns Hopkins University Press, 1926); *Papers of John Marshall*, ed. Herbert

law reading thus has been discussed with the same consistency as his hair style (an eighteenth-century comb-over), his dress (all black), and his height (either five feet four or five feet six inches).⁶ As Ralph Ketcham concludes, the “sole advantage for Madison of many years’ intermittent study of the law, aside from the general increase in knowledge, was a technical familiarity with the world of torts and suits inhabited by so many of his political colleagues.”⁷

What do we call someone who studied law but did not become a lawyer? In the twenty-first century, law students usually gain admittance to the bar before abandoning law practice for politics or other fields—thus remaining *lawyers*. The dominance of institutional legal education ensures that even those who choose not to take the bar can at least say they went to law school. Among legal historians, the occasional person skips the bar on

A. Johnson (Chapel Hill: University of North Carolina Press, 1974), vol. 1; see also Joseph Smith, “Review of Papers of John Marshall,” *Columbia Law Review* 75 (1975): 687, 690–91; Charles T. Cullen, “New Light on John Marshall’s Legal Education and Admission to the Bar,” *American Journal of Legal History* 16 (1972): 345; William F. Swindler, “John Marshall’s Preparation for the Bar—Some Observations on His Law Notes,” *American Journal of Legal History* 11 (1967): 207.

6. See, for example, Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (Oxford: Oxford University Press, 2006), 88–89.

7. Ralph Ketcham, *James Madison: A Biography* (1971; Charlottesville: University of Virginia Press, 1990), 145; see also *ibid.*, 56 (stating that he “never intended to practice, and he never qualified as a counsel-at-law”). For similar comments, see Jack Rakove, *James Madison and the Creation of the American Republic*, 3rd ed. (New York: Pearson/Longman, 2007), 34 (noting “Madison resumed reading law, but with no more idea of practicing than he had shown a decade earlier”); Charles Cerami, *Young Patriots* (Naperville, Ill.: Sourcebooks, 2005), 16 (declaring “his training soon qualified him to practice law, but . . . Madison decided against the grubby business of representing clients whose routine affairs held little interest for him.”); Gary Wills, *James Madison* (New York: Times Books, 2002), 88 (making no mention of Madison’s law reading); Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca, N.Y.: Cornell University Press, 1995), 80–81 (suggesting reasons Madison did not follow a law career); Robert Allen Rutland, *James Madison: The Founding Father* (New York: Macmillan, 1987), 5–6 (noting “Madison was no lawyer”) and index entry at 282 (“disdains legal career”); Douglass Adair, *Fame and The Founding Fathers*, ed. Trevor Colburn (New York: W. W. Norton, 1974), 130 (describing Madison’s disinclination towards the practice of law); Irving Brant, *James Madison* (Indianapolis, Ind.: Bobbs-Merrill, 1941–1961), 1:111–12 (referring to “Madison’s much-controverted study of law”), 2:309–310, 336–37 (emphasizing interest in government over common law); Douglass Adair, “James Madison’s Autobiography,” *William and Mary Quarterly* 2 (1945): 195–96 (only briefly mentioning his study of law). Exceptions are Richard B. Morris, *Witnesses at the Creation: Hamilton, Madison, Jay, and the Constitution* (New York: Holt, Rinehart and Winston, 1985), 95 (declaring Madison a “deep student of law, particularly international law and political theory”), and Raoul Berger, “Jack Rakove’s Rendition of Original Meaning,” *Indiana Law Journal* 72 (1997): 619, 621 (Madison had studied law for years).

their path to law school teaching—but many of us, regardless of practical experience, can technically claim the title *lawyer*.⁸ For better or worse, we may accept ideas about lawyers possessing some specialized ways of thinking. For many of us, for example, constitutional interpretation is the “peculiar province” of lawyers and judges.⁹

But how might someone like Madison—who studied law but never became a lawyer—think about law? In the eighteenth-century Anglo-American world, Madison was not alone. Hamilton Bryson has emphasized that “Blackstone along with Locke, Burnet, and many others believed that the study of law should be included in a gentleman’s liberal education.”¹⁰ Even in Virginia, Madison was not the only gentleman to study but not practice. Yet towards the end of the eighteenth century, at least in Virginia, the study of law increasingly seemed to lead to a professional identification. Indeed, in 1773, the anonymous author who recommended the establishment of a professorship of law at William and Mary assumed the purpose would be to train “gentlemen of the bar.”¹¹

The lack of a term for law student/nonlawyer status is a problem. Jefferson once derisively referred to the members of the Virginia legislature of the 1780s as “lawyers and demi-lawyers.”¹² Jefferson may have meant the term to refer to readers of law who had not become lawyers or, perhaps more likely, may have meant it to dismiss the abilities of certain legislators. He probably did not refer to Madison. But, for want a better term, I will use it in this essay. Madison was a *demi-lawyer*.

Madison was sensitive to this demi-lawyer status. In his autobiographical sketch written in the 1830s, he repeatedly described his study of the law while emphasizing his lack of professional identification.¹³ He had stayed at Nassau Hall (Princeton) after graduation in 1771 “employing his times in miscellaneous studies; but not without a reference to the profession of

8. A related problem befalls those of us with PhDs who teach in law schools and wonder whether we should or should not describe ourselves as *historians*.

9. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810): “It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”

10. W. Hamilton Bryson, *Legal Education in Virginia, 1779–1979: A Biographical Approach* (Charlottesville: University Press of Virginia, 1982), 17.

11. Letter to the Editor, *Virginia Gazette*, December 30, 1773, quoted in Bryson, *Legal Education in Virginia*, 20.

12. Thomas Jefferson, “Autobiography” (1821), in *The Works of Thomas Jefferson*, ed. Paul L. Ford (New York: G. P. Putnam’s, 1904), 1:3, 71 (describing Madison’s efforts to shepherd the Virginia revisal bill despite the “endless quibbles, chicaneries, perversions, vexations and delays of lawyers and demi-lawyers”).

13. Adair, “James Madison’s Autobiography,” 191.

the Law.”¹⁴ After returning to Virginia, he continued “for several years, in very feeble health, but without neglecting a course of reading, which mingled miscellaneous subjects with the studies intended to qualify him for the Bar, for a practice at which however he never formed any absolute determination.”¹⁵ Later, apparently referring to the early 1780s, Madison discussed having “resumed his law studies to which the forenoon was chiefly dedicated.”¹⁶

What constituted Madison’s law studies is difficult to determine. His extensive library did not survive, and he never had the compulsive book-cataloging impulse of Jefferson.¹⁷ Whereas Jefferson wrote multiple reading lists over his lifetime to prospective students, Madison’s correspondence records the title of only one law book that he read. Titles seemed not to have much mattered to him, nor did long lists.

Madison’s birth in 1751 placed him in a transitional moment in Virginia legal education. While a few young men went to England to attend the Inns of Court, by the early 1770s, most students stayed in Virginia.¹⁸ There, a young student could read alone, following a suggested course of readings. Alternatively, he could learn law under the supervision of a practitioner. After 1779, when George Wythe became the first professor of law and police at William and Mary, a student could follow an institutional approach by attending lectures and participating in moot court and moot legislature.¹⁹

When Madison first began to study law in 1773 upon his college graduation, the institutional approach did not yet exist. Thus Madison first undertook to read law relatively alone and without much direction. In 1773, Madison wrote that he intended “to read Law occasionally and have procured books for that purpose.”²⁰ Madison asked his college friend, William Bradford, who had decided to study law in Philadelphia under Edward Shippen, to send him the sketch of his plan of reading and the

14. *Ibid.*, 197.

15. *Ibid.*, 198.

16. *Ibid.*, 200.

17. His library eventually had nearly 4,000 volumes. Most were sold by John Payne Todd.

18. See Alfred E. Jones, *American Members of the Inns of Court* (London: Saint Catherine, 1924); Bryson, *Legal Education in Virginia*; Alan M. Smith, “Virginia Lawyers, 1660–1776: The Birth of an American Profession” (PhD diss., John Hopkins University, 1967).

19. See W. H. Bryson, “Legal Education,” in *Virginia Law Books: Essays and Bibliographies*, ed. W. Hamilton Bryson (Philadelphia: American Philosophical Society, 2000), 335–39.

20. Madison to William Bradford, December 1, 1773, *The Papers of James Madison*, ed. Robert A. Rutland and William M. E. Rachal (Chicago: University of Chicago Press, 1962) [hereafter *PJM*], 1:100.

“books & the order” in which you intend to read them.²¹ Although Bradford successfully continued in this venture, Madison soon dropped the effort.

That twenty-two-year-old Madison quit was not surprising. He had made no apparent effort to attach himself to any of the several men in Virginia who guided law students. He had no real interest in studying law as a professional vocation. His admitted interest in the study was general—the “principles & Modes of Government are too important to be disregarded by an Inquisitive mind and . . . well worth [of] a critical examination by all students that have health & Leisure.”²² Government generally, not law specifically, interested him.

Nevertheless, Madison did read some law. When he arrived in Congress in the spring of 1780, delegate Thomas Rodney commented that Madison had “some little reading in the law.”²³ Certainly by 1783, Madison had acquired a sense of core law books. That year, he drafted a list of books for the proposed Library of Congress. The “Law” section included basic common law (Coke’s *Institutes*, Blackstone’s *Commentaries*), civil and comparative law (Justinian’s *Institutes*, the *Codex juris civilis*, Taylor, Domat, and the Frederician Code), legislation (a book on English statutes and one on parliamentary practice), commercial law (a book each on customs, exchange, rates, and admiralty), and a law dictionary.²⁴ Whether the law section reflects Madison’s reading or Madison’s solicitation of wider input is unknown.²⁵

21. *Ibid.*

22. *Ibid.*, 101.

23. Brant, *James Madison*, 2:13 (quoting Diary of Thomas Rodney, March 10, 1781).

24. “List of Books Reported by a Committee,” Papers of the Continental Congress, 1784–1789 (National Archives), Roll 196, item 183. “Law of Nature and Nations” included works on the law of nature (Grotius, Puffendorf, Vattel, Burlamaqui, Selden, Bynkershoek, Barbyrac), the law merchant, law of the sea (Grotius, Selden, Molloy, Lee), prizes, and legislation of European countries. Some of these works were on Madison’s college reading list. See Dennis F. Thompson, “The Education of a Founding Father: The Reading List for John Witherspoon’s Course in Political Theory, as Taken by James Madison,” *Political Theory* 4 (1976): 523–29.

25. On the list, see Robert A. Rutland, “*Well Acquainted with Books*”: *The Founding Framers of 1787* (Washington, D.C.: Library of Congress, 1987); Tom Glynn and Craig C. Hagensick, “Books for the Use of the United States in Congress Assembled, 1783 and 1800,” *Libraries & Culture* 37 (2002), 109–22. Towards the end of Madison’s work on the list, Jefferson arrived in Philadelphia and likely shared his library list. See Adrienne Koch, *Jefferson and Madison: The Great Collaboration* (1950; Gloucester, Mass.: Peter Smith, 1970), 7–14. Although other sections of the list show Jefferson’s influence, scholars presume little Jefferson influence in the law section (Rutland, “*Well Acquainted*,” 29–30 [Robert L. Scribner introduction]). For additional discussion, see *PJM*, 6:64–65.

Had Madison read this basic list, he could have easily been admitted to the bar. Although Jefferson repeatedly suggested several years of legal study, the length and depth of study differed markedly among late eighteenth-century Virginia law students. In 1766, Patrick Henry was admitted to the bar, over George Wythe's objections, after having apparently spent as little as six weeks reading Coke on Littleton and studying the laws of Virginia.²⁶ John Marshall attended Wythe's lectures at William and Mary from May to July of 1780 and was then admitted to the bar.²⁷

Madison, however, did not seek entry to the bar. He spent most of the late 1770s involved in Virginia politics. In 1780, he began his involvement in continental politics, living until late 1783 in Philadelphia. Other than the law list for the Library of Congress, there is little evidence of legal interest during these years.²⁸

Abruptly in 1783, at the age of thirty-two and at the end of his stint as congressional delegate, Madison returned to his law studies. The catalyst for this second, more serious law study appears to have been a failed romance. Madison had been interested in Catherine (Kitty) Floyd, the daughter of a New York delegate.²⁹ Jefferson had been encouraging, noting in code that "it will render you happier than you can possibly be in a singl[e] state."³⁰ Yet by August 1783, despite the arrival of miniature paired portraits of Madison and Kitty, Kitty had ended the relationship for reasons that remain mysterious.³¹ Madison made plans to return to Montpelier.

Although Madison would not have been the first person to drown his sorrows in law, more plausible is that his interest in law related to a desire for an income.³² Later, he insisted that he had undertaken this second foray into law with the intent "to qualify him for the Bar."³³ Unlike Jefferson or

26. See Moses Coit Tyler, *Patrick Henry* (Boston: Houghton, Mifflin, 1894), 20–25.

27. *Papers of John Marshall*, 1:37–41; Cullen, "New Light," 345.

28. See Rev. James Madison to Madison, August 2, 1782, *PJM*, 5:16—"I hope you have not laid aside your Attention to the Law, for it seems absolutely necessary here to give Importance to an active Character, as well as the most profitable Business one can be engaged in."

29. See Brant, *James Madison*, 2:283–87 (discussing the affair in a chapter titled, "Romance").

30. Jefferson to Madison, April 14, 1783, *PJM*, 6:459.

31. See, for example, Wills, *James Madison*, 5–6 (stating that "Madison was so humiliated by this rejection that he later scored out the passage" discussing the breakup). Madison may have been trying to protect his wife of nearly forty years, Dolley Madison, to whom he intended to leave his papers.

32. See Eugene L. Didier, "Thomas Jefferson as a Lawyer," *Green Bag* 15 (1903): 153 (describing how Jefferson turned to law after "disappointment in love," the end of his relationship with Rebecca Burwell).

33. Adair, "James Madison's Autobiography," 198.

Washington, whose fathers' early deaths left them estates, Madison's father remained alive and in control of the family property. Madison's father died in 1801 when Madison was secretary of state. His mother lived to be ninety-eight and died in 1829, long after Madison had retired from the presidency and not too long before his own death in 1836. In the 1780s, Madison was thus dependent for income on his father, Philadelphia lenders, the state (via his service as a delegate), and eventually Jefferson.³⁴ Madison's financial dependence may have proved a stumbling block for the Floyd relationship. During this period, Jefferson had urged unsuccessfully that Madison buy a farm near him. In the wake of the Floyd breakup, Madison's father deeded a 560-acre farm to him.³⁵ Yet, the land posed difficulties for Madison, who wanted "to depend as little as possible on the labour of slaves."³⁶ As Jefferson would advise, a legal career meant that under "every change of fortune" one would have resource from which to "derive an honourable subsistence."³⁷

Madison read law—or at least wrote about reading law—for almost two years. In the winter of 1783–1784, Madison returned to Montpelier and wrote Jefferson that "I am not yet settled in the course of law reading with which I have tasked myself."³⁸ During the winter, he entered "on the course of reading which I have long meditated."³⁹ The great quantity of snow meant that Madison had "pursued my intended course of law-reading with fewer interruptions than I had presupposed."⁴⁰ Throughout 1784, Madison continued his reading and eventually turned down Jefferson's invitation to Paris, fearing that "it would break in upon a course of reading, which, if I neglect now, I shall probably never resume."⁴¹ In March 1785, Madison wrote the Marquis de Lafayette that he spent "the chief of my time in reading, & the chief of my reading, on Law."⁴² In

34. See Brant, *James Madison*, 2:307–9, 338–42; Ketcham, *James Madison*, 141–42.

35. See *Writings of James Madison, Comprising his Public Papers and his Private Correspondence*, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1900–1910) [hereafter *WJM*], 2:46n1 (August 19, 1784); Brant, *James Madison*, 2:324 (dating deed to August 1784).

36. Madison to Edmund Randolph, July 26, 1785, *PJM*, 8:328; see Ketcham, *James Madison*, 146–49.

37. Jefferson to Thomas Mann Randolph, July 6, 1787, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton, N.J.: Princeton University Press, 1950–) [hereafter *PTJ*], 11:556, 557, 558.

38. Madison to Jefferson, December 10, 1783, *PJM*, 7:401.

39. Madison to Randolph, March 10, 1784, *PJM*, 8:3.

40. Madison to Jefferson, February 11, 1784, *PJM*, 7:418–19.

41. William C. Rives, *Life and Times* (Boston: Little, Brown & Company, 1859–1868; reprint, 1970), *Life and Times*, 2:7–38.

42. Madison to Lafayette, March 20, 1785, *PJM*, 8:250, 254.

July, he wrote Edmund Randolph that he kept up his “attention . . . to the course of reading which I have of late pursued & shall continue to do so.”⁴³ Whether reading or not, he was determined that his friends believe him to be doing so.

Madison may have been relying on Jefferson as a guide and using Jefferson’s library.⁴⁴ Madison’s first biographer, William C. Rives, described Madison as having “entered upon the study of the law under the auspices of Mr. Jefferson.”⁴⁵ Rives knew Madison and had himself studied law with Jefferson.⁴⁶ By the 1790s, Jefferson had become known for his willingness to lend his books to those embarked on “a course of law reading” or who were studying “law in our neighborhood.”⁴⁷

For Jefferson, law was “to be acquired from books.”⁴⁸ As he noted, all one needed were the “books to be read, and the order in which they are to be read.”⁴⁹ While Jefferson’s law reading lists would become increasingly wide-ranging and formidable, his early list reflected conventional advice.⁵⁰ They began with Coke (Coke on Littleton, the *Institutes*, and *Reports*), the post-1665 reports (Vaughan, Salkeld, and Lord Raymond), and ended with Blackstone’s *Commentaries*, and the Virginia laws.⁵¹

In the 1780s, the one book that Madison recorded reading was Coke on Littleton.⁵² Whether he read the original edition is unknown; however, he did ask Jefferson to look to see if “Hawkin’s Abridgt. Of Co: Litt:” was

43. Madison to Randolph, July 26, 1785, *PJM*, 8:327, 328.

44. See Madison to Jefferson, December 10, 1783, *PJM*, 7:401 (describing sending “draught on your library”).

45. Rives, *Life and Times*, 2:19.

46. See Drew McCoy, *Last of the Fathers* (Cambridge: Cambridge University Press, 1989), 331–32.

47. Jefferson to John Garland Jefferson, June 11, 1790, *PTJ*, 16:481; Jefferson to James Monroe, June 11, 1790, *PTJ*, 16:483; 487–88 (arranging the books and mentioning Coke); see also letter to Nicholas Lewis, June 11, 1790 (referring to lending books to Garland Jefferson).

48. Jefferson to Thomas Mann Randolph, August 27, 1786, *PTJ*, 10:305, 307.

49. *Ibid.*; see Jefferson to John Garland Jefferson, June 11, 1790, *PTJ*, 16:480–82: “all that is necessary for a student is access to a library, and directions in what order the books are to be read.”

50. See Jefferson to John Minor, August 30, 1814, *Writings of Thomas Jefferson*, ed. Paul L. Ford (New York: G. P. Putnam’s, 1898), 9:480–85; Jefferson to Dabney Terrell, February 26, 1821, *Writings of Thomas Jefferson*, ed. H. A. Washington (Washington, D.C.: Taylor & Maury, 1854), 7:208–9; M. L. Cohen, “Thomas Jefferson Recommends a Course of Law Study,” *University of Pennsylvania Law Review* 119 (1971): 823–44.

51. *PTJ*, 16:481; see also Jefferson to Herault, July 5, 1787, *PTJ*, 11:547, 548 (containing Thomas Jefferson’s list for a “law library as suffices for lawyers of the ordinary class in England or America” and including the 1773 edition of Salkeld’s *Reports*).

52. Madison to Edmund Randolph, March 10, 1784, *PJM*, 8:3 (“Co: Litt:”).

still at a Philadelphia bookseller.⁵³ This edition was updated and more clearly organized by the important English annotator William Hawkins. His interest in purchasing an almost treatise-like basic text speaks to a sensible, pragmatic approach to legal study. Jefferson suggested reading the remainder of the *Institutes* and the *Reports*. Whether Madison followed this advice is unascertainable, although he noted that he had also read “a few others from the same shelf” as Coke.⁵⁴

Beyond Coke, Madison read at least two additional works. Although Madison never recorded reading Blackstone, he likely had read parts in the 1770s. His friend Bradford had begun with the *Commentaries*, “which I am most pleased with & find but little of that disagreeable dryness I was taught to expect.”⁵⁵ It seems plausible that Madison would have followed suit. The title appears on Madison’s 1783 list for the Library of Congress and in 1785, as Madison attempted to shepherd Jefferson’s crime bill through the Virginia legislature, he took notes from volume 4. Later, Madison comfortably recorded John Dickinson’s reference to “Blackstone’s Commentaries” in the Philadelphia Convention debate over the ex post facto clause.⁵⁶

Lastly, sometime during this period, as I will explore in more detail, Madison read and took notes on William Salkeld’s *Reports* (1717–1718). Whether he read other reporters is not possible to determine. As will be discussed, some evidence suggests he also read Lord Raymond’s *Reports*, which duplicated certain cases in Salkeld.⁵⁷ Nonetheless, if he had read only one reporter, Salkeld would have been an excellent choice.

Salkeld’s *Reports* were popular among law students in the colonies and early United States. A famous guide to legal education in circulation in the colonies emphasized consulting Salkeld’s *Reports* “under their proper titles, which may easily be done, he having put them into the form of a

53. Madison to Thomas Jefferson, March 16, 1784, *PTJ*, 7:32, 37. Jefferson searched almost every book shop in Philadelphia for “Hawk’ abr’ Co. Lit.” to no avail. Jefferson to James Madison, May 25, 1784, *PJM*, 8:42. Jefferson owned a copy of the 1751 edition (E. Millicent Sowerby, *Catalogue of the Library of Thomas Jefferson* [Washington, D.C., 1952–1959], 2:219 [no. 1785]).

54. Madison to Randolph, March 10, 1784, *PJM*, 8:3.

55. William Bradford to Madison, November 5, 1773, *PJM*, 1:98. Madison referred to “the course and dry study of the Law.” He hastened to add that it was not a “barren dessert [sic]” because “the Law does bear fruit but it is sour fruit that must be gathered and pressed and distilled before it can bring pleasure or profit” (Madison to Bradford, January 24, 1774, *PJM*, 1:104, 105; Bradford to Madison, March 4, 1774, *PJM*, 1:108, 109 [discussing the appeal of money, “Golden fruit,” but bemoaning the “the dry Pages of Little and Coke”]).

56. Farrand, *Records*, 2:448 (August 29 [Madison’s Notes]).

57. Robert Raymond, *Reports of cases argued and adjudged in the courts of King’s Bench and Common Pleas*, 2nd ed. (London: H. Woodfall and W. Strahan; for T. Osborne, 1765).

commonplace.”⁵⁸ Colonial newspapers abound with booksellers’ notices of Salkeld’s *Reports* for sale.⁵⁹ Even as late as 1798, law student Joseph Story learned that Salkeld should be one of the first reports read.⁶⁰

Colonial Americans found the time period covered by Salkeld’s *Reports* (1689–1712) particularly relevant. Property and procedural reforms following the Restoration had turned old works such as Coke into limited practical value. The reign of William and Mary further modernized the common law as the “development of commerce, and the consequent variety and importance of personal property and of contracts, the growth of maritime jurisprudence, the development of equity, and the general introduction of more liberal and enlightened views of justice and public policy, all combined to give a new tone and impulse to the common law.”⁶¹ In addition, late eighteenth-century Americans attributed to the period essential constitutional reforms, including religious toleration, legislative authority, Crown limits, and rights rhetoric. Salkeld’s *Reports* derived additional value by including many opinions and dissents by the much-admired Chief Justice Holt.⁶² Six editions between 1717 and 1795 confirmed the value of the *Reports*.⁶³ Other reports such as Vaughan and Raymond were considered less than accurate.⁶⁴

Salkeld’s *Reports* also contained two cases of particular interest to colonists prior to the Revolution in terms of the relationship of English law to the colonies. The first case in volume 2 under the head, “Law Common,

58. Lord Chief Justice Reeve to his Nephew [containing instructions for the study of law], Francis Hargrave, *Collectanea Juridica* (London: E. and R. Brooke, 1791), 1:79, 80; see *Portrait of a Patriot: The Major Political and Legal Papers of Josiah Quincy Junior*, ed. Daniel R. Coquillette and Neil Longley York (Boston: Colonial Society of Massachusetts, 2007), vol. 2 (The Law Commonplace), 2:89–90 (including Reeve’s instructions); Joseph Story, “Course of Legal Study” (N. A. Review, 1817) in *The Miscellaneous Writings of Joseph Story*, ed. William Story (Boston: C. C. Little and J. Brown, 1852), 66, 74 (discussing Reeve’s letter).

59. See, for example, *New-York Daily Gazette*, May 9, 1789, [114:453] (announcement of James Rivington, a prominent New York bookseller, that he had “Salkeld, with many of the reports, and law writers.”).

60. See R. Kent Newmyer, *Supreme Court Justice Joseph Story* (Chapel Hill: University of North Carolina Press, 1985), 42 (emphasizing order in which Salkeld came among the first reports read).

61. Van Vechten Veeder, “The English Reports, 1292–1865,” *Harvard Law Review* 15 (1901): 1, 19.

62. *Ibid.*, 17–19 (emphasizing that Lord Hardwicke had supervised publication).

63. See John William Wallace, *The Reporters: Arranged and Characterized with Incidental Remarks*, 4th ed. (Boston: Soule and Bugbee, 1882), 399–400; *Sweet and Maxwell’s A Legal Bibliography of the British Commonwealth of Nations*, ed. W. Harold Maxwell and Leslie F. Maxwell (1955: 2nd ed., London: John Rees, 1989), 1:308.

64. See Wallace, *Reporters*, 399 (criticizing some of the cases for being too short).

Canon, Civil &c.,” *Blankard v. Galdy* (1693), involved whether the laws of England applied in Jamaica.⁶⁵ *Blankard*, and its predecessor, *Calvin’s Case*, were crucial to revolutionary lawyers’ understanding of the imperial relationship.⁶⁶ *Smith v. Browne and Cooper* also appeared under the head, “Villeins and Villenage.”⁶⁷ In *Smith*, Holt stated that “as soon as a Negro comes into England, he becomes free,” nonetheless in Virginia “Negroes are saleable.”⁶⁸ *Smith* suggested that slavery, illegal in England, might be legal because of colonial legislative authorization.

Eighteenth-century American owners of Salkeld’s *Reports* spanned the colonies. John Adams, Oliver Ellsworth, and John Jay owned copies.⁶⁹

65. William Salkeld, *Reports of cases adjudg’d in the Court of King’s Bench; with some special cases in the courts of Chancery, Common Pleas and Exchequer* (London: Eliz. Nutt and R. Gosling, 1717–1718), 2:411 (distinguishing uninhabited countries “found out and planted” by English subjects and conquered countries).

66. See Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005), 1–74; Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004), 31–40; Mary Sarah Bilder, “English Settlement and Local Governance,” in *The Cambridge History of Law in America*, ed. Christopher Tomlins and Michael Grossberg (Cambridge: Cambridge University Press, 2008): 1:96–103; William R. Leslie, “Similarities in Lord Mansfield’s and Joseph Story’s View of Fundamental Law,” *American Journal of Legal History* 1 (1957): 278.

67. Salkeld, *Reports*, 2:666.

68. *Ibid.* The case ended with the comment—the Attorney General noted that it had been an inheritance rather than sale and “nothing was done” (*ibid.*).

69. See, for example, John Adams (Adams Library 1724 edition with minor annotations (Adams 72.9) and 1731 edition with significant annotations (Adams 72.10), Boston Public Library); John Chambers (Herbert A. Johnson, “John Jay: Lawyer in a Time of Transition, 1764–1775,” *University of Pennsylvania Law Review* 124 (1976): 1260, 1282); Charles Chauncey (inscription in 1773 edition, Yale University, MORRIS catalog entry); Benjamin Chew (e-mail correspondence from Phillip Seitz, Cliveden); Eliphalet Dyer (inscription in 1722 edition, Yale University, MORRIS catalog entry); Oliver Ellsworth (inscription in 1717 edition, Yale University, MORRIS catalog entry); Thomas Gibbons (inscription in 1773 edition, e-mail correspondence from Laura Stalker, Huntington Library); James Grindlay (Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries, 1700–1799* [Knoxville: University of Tennessee Press, 1978], 68); Matthew Griswold (inscription in volume 3 of 1724 and 1742 editions, Yale University, MORRIS catalog entry); John Jay (Johnson, “John Jay,” 1282); Samuel Johnston (*The John Johnston Donaldson Collection*, Thurgood Marshall Law Library); Peter Leigh (Johnson, *Imported Eighteenth-Century*, 86); Nathaniel Newdigate (Bilder, *Transatlantic Constitution*, 235–237n24); William Smith Sr. (Peter Hoffer, “Law and Liberty: In the Matter of Provost William Smith of Philadelphia, 1758,” *William and Mary Quarterly* 38 (1981): 681, 686n22); John Trumbull (1717 edition, Indiana Law Library, e-mail from Keith Buckley, Reference/Collection Development Librarian); John Worthington inscription in 1742 edition (Yale University, MORRIS catalog entry); William Wyly (e-mail from Laura Stalker, Huntington Library); Jaspas Yeates (e-mail correspondence from Heather Tennes, Director of Archival Services, Lancaster

Many copies contain annotations. For example, John Adams annotated *Smith v. Brown*: “It seems to be agreed by two Cases in Salk. y^t some kind of action will lie for a Negro . . . I cannot say indeed y^t these Cases are well reported, which must not surprise, as Sir Edward Coke observes y^t there are [] erroneous Cases, in y^t most accurate of all Reporters Plowden.”⁷⁰ Other copies remain barely used. The continued importance of the work is evident in Jefferson’s purchase of several different editions, including a 1791 Dublin printing of the sixth edition.⁷¹

Beyond Salkeld, Madison planned to read even more law books. In 1784, he complained that his “progress . . . has been much retarded by the want of some important books” but neglected to state what they were.⁷² He told Jefferson that he planned to “import som[e] law-books” from London and Paris.⁷³ He also was looking for “good books” on public law, the “constitutions of the several existing confederacies,” and “the Law of nature and Nations.”⁷⁴ His notes on confederacies would later be used for *The Federalist Papers*.⁷⁵

Madison would complete the final component of Jefferson’s early reading list, knowledge of the Virginia laws, in his work on the Virginia

County Historical Society; John Rengier, “The Law in Judge Jasper Yeates’s Library,” *Journal of the Lancaster County Historical Society* 62 [1958]: 96–108). For additional Virginia owners, including King Carter, Henry Churchill, George Johnston, John Mercer, John Tarpley, and John Waller, see William H. Bryson, *Census of Law Books in Colonial Virginia* (Charlottesville: University of Virginia Press, 1978), xii, 13; Johnson, *Imported Eighteenth-Century*, 79; see also Bryson, “Private Law Libraries,” in *Virginia Law Books*, 482 (counting thirteen copies in colonial Virginia law libraries).

70. Salkeld, *Reports* (1731) (Adams 72.10, Boston Public Library), 2:667, <http://www.archive.org/stream/reportsofcasesad00grea#page/666/mode/2up>.

71. Sowerby, *Catalogue*, 2:345–46 [No. 2073]. In 1770, the library that Jefferson used while studying law at his parents’ home burned. He noted that the loss “‘fell principally on my books of Common Law, of which I have but one left, at that time lent out.’” Chinard, *The commonplace Book*, 1 (quoting Jefferson). Jefferson’s Catalog of Books (1783) has a “2” in the listing for the number of volumes of Salkeld carefully converted to a “3,” suggesting that Jefferson originally owned a two-volume edition (“1783 Catalog of Books,” Thomas Jefferson Papers: An Electronic Archive [Massachusetts Historical Society], 126, <http://www.masshist.org/thomasjeffersonpapers/catalog1783/>); see also Douglas Wilson, “Sowerby Revisited: The Unfinished Catalogue of Thomas Jefferson’s Library,” *William and Mary Quarterly* 41 (1984): 615, 619. A letter to Archibald Stuart, July 20, 1795, seems to imply a sale of a copy of Salkeld *Reports*. Jefferson to Archibald Stuart, *PTJ*, 28:410.

72. Madison to Randolph, March 10, 1784, *PJM*, 8:3.

73. Madison to Thomas Jefferson, February 17, 1784, *PJM*, 7:421.

74. Jefferson to James Madison, May 25, 1784, *PTJ*, 7:288.

75. Bernard Bailyn, *To Begin the World Anew: The Genius and Ambiguities of the American Founders* (New York: Knopf, 2003), 103.

revisal. By the 1780s, formal Virginia legal education emphasized legislation. George Wythe's title at William and Mary was professor of law and police, the latter term referring to larger aspects of governance and administration. While a moot court was held monthly, a legislative moot occurred "every Saturday."⁷⁶ At the moot legislature, Wythe served as Speaker and the students formed a forty-member house. The students debated the bills "drawn up by the Com^{tee} appointed to revise the laws."⁷⁷

Madison had firsthand experience. For three consecutive falls in 1784, 1785, and 1786, Madison served in the Virginia legislature on committees charged with revising courts and Virginia law.⁷⁸ In the October 1784 session of the Virginia legislature, Madison chaired the committee for Courts of Justice.⁷⁹ In the fall of 1785, he began to lead the efforts to pass the act for religious freedom and other bills of the revised code in the Virginia legislature.⁸⁰ In this capacity, he wrote his "Memorial and Remonstrance" against religious assessments for religious instructors and shepherded the bill for religious freedom through the legislature. The 1784–1786 sessions also saw significant fights over slavery in the Virginia legislature, in particular, efforts to repeal the 1782 act permitting private manumission.⁸¹

By early 1785, Madison could have been admitted to the bar had he so desired. In January 1785, Madison remained in Richmond "in the library,"⁸² "chiefly with a view of gaining from the Office of the Attorney [General Randolph] some insight into the juridical course of practice."⁸³ In February, Madison was granted an LLD from George Wythe at William and Mary.⁸⁴ With admission to the Virginia bar controlled by the

76. Alonzo Thomas Dill, *George Wythe: Teacher of Liberty* (Williamsburg: Virginia Independence Bicentennial Commission, 1979), 44.

77. Robert M. Hughes, "William and Mary: The First American Law School," *William and Mary Quarterly* 2 (1922): 40, 41 (quoting John Brown, February 15, 1780).

78. Editorial Note, *PJM*, 8:163–64.

79. *PJM*, 8:163.

80. Jefferson to James Madison, January 22, 1786, *PJM*, 8:472 (commenting on the ninety-seven-day session and the revisal). Indeed, in February 1784, as Madison read law, he was corresponding with Jefferson about the possibility of reintroducing Jefferson's revision of Virginia law (Madison to Thomas Jefferson, Feb. 11, 1784, *PJM*, 7:419).

81. See Frederika Teute Schmidt and Barbara Ripel Wilhelm, "Early Pro-Slavery Petitions in Virginia," *William and Mary Quarterly* 30 (1976): 133, 135 (describing 52–35 vote against repeal and failed efforts for statewide abolition).

82. Madison to James Madison Sr., January 6, 1785, *PJM*, 8:216, 217.

83. Madison to Jefferson, January 22, 1785, *PJM*, 8:236 (bottom half of letter cut off); see Brandt, *James Madison*, 2:337 (discussing letter). The *Madison Papers* approximate the dates as January 7 to 22. Chronology, *PJM*, 8:xxviii.

84. *PJM*, 8:237. Jefferson and de Chattelux were the prior recipients. Randolph would be subsequently given an honorary degree.

attorney general and members of the General Court bar, Madison would have faced little trouble had he chosen admission.⁸⁵

Yet by the summer of 1785, Madison hesitated to become a *lawyer*. Awkward circumlocution characterizes his comments about the profession. He explained that he was “far from being determined ever to make a professional use of it.”⁸⁶ He hoped for a “decent & independent subsistence” but saw some “difficulties” with the “line” apparently of joining the profession.⁸⁷

Biographers have presumed that Madison decided not to become a lawyer because of his concern about public speaking or the inherently distasteful nature of the legal profession. Most of Madison’s best friends and closest correspondents during these years were all lawyers (Bradford, Randolph, Jefferson, Edmund Pendleton, and James Monroe), and he left no evidence of any particular dislike of the profession. He did think himself a poor public speaker; however, that does not seem to have prevented him from giving any number of speeches in legislatures and conventions, and he could have easily sought appointment as a judge. One wonders whether his personality—often apparently shy—would have made dealing with clients an awkward endeavor.

After 1785, Madison seems to have gratefully abandoned admission to the bar. In 1786, after a brief trip to the Annapolis Convention, he returned to the Virginia legislature to work on the revival. In the spring of 1787, Madison headed first to New York for Congress and then on to Philadelphia for the Convention that would not only bring him lasting fame but also, at the time likely of greater importance, a series of salaried government positions.

Missing Notes

Of course, establishing that Madison read some law books and proving that he understood them are entirely different things. Daniel Webster famously stated, “Many other students read more than I did, and knew more than I did. But so much as I read I made my own.”⁸⁸ James Kent similarly stated that “he had but one book, Blackstone’s *Commentaries*, but that one book he mastered.”⁸⁹ Did Madison master the law in the books that he read?

85. Smith, *Virginia Lawyer*, 261–66, 294–96, 350.

86. Madison to Randolph, July 26, 1785, *PJM*, 8:328.

87. *Ibid.*; see Ketcham, *James Madison*, 146–48.

88. George Ticknor Curtis, *Life of Daniel Webster* (New York: D. Appleton and Co., 1893), 44.

89. Charles Warren, *A History of the American Bar* (Boston: Little, Brown, 1911), 187.

Madison's first biographer thought so. Rives remarked on the "accuracy and even subtlety of Mr. Madison's legal knowledge" and on Jefferson's repeated reference to this aspect of Madison.⁹⁰ Rives wrote that Madison "gave such proof of the depth and accuracy of those attainments, even in the most abstruse and recondite parts of the law, as to leave no doubt that, if he had made it his profession, he could not have failed to attain the very highest eminence in it."⁹¹

Although Rives knew Madison, he based these specific conclusions on an examination of a set of Madison's notes on Salkeld's *Reports*. In 1858, Inman Horner, a Virginia lawyer, undertook to compare "the Manuscript Digest of Mr. Madison" with "the original Reports of Salkeld."⁹² Horner explained that Madison was not "a mere copyist" and that the manuscript was "worthy of preservation as a memorial of industry, patience and clear, strong and discriminating mind."⁹³ In a longer letter that transcribed certain sections, Horner hoped "that it is sufficient to satisfy Mr. Rives as to the general character and merits of the compilation of Mr. M. If not, I should be pleased to make further enquiry."⁹⁴

Unfortunately, these notes subsequently went missing. In 1962, the *Madison Papers* editors included a listing for the manuscript in volume 1 but declared it "not found."⁹⁵ I was curious whether the advent of electronic archival resources would surface this hitherto unfound manuscript. My initial search turned up only one known volume of notes on Salkeld's *Reports*: a manuscript by Thomas Jefferson in the Library of

90. Rives, *Life and Times*, 1:526.

91. *Ibid.*, 512, 524.

92. Inman Horner to W. C. Rives, November 27, 1858, *William C. Rives Papers*, Manuscript Division, Library of Congress, Box 90, Folder, November 1858. Horner had a "Law Library." I. Horner's Will, Will Book 29 (Fauquier County, VA), 33 (clause 7 referring to "Law Books"). The Library was appraised at \$700.00. J. Horner Appraisal, Will Book 29, at 110, 112 (recording "Law Library").

93. Horner to Rives, November 27, 1858; see *PJM*, 1:70.

94. I. Horner Notes, Mss. 2988, McGregor Collection: Madison family, Box 4 (Special Collections, University of Virginia Library). Rives used Horner's comments. Compare Horner, Notes: "If he adopted the Law as a profession, his rank at the Bar would have been coequal with his eminence as a Statesman," with Rives, *Life and Times*, 1:526—Madison "gave such proof of the depth and accuracy of those attainments, even in the most abstruse and recondite parts of the law, as to leave no doubt that, if he had made it his profession, he could not have failed to attain the very highest eminence in it." Rives may have intended that the second volume section on Madison "resumes his Literary, Legal, and Scientific Studies" would further analyze the manuscript (Rives, *Life and Times*, 2:ix).

95. *PJM*, 1:70. They added that "to conclude that he took them when he was reading law in the early 1770's is at best no more than a reasonable assumption" (*PJM*, 1:71).

Congress, Thomas Jefferson Papers.⁹⁶ The digitized microfilm version available on the Library of Congress's Web page of Jefferson Papers displayed the attribution on the label: "JEFFERSON, THOMAS // NOTES ON "SALKELD'S REPORTS."⁹⁷ The Notes were not reproduced in the printed Jefferson papers.⁹⁸ Although they were microfilmed along with the other Jefferson papers, Jefferson scholars have not emphasized them.⁹⁹

This "Jefferson" manuscript—hereafter referred to as the Notes—however, matched Horner's brief transcription of the Madison law notes.¹⁰⁰ The provenance supported the possibility of Madison's authorship. In 1931, the Library of Congress received the Notes from Miss Mary

96. See Thomas Jefferson Papers, series 7, vol. 5, Library of Congress: American Memory, http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser7.html.

97. Notes on Salkeld, The Thomas Jefferson Papers (Library of Congress) [hereafter TJP] series 7, vol. 5, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=284&itemLink=/ammem/mjthtml/mtjser7.html&linkText=6> (listed as Thomas Jefferson, Notes on "Salkeld's Reports") [hereafter Notes]. It is not known whether the Library of Congress made the identification or whether the Jefferson attribution was made prior to the gift. The Notes are listed in the *Index to the Thomas Jefferson Papers* (Washington, D.C.: Library of Congress, 1976): xix, 75. The volume does not appear to be referenced or reprinted in the *Papers of Thomas Jefferson*. The bound volume contains two other manuscripts, "in an unknown handwriting," "An act further to amend the judicial system of the United States," and "An act to punish certain offences against the United States" (LC description). I have transcribed the Notes from digital images. I have not expanded the thorn or other abbreviations. Regardless of form, I have rendered all s's as *s*. Madison's capitalization and punctuation is hard to discern. I have not shown interlineations as such. See Michael E. Stevens and Steven B. Burg, *Editing Historical Documents: A Handbook of Practice* (Walnut Creek, Calif.: Altamira, 1997). 127–45. The editors of the *Madison Papers* could produce a much improved version.

98. *The Papers of Thomas Jefferson's* chronological series focuses on correspondence and public papers. The undated legal notes thus would have fallen, regardless of authorship, outside of the scope of the series. Moreover, Jefferson never seems to have mentioned them in his correspondence. My thanks for this information to Barbara Oberg and W. Bland Whitley at *The Papers of Thomas Jefferson*.

99. They are not mentioned in Dewey's work on Jefferson as a lawyer, in Wilson's work on Jefferson's early Notebooks, in Dumbauld's work on Jefferson's Equity Commonplace, or in Chinard's edition of the Legal Commonplace. See Frank L. Dewey, *Thomas Jefferson: Lawyer* (Charlottesville: University Press of Virginia, 1986), 130–43 (describing Jefferson's law practice manuscripts in various collections); Edward Dumbauld, "Thomas Jefferson's Equity Commonplace Book," *Washington and Lee Law Review* 48 (1991): 1257, 1259; Douglas L. Wilson, "Jefferson's Early Notebooks," *William and Mary Quarterly* 42 (1985): 433, 449.

100. Horner's description of cases listed under "Abatement" match the cases selected in the Notes. His description of page numbers matches the pages in the Notes. Lastly, quoted portions of the transcription match the Notes (I. Horner Notes, Mss. 2988, McGregor Collection: Madison family, Box 4 [Special Collections, University of Virginia Library], 4 pp).

M. McGuire of New York City.¹⁰¹ She apparently was a grandchild of James C. McGuire, the administrator of the Dolley Payne Madison estate and afterwards the largest collector of Madison manuscripts.¹⁰²

Which attribution was correct? Could Rives and Horner have mistakenly assumed that notes taken by Jefferson were those of Madison?¹⁰³ Granted, the Notes did not share many characteristics with the distinctive style of Jefferson's later writing. They did, however, bear a distinct initial resemblance to the earlier sections of Jefferson's Legal Commonplace, particularly when viewed as digitized microfilm.¹⁰⁴

Let me pause here to advocate briefly for continued archival access to manuscripts and for the value of digital images. The apparent similarity of the digitized microfilm versions arises from the fact that the ink lines appear much thicker and blurrier than in reality. This blurring has the effect of erasing the distinct formation of various letters and instead emphasizing similarities arising from mid-eighteenth-century handwriting conventions (for example, a final *d* in which the tail extends backwards to the left over the word).

101. See e-mail correspondence from Barbara Bair (April 3, 2007) (on file with author).

102. She is listed as the sister of James Clark McGuire in the *New York Social Blue Book* (1930), <http://www.bklyn-genealogy-info.com/Directory/Blue/1930.BlueM.html>. The McGuires acquired many of Madison's manuscripts from John Payne Todd, Madison's stepson (Dorothy C. Eaton, Provenance, *Index to the Madison Papers* [Washington, D.C.: Library of Congress, 1965], http://lcweb2.loc.gov/ammem/collections/madison_papers/mjmabout2.html). Many papers were auctioned in 1892 after James McGuire's death, but other manuscripts remained in family hands and eventually were given to the Library of Congress.

103. Although the Notes theoretically could be those of a third person, this essay compares the more probable two authors, Madison and Jefferson. The most plausible alternative would be Edmund Randolph. Randolph and Madison were nearly the same age, best friends, and close correspondents. Randolph usually had an upstroke on the *t* in *the* and *to*. Madison more commonly wrote *t* with either only a downstroke or the upstroke nearly imperceptible. However, Randolph also almost always gave a left-trailing tail on final *y* and *g*. Madison rarely tended towards this convention. Another word that usually differs between the two is *The*. Randolph almost always seems to start the connection to the *h* from the bottom of the *T*; Madison usually strokes back part way up the *T* before connecting to the *h*. Lastly, Randolph usually connects the minuscule serpentine *s* at the beginning of a word with the following letter; Madison and the Notes author does not. With respect to the Notes, compare *constitution* in the Notes, 16 (*Borough v. Perkins*) with its cursive *s* with the serpentine *s* in Randolph's Draft for the Committee of Detail; see William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787* (Philadelphia: J. B. Lippincott, 1900), at [between 316 and 317].

104. Thomas Jefferson, Legal Commonplace Book, TJP, series 5 [hereafter Jefferson, LCB], entries 1–695, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj5&fileName=mtj5page059.db&recNum=2&itemLink=/ammem/mtjhtml/mtjser5.html&linkText=6>; <http://memory.loc.gov/cgi-bin/ampage?collId=mtj5&fileName=mtj5page059.db&recNum=149&itemLink=%2Fammem%2Fmtjhtml%2Fmtjser5.html&linkText=6>.

Microfilm also has the disadvantage of rendering largely invisible differences in size, ink, paper, and format. The Library of Congress's Manuscript Division graciously permitted me to see the original manuscripts and to take digital images. In these settings, the manuscripts do not look that much alike. When resources become available, producing a new set of digital images of these important collections would be a great service to future scholarship.

The Notes can be compared to Jefferson's Legal Commonplace Book at the Library of Congress and his Equity Commonplace at the Huntington Library.¹⁰⁵ If the Notes were by Jefferson, they would represent a third notebook in which Jefferson copied Salkeld's *Reports*. His reading notes on Salkeld appear as 162 entries in the Legal Commonplace and twenty-one entries in the Equity Commonplace.¹⁰⁶ An explanation for a third, separate copy of different cases is hard to discover.

Comparison reveals significant differences in handwriting. Jefferson imitated the way in which early eighteenth-century printing styles depicted certain letters. In Jefferson's Legal Commonplace and Equity Commonplace, the minuscule serpentine *s* is almost always attached to the next letter by an arched ligature at the top right of the *s*. The Notes author never attaches the *s* in this manner. In Jefferson's Legal and Equity Commonplaces, *ct* (as in *subject* or *respect*) have a similar arching ligature; the Notes have only an ordinary line.¹⁰⁷ The handwriting of the Notes does not match the markers identified by Douglas Wilson and Marie Kimball as typical of Jefferson's handwriting during the later 1760s and early 1770s when he was compiling his law commonplaces.¹⁰⁸

105. Thomas Jefferson, Equity Commonplace Book (Huntington Library) [hereafter Jefferson, ECB]. The listing for the microfilmed copy refers to it as Commonplace Book, 1765–1766. The Equity Commonplace is 171 pages and includes Salkeld's *Reports* and at least six other reports.

106. In the Legal Commonplace, Jefferson's notes on Salkeld run from entry 79 to 241. Jefferson next turned to read Raymond's *Reports* (Jefferson, LCB, 10v, 29r). In the Equity Commonplace, the entries run from 1 to 21. Jefferson only begins to emphasize the head with entry 92 (Bailments); see Jefferson, LCB, 12r. The Commonplaces have been dated to 1765–1767. Jefferson began the Equity Commonplace Book while taking notes on Salkeld's *Reports*, likely between entry 113 and 114 (Douglas Wilson, "The Handwriting of the Literary Commonplace Book," in *Jefferson's Literary Commonplace Book*, ed. Douglas L. Wilson [Princeton, N.J.: Princeton University Press, 1989], 199). In 1774, Jefferson ceased to practice but resumed practice briefly in 1783; see John Cook Wylie, "The Second Mrs. Wayland: An Unpublished Jefferson Opinion on a Case in Equity," *American Journal of Legal History* 9 (1965): 65. His later interest in law focused on the collection of early Virginia laws (Marie Kimball, *Jefferson: The Road to Glory, 1743 to 1776* [1943; Westport, Conn.: Greenwood, 1977]), 96–97).

107. Wilson, "Handwriting," 194.

108. Because the first part of the Legal Commonplace bears the closest resemblance to the Notes, examples of differences have been drawn from this section. For detailed discussion of

Even to the casual observer, Jefferson's Legal Commonplace is written in a rounder hand with careful loops and each letter precisely, almost beautifully, rendered. The handwriting of the Notes is economical, pragmatic, purposive—with few loops and a curlicue on the capital *P* a rare adornment.

Moreover, stylistic differences occur between the Jefferson commonplaces and the Notes. Jefferson arranged his commonplaces by an entry number; the Notes author arranged the cases according to Salkeld's topic. Jefferson added a citation with the volume and page number but no date; the Notes author recorded a regnal date but no page number for each case.¹⁰⁹ Jefferson used the abbreviations “pl,” “def,” and “v”; the Notes uses “plf,” “dft,” and “vs.”¹¹⁰

Jefferson, see Wilson, “Handwriting,” 191–207; Marie Kimball, *Jefferson*; see also Wilson, “Thomas Jefferson's Early Notebooks,” 440. The page numbers following quotations refer to Wilson, “Handwriting.” In the early 1760s, Jefferson's hand slants “noticeably to the right” (191), although by the time of his law notes the “slant to the right is . . . much less pronounced” (192); the Notes hand has almost no slant. Compare Jefferson, LCB, 1[v], <http://memory.loc.gov/cgi-bin/ampage?collId=mtj5&fileName=mtj5page059.db&recNum=3&itemLink=/ammem/mtjhtml/mtjser5.html&linkText=6>; with Notes, 7, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=292&itemLink=/ammem/mtjhtml/mtjser7.html&linkText=6>. In the late 1760s, Jefferson's hand crosses *t* “without lifting the pen from the paper” (192); the Notes hand crosses *t* with a separate stroke. In 1767–1772, Jefferson suppressed the long *s*, used a serpentine *s* often connected at the top to the following letter, and then abandons the serpentine *s* for the cursive *s* (193). The Notes hand does not suppress the long *s*, uses a serpentine initial *s* and a cursive final *s*, and does not consistently connect the serpentine *s* to the following letter. Compare Jefferson, LCB, 2[r], <http://memory.loc.gov/cgi-bin/ampage?collId=mtj5&fileName=mtj5page059.db&recNum=4&itemLink=/ammem/mtjhtml/mtjser5.html&linkText=6>; with Notes, 10, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=295&itemLink=/ammem/mtjhtml/mtjser7.html&linkText=6>. In 1770–1772, Jefferson used “open or spread” ascenders in *l*, *b*, *t* (194); the Notes hand does not have such ascenders. Other differences beyond Wilson/Kimball description are noticeable. Jefferson almost always has an open loop in the minuscule *y*; the Notes has a simple downstroke. Compare Jefferson, LCB, 3[v], <http://memory.loc.gov/cgi-bin/ampage?collId=mtj5&fileName=mtj5page059.db&recNum=7&itemLink=/ammem/mtjhtml/mtjser5.html&linkText=6>; with Notes, 6, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=291&itemLink=/ammem/mtjhtml/mtjser7.html&linkText=6>.

109. For example, a Jefferson citation: *Howard v. Tremaine*, Salkeld, 1:278. The same citation in Notes: *Howard v. Tremaine* 4 W & M (3); see Salkeld, *Reports* (3rd ed.), 1:278. The Legal Commonplace includes *Blankard* and *Smith* (the two colonial cases); the Notes omit both of them (suggesting post-independence authorship).

110. Compare Jefferson, LCB, with Notes. Jefferson seems more likely to have used the first or second editions and, as discussed below, the Notes author a later edition. Jefferson's notes on Salkeld contain almost no citations aside from those to Lord Raymond. The first and second editions contained relatively few citations. Jefferson may have added the citations to Raymond himself because they do not always match the citations to Lord

The handwriting of the Notes resembles other examples of Madison's handwriting from the mid-1780s. Handwriting changes over an author's lifetime and among types of documents. Jefferson, for example, transitioned from an italic to a round hand and also "tended to write differently when he was copying from when he was drafting or making notes, and his hand was remarkably versatile."¹¹¹ Madison's early hand is far more ornate than his later hands.¹¹² By the 1780s, Madison used a similar small, upright hand when making notes for himself (e.g., his notes on the bill for religious establishment or notes for various speeches) or lists (e.g., the 1783 Congress list) or even a formal text such as the "Memorial" and the Virginia legislative resolution.¹¹³ When taking draft notes, he used a shorthand filled with superscript abbreviations, in particular "y" and "y^e"—"that" and "the."¹¹⁴ Indeed, the editors of the *Madison Papers* noted in the volume for 1784–1786 that they had expanded the thorns.¹¹⁵ Words such as *Stat.*, *Parliament*, *Habeas corpus*, *case of*,

Raymond added to later editions. See, for example, Jefferson, LCB, 25 [No. 185] *Greeves v. Rolls* (Jefferson citing to 1 Raym. 718; fifth edition citing to 1 Ld. Raym. 706).

111. Wilson, "Jefferson's Early Notebooks," 440, 435; see Wilson, "Handwriting," 193. For examples of round and Italian hands, see Ray Nash, *American Writing Masters and Copybooks: History and Bibliography through Colonial Times* (Boston: Colonial Society of Massachusetts, 1959), plates III–V.

112. See, for example, "In James Madison's Early Hand, Biblical Quotation, Nov. 22, 1772," James Madison Papers (Library of Congress) [hereafter JMP], [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=01/mjm01.db&recNum=51&itemLink=r?ammem/mjm:@FIELD\(DOCID+@BAND\(@lit\(mjm011994\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=01/mjm01.db&recNum=51&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm011994)))).

113. See, for example, Madison, Notes for Speech, Virginia House of Delegates (1784), JMP, http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=302&itemLink=D?mjm:66:/temp/~ammem_yfp0::; Madison, Notes on Debate on Bill for Relig Estabt proposed by Mr Henry (Oct.-Nov. 1785), JMP, http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=517&itemLink=D?mjm:21:/temp/~ammem_jkF2::; [Madison], Citizens' "Memorial and Remonstrance" to Virginia (July 28, 1785), JMP, [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=448&itemLink=S?ammem/mjm:@FIELD\(AUTHOR+@od1\(+citizens%27+memorial+and+remonstrance++to+virginia+\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=448&itemLink=S?ammem/mjm:@FIELD(AUTHOR+@od1(+citizens%27+memorial+and+remonstrance++to+virginia+))).

114. See Notes, 21, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=306&itemLink=%2Fammem%2Fmtjhtml%2Fmtjser7.html&linkText=6>. His Notes for Plan of Government (1788) also reveal use of the "y" and "y^e." Madison, Notes for Plan of Government (1788), JMP, [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=03/mjm03.db&recNum=879&itemLink=r?ammem/mjm:@FIELD\(DOCID+@BAND\(@lit\(mjm023429\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=03/mjm03.db&recNum=879&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm023429)))).

115. *PJM*, 8:xxiii. My appreciation to David Mattern of the *Madison Papers* for bringing the editors' comment to my attention. As is evident from the transcript of the Madison's Notes, even his rewritten Convention notes contained similar references; see, for example, *Documentary History of the Constitution of the United States, 1786–1870*, (Washington, D.C.: Department of State, 1900), 3:248, 324.

necessary, judge are identical to other examples in Madison's writing from the 1780s.¹¹⁶ The style of page numbering is similar to the style Madison used for other early notes.¹¹⁷

The general similarity between Jefferson's and Madison's handwriting is not surprising. Madison was particularly attuned to handwriting; indeed,

116. For *Stat.*, compare Notes, 38 (near bottom of page), <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=323&itemLink=%2Fammem%2Fmjthtml%2Fmjtser7.html&linkText=6>, with Madison, Extracts . . . Sheffield (1780) bound with Notes on Exports and Navigation (1769), JMP, http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=28/mjm28.db&recNum=1695&itemLink=D?mjm:3:/temp/~ammem_xTKW: (near bottom of page). For *Parlia*^m, compare Notes, page 37 (under Parliament), <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=322&itemLink=%2Fammem%2Fmjthtml%2Fmjtser7.html&linkText=6>, with Madison, [Notes on Charters of Incorporation,] verso of Resolution and Notes on Opening and Repair of Roads (1784–1785) (right column near top third), JMP, [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=308&itemLink=r?ammem/mjm:@FIELD\(DOCID+@BAND\(@lit\(mjm012448\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=308&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm012448))))). For habeas corpus, compare Notes, 32, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=317&itemLink=%2Fammem%2Fmjthtml%2Fmjtser7.html&linkText=6>, with Madison, Notes for a Speech on Revising 1776 Virginia Constitution (June 1784), JMP, [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=182&itemLink=r?ammem/mjm:@FIELD\(DOCID+@BAND\(@lit\(mjm012402\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=182&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm012402))))). For *Case of*, compare Notes, 19, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=304&itemLink=%2Fammem%2Fmjthtml%2Fmjtser7.html&linkText=6>, with Madison, Notes for Debate on Trade and Paper Money in Virginia Legislature (Nov. 1786), JMP, [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=794&itemLink=r?ammem/mjm:@FIELD\(DOCID+@BAND\(@lit\(mjm012075\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=794&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm012075)))), and Madison, [Notes on Charters of Incorporation,] verso of Resolution and Notes on Opening and Repair of Roads (1784–1785), JMP, [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=308&itemLink=r?ammem/mjm:@FIELD\(DOCID+@BAND\(@lit\(mjm012448\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=308&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm012448))))); see *PJM*, 8:467–69. For *necessary*, compare Notes, 32 (under first case), <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=317&itemLink=%2Fammem%2Fmjthtml%2Fmjtser7.html&linkText=6>, with Madison, Notes for Debate on Trade and Paper Money in Virginia Legislature (Nov. 1786), JMP, [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=794&itemLink=r?ammem/mjm:@FIELD\(DOCID+@BAND\(@lit\(mjm012075\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=794&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm012075))))). For *judge* with Madison's distinct J, compare Notes, 34, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=319&itemLink=%2Fammem%2Fmjthtml%2Fmjtser7.html&linkText=6>, with Madison, Notes on Debate on Bill for Relig Estabt proposed by Mr. Henry and JM (Oct.–Nov. 1785), JMP, http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=517&itemLink=D?mjm:21:/temp/~ammem_jkF2.

117. See, for example, Brief System of Logick (1763–1765), JMP, http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=28/mjm28.db&recNum=1620&itemLink=/ammem/collections/madison_papers/mjmser6.html&linkText=6; Ancient & Modern Confederacies [1787?], JMP, [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=1035&itemLink=r?ammem/mjm:@FIELD\(DOCID+@BAND\(@lit\(mjm01278\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=02/mjm02.db&recNum=1035&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm01278))))).

late in life, Madison successfully “faked” Jefferson’s handwriting in altering a letter.¹¹⁸ He may have been particularly influenced by Jefferson’s handwriting during the early 1780s after Madison used Jefferson’s handwritten list to help compose the final sections of the list for the Library of Congress and as the two men exchanged numerous letters.

Some readers may be familiar with scholarship that seeks to identify the authorship of late eighteenth-century essays using statistical word counts.¹¹⁹ An informal effort to count words proved sufficiently difficult and inconclusive that I abandoned it. The theoretical problems of comparing word counts derived from published political essays with heavily abbreviated law commonplaces also suggested little advantage.¹²⁰ Nevertheless, one interesting comparison did arise. In their important study of *The Federalist Papers*, Frederick Mosteller and David Wallace suggested that *also* was an important marker word for Madison, at least as against Hamilton’s writing.¹²¹ The Notes show a repeated use of *also* where one would expect “in addition.” For example, the Notes author writes, “On breach of promise to marry, action lies for man as well as woman, also for scandalous words per quod he lost his marriage.”¹²² Or, adding to the fourth rationale in a case, “also that if disseisee [*sic*] devises, and after re-enters, ye devise is good.”¹²³ Interestingly, this use of *also* appears in occasion in Salkeld itself.¹²⁴ In addition, the watermarks on the paper are consistent with the types of paper that Madison was using during this period, although this evidence is itself inconclusive.¹²⁵

Rives and Horner would seem to have been correct in their belief that Madison authored the Notes. Existing evidence suggests that they date

118. *PTJ*, 7:451; see Wills, *James Madison*, 162.

119. See, for example, Frederick Mosteller and David L. Wallace, *Applied Bayesian and Classical Inference: The Case of the Federalist Papers*, 2nd ed. (New York: Springer-Verlag, 1984).

120. See Mosteller and Wallace, *Applied Bayesian*, 195, 243–48 (discussing variations among texts).

121. *Ibid.*, 244, 252.

122. Notes, 5 (*Harrison v. Cage*).

123. Notes, 24 (*Bunter v. Coke*).

124. Compare Salkeld, *Reports* (3rd ed.), 1:71; Notes, 9 (*Anon.*) (awards should not be set aside for “want of notice of the meeting. Also you shall not take exceptions to the formality of it.”).

125. The Notes measure approximately 10.1 inches by 7.5 inches. The paper has ten chain lines. Much of the paper appears to have a watermark with a GR on it. Page 7 is marked T. French. Similar types of paper appear in Madison’s Philadelphia Convention Notes. See James H. Hutson, “The Creation of the Constitution: The Integrity of the Documentary Record,” *Texas Law Review* 65 (1986): 1, 27–30. The watermark evidence itself is inconclusive as Jefferson also used similar papers.

from the mid-1780s. Madison thus took the Notes while engaged in his second attempt to study law and shortly before he attended the Philadelphia Convention.

The Study of Student Law Notes

Establishing the Notes as those of Madison solves only part of the difficulty with them—student law notes have not been easy sources to study. A decade ago Karen Beck noted, “valuable as these materials are, they often are overlooked and underutilized as research sources.”¹²⁶ The Founding generation’s law student notebooks and their occasional mention of common-law books has traditionally attracted little interest.¹²⁷ Thomas Jefferson’s law notes—the Legal Commonplace—were initially presumed to have been destroyed, and after being discovered attracted almost no attention until the 1920s.¹²⁸ Even then, the editor did not consider Jefferson’s sections from Salkeld and other common-law reporters worthy of reprinting.¹²⁹ His Equity Commonplace remains unedited and not easily accessible. The editors of John Marshall’s legal papers only reprinted an excerpt of his law notes. The author of the legal manuscript law abridgment bound at the end of Jefferson’s Legal Commonplace remains unidentified.¹³⁰ George

126. Karen S. Beck, “One Step at a Time: The Research Value of Law Student Notebooks,” *Law Library Journal* 91 (1999): 29.

127. Even Jefferson’s Commonplace receives only brief citation; see, for example, Saul Cornell, “A New Paradigm for the Second Amendment,” *Law and History Review* 22 (2004): 163 (referring to Jefferson’s “fondness to Beccaria”); Linda Keller, “The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Human Rights,” *New York Law School Journal of Human Rights* 19 (2003): 571; James B. Staab, “The Tenth Amendment and Justice Scalia’s ‘Split Personality,’” *Journal of Law and Politics* 16 (2000): 245 (referring to belief that humans are social animals); Stuart Banner, “When Christianity Was Part of the Common Law,” *Law and History Review* 16 (1998): 27, 53–54.

128. See Jefferson, *Commonplace Book* (Chinard), 3.

129. See Jefferson, *Commonplace Book* (Chinard), 14–16 (noting these sources “only serve to show with what care and thoroughness Jefferson had prepared himself for the bar”), 76–81 (listing cases). Chinard did reprint 231 (*Smith v. Brown and Cooper*) and 242 (*R. v. Tucker*) (ibid., 15, 80–81).

130. *Grounds & Rudiments*, TJP, Series 5, <http://memory.loc.gov/cgi-bin/ampage?collId=mtj5&fileName=mtj5page059.db&recNum=318&itemLink=%2Fammem%2Fmtjhtml%2Fmtjser5.html&linkText=6>. The manuscript seems to be a copy of the maxim heads in *The grounds and rudiments of law and equity, alphabetically digested: containing a collection of rules or maxims* (1749).

Washington's papers include copied legal forms that have received little attention.¹³¹ Other eighteenth-century law notebooks remain unstudied.¹³²

The past several decades of scholarship on the history of the book, reading practices, writing technologies, and note-taking transmission indicate changes in this neglect.¹³³ Jefferson's tendency to take lengthy notes and to take large extracted notes has brought attention to his note taking, and David Konig and Michael Zuckert are working on a new edition of his *Legal Commonplace*.¹³⁴ Daniel Coquillette has recently published the

131. George Washington, *Forms of Writing*, George Washington Papers (Library of Congress) [hereafter GWP], ser. 1A (despite title, pages 2–24 contain law materials), http://lcweb2.loc.gov/cgi-bin/ampage?collId=mgw1&fileName=mgw1a/gwpage001.db&recNum=0&tempFile=/temp/~ammem_aQat&filecode=mgw&next_filecode=mgw&itemnum=1&ndocs=100; George Washington, 1778, Extracts from John Mercer's 1737 Abridgment of the Public Acts, ser. 8d (containing twenty-eight pages of legal materials), GWP, http://lcweb2.loc.gov/cgi-bin/ampage?collId=mgw8&fileName=mgw8d/gwpage001.db&recNum=2&tempFile=/temp/~ammem_7ZBY&filecode=mgw&next_filecode=mgw&itemnum=1&ndocs=100.

132. See, for example, Jacob Hubley, *Commonplace Book of Law, 1754–1768*, Princeton University, Gen. Mss. No. 533; Thomas Gibbons, *Law Notebook of Thomas Gibbons, 1788* (Drew University Archives) (likely of *Gibbons v. Ogden* fame); [Charles Carroll], [Commonplace book] [1750–1770] (Thurgood Marshall Law Library, University of Maryland) (7 vols.).

133. See, for example, M. T. Clanchy, *From Memory to Written Record: England, 1066–1307*, 2nd ed. (1979; Cambridge: Blackwell, 1993); Walter J. Ong, *Orality and Literacy: The Technologizing of the Word* (London: Methuen, 1982); E. Jennifer Monaghan, *Learning to Read and Write in Colonial America* (Amherst: University of Massachusetts Press, 2005); Lotte Hellinga and J. B. Trapp, eds., *The Cambridge History of the Book in Britain* (Cambridge: Cambridge University Press, 1998–2002), vol. 3; Tamara Platkin Thornton, *Handwriting in America: A Cultural History* (New Haven, Conn.: Yale University Press, 1996); *A History of the Book in America, Vol. 1: The Colonial Book in the Atlantic World*, ed. Hugh Amory and David D. Hall (Cambridge: Cambridge University Press, 2000); David D. Hall, *Cultures of Print: Essays in the History of the Book* (Amherst: University of Massachusetts Press, 1996); Richard D. Brown, *Knowledge Is Power: The Diffusion of Information in Early America, 1700–1865* (Oxford: Oxford University Press, 1989); James Raven, *The Business of Books: Booksellers and the English Book Trade, 1450–1850* (New Haven, Conn.: Yale University Press, 2007); Joan Shelley Rubin, "What Is the History of the History of the Book?" *Journal of American History* 90 (2003): 555; Ann Blair, "Humanist Methods in Natural Philosophy: The Commonplace Book," *Journal of the History of Ideas* 53 (1992): 541. For works specifically on law notebooks, see *Commonplace Books of Law: A Selection of Law-Related Notebooks from the Seventeenth Century to the Mid-Twentieth Century*, ed. Paul Pruitt and David Durham (Tuscaloosa: University of Alabama School of Law, 2005); Alfred L. Brophy, "The Law Book in Colonial America," *Buffalo Law Review* 51 (2003): 1119; M. H. Hoeflich, "The Lawyer as Pragmatic Reader: The History of Legal Common-Placing," *Arkansas Law Review* 55 (2003): 87–122; Beck, "One Step at a Time," 29.

134. *The Legal Commonplace Book of Thomas Jefferson*, ed. David Konig and Michael Zuckert (in development for inclusion in the Second Series, *The Papers of Thomas*

law commonplace of Josiah Quincy Jr.¹³⁵ The difficulty even in reprinting this type of notes is evident from the Quincy Commonplace where the editors have attempted to show the use of different size fonts, explain a multitude of abbreviations and references, and demonstrate the significance of the commonplace.

Are these late eighteenth-century law commonplaces more than notebooks “full of extracts, largely from English sources, copied out” by young men?¹³⁶ The absence of a useful interpretive approach to the notebooks and their predominantly common-law sources has contributed to oversight. Much of the scholarship on intellectual influences on the Founding generation focuses on the transmission of theoretical ideas.¹³⁷ Unlike works of political theory (e.g., Locke, Montesquieu, Adam Smith, Beccaria) or civil or natural law (e.g., Grotius, Puffendorf, Burlamaqui), English common-law sources beyond Coke on Littleton and Blackstone’s *Commentaries* have not been seen as an important influence.¹³⁸ Even in legal scholarship on the Constitutional Convention, the influence of common-law traditions has been difficult to establish.¹³⁹ In

Jefferson). For use of the commonplace, see, for example, Kenneth A. Lockridge, *On the Sources of Patriarchal Rage: The Commonplace Books of William Byrd and Thomas Jefferson and the Gendering of Power in the Eighteenth Century* (New York: New York University Press, 1992).

135. *Portrait of a Patriot*, vol. 2 (The Law Commonplace); Daniel R. Coquillette, “Legal Education of a Patriot: Josiah Quincy Jr.’s Law Commonplace (1763),” *Arizona State Law Journal* 39 (2007): 317–76.

136. *Portrait of a Patriot*, 2:75.

137. See, for example, Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 9–55, 111–13 (relying on Blackstone as source for English common-law thought).

138. See Robert G. Natelson, “Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders,” *Texas Review of Law and Politics* 11 (2007): 249n39 (providing statistical evidence of dominance of Blackstone and Coke). A Westlaw search for articles mentioning “Salkeld’s Reports” produced eleven results. The only ones to discuss the work in relation to a constitutional question were Natelson, “Judicial Review”; Thomas Y. Davies, “What Did the Framers Know, and When Did they Know It? Fictional Originalism in *Crawford v. Washington*,” *Brooklyn Law Review* 71 (2005): 105; Edward Wetmore, “Patent Law,” *Yale Law Journal* 17 (1907): 101 (Salkeld contained the first reported patent case). Articles referring, however, to cases in Salkeld’s *Reports* (Salk.) are numerous.

139. See, for example, Natelson, “The Founders’ Hermeneutic”; Bernadette Meyler, “Towards a Common Law Originalism,” *Stanford Law Review* 59 (2005): 551; H. Jefferson Powell, “The Original Understanding of Original Intent,” *Harvard Law Review* 98 (1984): 894–902; Charles A. Lofgren, “The Original Understanding of Original Intent?” *Constitutional Commentary* 5 (1988): 77. A significant debate over the common-law interpretive tradition involves the relevance of common-law interpretive methodologies for legislation; see, for example, John F. Manning, “Textualism and the Equity of the

the scholarship focusing on original intent and meaning, even where common-law cases or treatises are cited, there is often less attention paid to whether it is possible to prove anyone read the treatise or was aware of the case—or, more importantly, agreed with either.¹⁴⁰

Jefferson's law notes at least have the advantage of volume. His *Legal Commonplace* contains more than 300 pages with 905 entries. His *Equity Commonplace* has 2,018 paragraph entries from English reports.¹⁴¹ Compared to law commonplaces composed of copied legal forms, Jefferson's approach was relatively discursive. Moreover, Jefferson left case files, and in theory one might be able to trace some influence between notes and later cases. Even Josiah Quincy at least had a relatively complicated system of taking notes that included a commonplace, a *Legis Miscellanea*, and a set of manuscript law reports on Massachusetts cases.¹⁴²

But what to do with the Notes? They are not long, a mere thirty-nine pages plus two lines. They are not expansive, any number of entries consist of a case name and one brief sentence. They are not from a particularly interesting source but are summaries of common-law cases from Salkeld's *Reports*. They appear to contain little original or intellectual content. They seem to bear no relation to some larger system of learning law. We know the note taker never went on to use them in professional sense as a lawyer.

Yet, in a peculiar sense, this apparent intellectual barrenness of the Notes offers a perfect opportunity to think about whether law student notes have a value beyond telling us "about colonial legal education." Several decades ago, Walter Ong emphasizes, the technology of writing itself "separates interpretation from data."¹⁴³ Even cursory written notes

Statute," *Columbia Law Review* 101 (2001): 1; Hans W. Baade, "'Original Intent' in Historical Perspective: Some Critical Glosses," *Texas Law Review* 69 (1991): 1001.

140. Recent effort to establish readership include Fabio Arcila Jr., "In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause," *University of Pennsylvania Journal of Constitutional Law* 10 (2007): 1; Davies, "What Did the Framers Know," 105. For discussion with respect to the Court and the foreign precedent question, see Diarmuid F. O'Scannlain, "What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law," *Notre Dame Law Review* 80 (2005): 1893. Because of the extensive publication of eighteenth-century criminal cases, common-law decisions appear often in discussions of constitutional criminal procedure.

141. Jefferson, ECB, 171.

142. *Portrait of a Patriot*, 2:21–23.

143. Walter J. Ong, "Writing Is a Technology That Restructures Thought," in *The Written Word: Literacy in Transition*, ed. Gerd Baumann (Oxford: Oxford University Press, 1986), 23, 38.

necessarily involve interpretation of the original text. Can we find in these notes something of the mind of Madison?

Madison's Method

In writing about law notes, Chief Justice Matthew Hale emphasized, "A Method therefore is necessary; but various, according to every Mans particular fancy."¹⁴⁴ Ann Blair's scholarship on note taking provides an analytical approach to discussing notes.¹⁴⁵ She explains, "To the cultural historian, . . . note taking is most interesting at a level between that of the universal and that of the individual."¹⁴⁶ Blair suggests that all note taking involves "basic maneuvers": storing, sorting, summarizing, and selecting.¹⁴⁷ David Allan similarly describes how an eighteenth-century commonplacer "had engaged with the *Wealth of Nations* in a deeply personal—at times, thoroughly idiosyncratic—way, vigorously exploiting the longstanding conventions of commonplace-keeping . . . for his own immediate and distinctive purposes."¹⁴⁸ Blair's four categories can help to isolate the ways in which Madison engaged with Salkeld's *Reports*, turning a tradition of law commonplacing to his own purposes.

Of course, before presuming that Madison's notes reflect his own mind, we should inquire whether they might reflect the mind of some other abridger. I have not found a printed source that excerpts Salkeld's *Reports* in the manner of the Notes. The idiosyncratic nature of the Notes abridgment makes it seem implausible that they were part of some larger printed law book. Could Madison alternatively have been copying someone else's manuscript law notes? This possibility is much more difficult to disprove. They do not resemble the notes that would have been the most likely source for Madison, those of Jefferson. Indeed, as will be discussed below, the Notes abridge Salkeld in such an unusual manner

144. Henry Rolle, *Un abridgment des plusieurs cases et resolutions del common ley: alphabeticalment digest desouth severall titles* (London: A. Crooke, 1668) (copy in EEBO has preface added at end of copy, [quotation at 8]) (attributed to Hale by Francis Hargrave); see Earle Havens, *Commonplace Books: A History of Manuscripts and Printed Books from Antiquity to the Twentieth Century* (New Haven, Conn.: Yale University, 2001), 38–39.

145. Ann Blair, "Note Taking as an Art of Transmission," *Critical Inquiry* (2004), <http://criticalinquiry.uchicago.edu/features/artsstatements/arts.blair.htm>.

146. *Ibid.*

147. *Ibid.*

148. David Allan, "A Reader Writes: Negotiating *The Wealth of Nations* in an Eighteenth-Century English Commonplace Book," *Philological Quarterly* 81 (2002): 207, 226.

that it seems unlikely that anyone would have advocated copying them. I believe that Madison took the Notes while reading Salkeld himself, but it is important to emphasize that studies of notes necessarily founder somewhat on the difficulty of proving the original source for the notes.

As a last preliminary matter, can we determine which of the five editions of Salkeld's *Reports* published between 1717–1718 and 1773 Madison used? In certain instances, the edition matters. Jefferson's library unfortunately only now contains the sixth edition. Madison's own library has been dispersed. No significant changes in the main text occurred among editions. Marginalia citations were added; however, Madison copied relatively few. The only advantage in proving the edition would be if, somewhere, sometime, an edition with Jefferson's initials at signatures I & T and Madison's handwriting were found, an even tighter case could be made for Madison's use of Jefferson's law library and Madison's status as a Jefferson law student.

Nonetheless, a case can be made that Madison likely used the third edition (1731–1732). This edition had "proper References, more than in any former Edition" added.¹⁴⁹ The first edition (1717–1718) had typographical errors that do not appear in the Notes.¹⁵⁰ The second edition (1721–1722) lacked citations included in the Notes.¹⁵¹ The third edition included these citations. Moreover, at least one typographical error explains a strange error in the Notes. Madison lists *Erby v. Erby* as case (0) because the edition had

149. William Salkeld, *Reports of cases adjudged in the Court of King's Bench; with some special cases in the courts of Chancery, Common Pleas and Exchequer*, 3rd ed. ([London]: E. and R. Nutt and R. Gosling, (assigns of E. Sayer, Esq;) for J. Walthoe, 1731–1732), 1: title page [hereafter Salkeld, *Reports* (3rd ed.).] The ESTC number is T097360 and the Gale Document Number on Eighteenth-Century Collections Online is CW106867468 (vol. 1) and CW106867892 (vol. 2). A third volume of cases appeared in 1724 and later editions. No material from the third volume appears in the Notes.

150. William Salkeld, *Reports of cases adjudg'd in the Court of King's Bench; with some special cases in the courts of Chancery, Common Pleas and Exchequer* (London: Eliz. Nutt and R. Gosling, 1717–1718), 1:6, 1:27. The ESTC number is T097358 and the Gale Document Number on Eighteenth-Century Collections Online is CW124034935 (vol. 1) and CW124035360 (vol. 2). The case, *Holman v. Waldon*, was reported in that edition as *Waldon v. Holman*, whereas later editions listed it as Madison copied. *Birkmyr v. Darnell* was listed as *Bourkermire*; Madison wrote the former.

151. William Salkeld, *Reports of cases adjudged in the Court of King's Bench; with some special cases in the courts of Chancery, Common Pleas and Exchequer*, 2nd ed. ([London]: Eliz. Nutt, and R. Gosling, (assigns of Edw. Sayer, Esq;) for J. Walthoe; and J. Walthoe Jr., 1721–1722), 1:6 (*Holman v. Warden* with no citations) with Notes, 1 (*Holman v. Warden* with citations to 1 Inst. 2a Noy 135). The ESTC number is T097359 and the Gale Document Number on Eighteenth Century Collections Online is CW124040138 (vol. 1) and CW125289115 (vol. 2).

listed it as case (1) although it was actually case (3).¹⁵² This typographical error was fixed in the fourth edition, although the fourth is extremely close to the third.¹⁵³ By the fifth edition (1773), so many citations appear added by George Wilson that Madison's limited selection seems unlikely.¹⁵⁴ Absent such evidence, the third edition seems a plausible source for the Notes, but further comparisons of marginalia and typography might establish a different edition.

Storing

The material composing the Notes was stored in forty pages, sewn together. The Notes thus belong to the genre of legal commonplaces. By Madison's time, a student of law read law not merely by reading the text but by compiling a commonplace. While a *commonplace* referred to a volume of notes, often based on literary or philosophical texts, it had a particular meaning within the Anglo-American common-law tradition. It referred to a method of taking notes in which one arranged cases under an alphabetical group of common-law headings.¹⁵⁵ The Monticello library

152. Salkeld, *Reports* (3rd ed.), 1:6 (*Holman v. Warden* has marginalia citations beginning with citations to 1 Inst. 3a and ending with Noy 135). Other citations do not appear in the first and second edition; see, for example, the reference to Co. Lit. 303 in the first case, *Duncombe v. Church*. In the third edition, the running head and some misnumbering may have confused Madison. *Erby v. Erby* was numbered as (1) even though it was number (3); Madison listed it as (0) and neglected to include *Assets* and *Assignment* (*ibid.*, 1:79–81; Notes, 11).

153. William Salkeld, *Reports of cases adjudged in the Court of King's Bench: with some special cases in the courts of Chancery, Common Pleas and Exchequer*, 4th ed. (London: Henry Lintot (assignee of Edward Sayer, Esq.) for T. Osborne, 1742), 1:79–80 (*Erby* listed as (3)). The ESTC number is T150070 and the Gale Document Number on Eighteenth Century Collections Online is CW124829655 (vol. 1) and CW124149692 (vol. 2).

154. William Salkeld, *Reports of cases adjudged in the Court of King's Bench: with some special cases in the courts of Chancery, Common Pleas, and Exchequer*, 5th ed. (London: W. Strahan and M. Woodfall; for Edward Johnston, 1773). The ESTC number is T108112 and the Gale Document Number on Eighteenth Century Collections Online is CW124151040 (vol. 1) and CW124151306 (vol. 2). None of the substantive notes added to the fifth edition appear to be in the Notes.

155. On humanistic commonplacing, see Havens, *Commonplace Books: A History of the Book in America*, vol. 1; Wilson, "Thomas Jefferson's Early Notebooks," 433. On law commonplacing, see Hoefflich, "Lawyer," 87–122; W. S. Holdsworth, "Charles Viner and the Abridgments of English Law," *Law Quarterly Review* 39 (January 1923): 17–39; David Konig, "Legal Fictions and the Rule(s) of Law: The Jeffersonians Critique of Common-Law Adjudication," *The Many Legalities of Early America*, ed. Bruce H. Mann and Christopher L. Tomlins (Chapel Hill: University of North Carolina Press, 2001), 97–117; Beck, "One Step at a Time," 31–32. On the influence of Blackstone, see Dennis R. Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," *New York University Law Review* 51 (1976): 731; see also Brophy, "The Law

included printed guides to commonplacing and commonplace manuscripts.¹⁵⁶ One manuscript had passed through two earlier generations of Virginia lawyers, and pasted inside its front cover was *A Brief Method of the Law. Being an exact Alphabetical Disposition of all the Heads necessary for a Perfect Common-place* (1680).¹⁵⁷

Madison began with the plan to keep a careful volume of law notes. Wide-ruled margins mark the first and subsequent pages. The first page was carefully titled, "Salkeld's Reports Volume 1." Significant blank lines were left between case entries. The handwriting was neat, unrushed, and generous through the first two-thirds of the manuscript. By the later pages, Madison's handwriting has shrunk to the small, squished (but legible) handwriting that characterizes so many of his other notes.

At the most mundane level, we have no idea how Madison physically stored the finished Notes. At some later point, the Notes were bound into the hardcover volume in which they now exist, along with two documents in an unidentified handwriting. There is at present no separate title page or cover. In this regard, the Notes resemble other more famous Madison notes. The Notes on the Philadelphia Convention were also originally sewn together and have no separate title page. Did Madison stack his notes in a pile, place them in a box, keep them in a folder? We do not know.

Eighteenth-century commonplaces survive only in instances where a future possessor concluded it made sense to save, rather than discard them. Most surviving law commonplaces fall into one of two categories. First, some legal commonplaces were useful. Commonplaces of legal forms or those that contained accounts of colonial court cases (unreported during the eighteenth century) had value to their possessors even after the author's death or retirement. Other commonplaces were valuable as a guide to commonplacing. Second, even if not apparently useful, some commonplaces were substantial in terms of their size or the number of volumes. The

Book in Colonial America," 1119; Richard J. Ross, "Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640," *Yale Journal of Law & the Humanities* 10 (1998): 229, 281-95 (discussing seventeenth-century organizational methods).

156. For printed guides, see Sowerby, *Catalogue*, 2:227 [No. 1802] (describing Giles Jacob's *Common Law Commonplac'd* [1726]). For manuscripts, see *ibid.*, 2:224 [No. 1795] (*Abridgment of the Common Law*, 364 pages apparently in a seventeenth-century hand in an alphabetical arrangement beginning with "Forfeiture"); 2:225 [No. 1797] (*Common-place Book*, 228 pages containing excerpts from various treatises).

157. *Sir John Randolph, Common-place Book*, TJP, series 8, vol. 4; Sowerby, *Catalogue*, 2:225 [No. 1798]; Jefferson, "1783 Catalog," 104, <http://www.masshist.org/thomasjeffersonpapers/catalog1783/>.

sheer bulk of these and their substantial appearance may have aided survival.

Madison's Notes fell outside both categories. They held no real value for another lawyer or law student. They did not have a complete set of headings, and any glance at the content would have sent a law student scurrying back to read the original reports. Moreover, at a mere forty pages, the Notes are precisely the type that we would expect to have been destroyed—and other such Madison notes may have been. Indeed, part of Horner's assignment seems to have been to determine whether Rives should throw them away or were they "worthy of preservation."¹⁵⁸ (If so, then one cringes at what Rives might have destroyed.) The Notes likely survive only because Horner saw in them Madison's "strong and discriminating mind."¹⁵⁹

Sorting

The purpose of a law commonplace was in large part to sort the vast material of the common law into some usable system. In a traditional-law commonplace, the system was alphabetical. *Abatement* began and *Writs* usually ended the "heads" or "proper titles."¹⁶⁰ A law student would buy or borrow a guide that provided these heads.¹⁶¹ The heads provided both a guide to the substance of the common law and a method of sorting and recalling common-law cases, doctrines, exceptions, and relevant statutes. The Notes reflected this approach by beginning with *Abatement* (the first head in Salkeld) and end with *Writ* (the last head in Salkeld).¹⁶²

These alphabetical commonplace heads organized many popular printed eighteenth-century compilations of cases and statutes.¹⁶³ William Nelson's

158. Horner to Rives, November 27, 1858.

159. Ibid.

160. See, for example, Charles Viner, *A General Abridgment of Law and Equity, Alphabetically digested under proper Titles* (Aldershot: printed for the author, 1741–1753: title page).

161. See, for example, [Samuel Brewster], *A Brief Method of the Law: being an exact Alphabetical Disposition of all the Heads Necessary for a Perfect Common-place: Useful to all Students and Professors of the Law* (London: Assignees of Richard and Edward Atkins for John Kidgell, 1680) (the subtitle emphasized that it had been "Printed in this Volume for the conveniency of Binding with Common-place-books"); *A collection of heads and titles proper for a common place-book in law and equity. interspers'd with many useful words for the benefit of references to the titles* (London: E. and R. Nutt and R. Gosling for J. Worrall, 1733).

162. The first case discussed is *Duncombe v. Church*; the last case is *Tochins Case* (Notes, 1, 40).

163. See Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries, 1700–1799* (Knoxville: University of Tennessee Press, 1978), 59.

An Abridgment of the Common Law (1725–1726) emphasized cases arranged in “clear and Alphabetical METHOD, under Proper Heads.”¹⁶⁴ Giles Jacob produced the succinct *The Common Law Common-placed* (1726).¹⁶⁵ Matthew Bacon’s five-volume *New Abridgment of the Law* (1736–1766) followed commonplace headings.¹⁶⁶ Even the massive twenty-two volumes of Charles Viner’s great work, *A General Abridgment of Law and Equity* (1741–1753) ran from *Abatement* to *Writ*, with a final entry for *Year*.¹⁶⁷

The alphabetical approach to the common law was not merely “the want of any better system.”¹⁶⁸ John Locke’s influential work on humanistic commonplacing promoted alphabetical arrangements.¹⁶⁹ William Holdsworth remarked on “the extent to which the alphabet has dominated the literature of English law.”¹⁷⁰ As he noted, “the making of a ‘common-place’ book or alphabetical abridgment was from an early date, and long continued to be, the approved method of acquiring a knowledge of the law.”¹⁷¹ Although the method began to be abandoned in the early nineteenth-century United States, the alphabetical arrangement still underpins the West Digest System.¹⁷² Indeed, regardless of a treatise’s arrangement, an alphabetical index remains necessary.¹⁷³

164. William Nelson, *An abridgment of the common law: being a collection of the principal cases* ([London], E. and R. Nutt and R. Gosling for R. Gosling, 1725–1726), 1:[title page].

165. Giles Jacob, *The Common Law Common-plac’d: containing, The Substance and Effect of all the Common Law Cases . . . collected as well from Abridgments as Reports, in a perfect new Method*, 2nd ed. (London, E. and R. Nutt and R. Gosling for F. Clay, 1733); see also *An attorney’s practice common-plac’d . . .* ([London]: Henry Lintot, 1743); George Crompton, *Practice common-placed: or, the rules and cases of practice in the courts of King’s Bench and Common Pleas, methodically arranged* (London: W. Strahan and M. Woodfall, 1780).

166. Matthew Bacon, *A new abridgment of the law* ([London]: E. and R. Nutt and R. Gosling for H. Lintot, 1736–1766).

167. Viner, 22:550 (“(A) Year, Day, and Waste”).

168. A. W. B. Simpson, “The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature,” *University of Chicago Law Review* 48 (1981): 632, 639.

169. See Lucia Dacome, “Noting the Mind: Commonplace Books and the Pursuit of the Self in Eighteenth-Century Britain,” *Journal of the History of Ideas* 65 (2004): 603.

170. Holdsworth, “Charles Viner,” 28.

171. *Ibid.*, 29.

172. “Abatement” is now West Key Number 2, following “Abandoned and Lost Property.” For a discussion regarding the abandonment of the alphabetical arrangement in the first American digest, see Nathan Dane, *General Abridgment of American Law* (1823–1829); see Frederick C. Hicks, *Materials and Methods of Legal Research*, 3rd ed. (New York: Lawyers Co-operative, 1942): 231–32 (summarizing shortcomings of alphabetical arrangement). For the original Digest headings, see *ibid.*, 234–42.

173. Holdsworth, “Charles Viner,” 37.

The alphabetical arrangement supported certain understandings of law. Although some criticized the “‘A.B.C. abridgement’” method as lacking in “‘methodicall coherence,’” it was at least not “‘an overly artificial reduction of the law to an inherently false, or at least problematic, ‘natural’ and ‘logical’ order.”¹⁷⁴ As Holdsworth again argued, the alphabetical arrangement was “‘free from three of the great weaknesses of a purely logical system—the neglect of the historic order of development, the inaccessibility of the material without the key to the logical labyrinth, and the artificiality which results from the attempt to force multifarious human activities into a purely logical system.’”¹⁷⁵ In addition, alphabetical arrangement allowed the law to be about both substance and procedure. David Seipp points out that, although some terms referred to judicial proceedings, more “‘headings described various sorts of persons, possessions, and transactions.’” As he explains, alphabetical order allowed the common law to sort “‘itself primarily in terms of the legal landscape outside the courtroom.’”¹⁷⁶ In turn, as commonplace heads became, as Michael Hoeflich puts it, “‘almost canonical’ and “‘standardized,’” they described and bounded a common-law interpretative community.¹⁷⁷

Madison—simply by copying heads in alphabetical order—was acquiring a dominant mode of thinking about the common law. Salkeld’s *Reports* assisted in this enterprise. By the late eighteenth century, other case reports followed a more conventional chronological arrangement. Salkeld, however, arranged cases according to subject, alphabetically digested under “‘proper heads.’” The volumes contained a table of the heads.

Madison thus did not sort the material. The cases appear in the alphabetical order with which they appear in Salkeld. He referenced the order of the cases under each head with its number in parentheses: for example, (1) for the first case, (3) for the third case, and so on. Madison copied the regnal dates for cases. Although seemingly unremarkable, this inclusion is actually curious. A date is useful if one is thinking about law as historically contingent or dependent. The reporter’s name conveyed the general period of the cases. But in Virginia in the 1780s, whether an English case had been decided in 2 W. III or 15 W & M did not really matter. Jefferson indeed omitted the dates. Madison accepted the presentation

174. Havens, *Commonplace Books*, 39 (quoting Abraham Fraunce, *The Lawiers Logike, exemplifying the praecepts of logike by the practise of the common lawe* [1588]).

175. Holdsworth, “Charles Viner,” 39.

176. David J. Seipp, *The Structure of the Common Law, 1180–1880*, chap. 4: “METHOD: Institutes and Reports from the Fifteenth to the Seventeenth Century.” Unpublished manuscript (provided to author, 2008).

177. Hoeflich, “The Lawyer,” 103 (using Stanley Fish’s concept of “interpretative community”).

of the information and copied the dates simply because that information appeared with each case. He wanted to imitate what he took to be the official presentation of the material. The date made the Notes look more authoritative even though it was substantively relatively meaningless.

Nonetheless, Madison did a type of mental sorting. Madison appears to have compared some cases to the version reported in *Lord Raymond*. At the end of *Iveson v. Moore*, Madison added “—see 1 Raym^d 495 where it appears that this case by consent of Holt was argued before all the Justices of the Comon pleas & Barons of Exchequer, who were all of opinion that the action well lay.”¹⁷⁸ This precise reference does not appear in Salkeld or Jefferson’s *Legal Commonplace* (Jefferson’s citation to the page number was 493).¹⁷⁹ Similarly, Madison noted that *Ashby v. White* was more “fully reported” in *Lord Raymond*.¹⁸⁰ Once again the reference to Raymond does not appear in Salkeld, and Jefferson did not note the case in the section of his notes from Salkeld.¹⁸¹ Madison also occasionally added internal cross-references, suggesting links between various cases, although these seem to have been drawn from marginalia comments in Salkeld.¹⁸² Lastly, he may have compared or contemplated comparing other cases. He copied relatively few of the citations added in the margins; however, a number of the ones that he did copy referred to volumes available in Jefferson’s library. Whether Madison ever compared the cases has to be left to our imagination.

Selecting

Although Madison did not sort the cases, he was highly selective. This selectivity is one of the most interesting aspect of the Notes. Salkeld contained approximately 240 heads. Madison copied material from approximately half. This selective approach whittled the 702 pages of Salkeld down to the thirty-nine pages plus two lines of the Notes. (A list in the

178. Notes, 4.

179. The reference does not appear in the third edition and, although the fourth and fifth edition added references to *Lord Raymond*, there is no such reference. Jefferson, *Legal Commonplace*, 11v (85). Madison corrected his initial page number. The original number is difficult to read; it looks as if he altered 486 to 495. The change would suggest a decision to more precisely note the discussion rather than simply the first page of the case. The case appears at pages 486–495 in *Lord Raymond*, volume 1.

180. Notes, 5. Beyond these two instances, I have not attempted to sort out which references were added by Madison and which appeared in Salkeld.

181. Jefferson, *Legal Commonplace*, 11v-12r (87–88).

182. On pages 27 and 28, Madison writes “see (32) contra,” “see (20) contra” and “see (13) contra,” “see (6) contra.”

appendix to this article shows the heads contained in the third edition of Salkeld's *Reports* and the heads that Madison omitted.)

Though selective, Madison's approach nonetheless retained an impressive array of topics. The breadth can be appreciated if the heads that he copied are rearranged roughly under modern categories. His heads covered contract and commercial law,¹⁸³ property,¹⁸⁴ criminal law,¹⁸⁵ procedure,¹⁸⁶ torts,¹⁸⁷ and institutions and personnel.¹⁸⁸ The copied heads described an important core of law—one which remains at the heart of the modern first-year curriculum. Moreover, in less than forty pages, Madison recorded over 430 cases. In almost every case, Madison copied less than the entire version of the case in Salkeld. Regardless of how carefully he copied, he read over 400 cases and likely skimmed at least all the heads.

The omitted heads help to define the boundaries of Madison's project. Madison dropped heads that did not appear applicable to postrevolutionary American law. In the *A* section, Madison dropped heads that related to uniquely English forms of property (ancient demesne, annuity), the Church of England (advowson), English criminal law not strictly followed (appeal and attainder), English citizenship (aliens), English regulatory

183. For example, account, assignment, bankrupts, bargain and sale of goods, bills of exchange, covenant, joint and several, merchants, merchandize, money, payment and satisfaction, tender and refusal.

184. For example, administrator, age, apportionment and division, apprentice, assets, attornment, baron and feme, bastard, copyholder, deeds and charters, devise, detinue, discent, disseisin, dower, ejectment, executors, grants, highways (rivers, bridges), incidents (appendant, appurtenant), joint-tenants and tenants in common, leases, legacy, marriage, master and servant, mortgages, nuisances, oyer and shewing of deeds, records, rents, trespass, uses and trusts.

185. For example, arrest de corps, amerciaments & fines, assize, bail in criminal cases, deceit, escape, felony, forgery, gaming, habeas corpus, indictment, outlawry, treason.

186. For example, abatement, action in general, action sur le case, action sur le case, sur assumpsit, action popular, amendment, arbitrement, arrest of judgment, attachment, audita querela, avowry, bail in civil cases, breach in actions of debt, covenant, &c, certiorari, challenge, costs, condition, contempt, continuance & discontinuance, covenant, damages, debt, deceit, declaration, demurrer, departure, exposition of words, error, evidence, execution, extinguishment, imparlance, issue general, jeofails, judgments, limitations, mandamus, motion, novel assignment, nonsuit, oaths & affidavits, pleas & pleadings, restitution, revocation, scire facias, trial, variance, writ.

187. For example, cases involving tort concepts appear under actions sur le case sur assumpsit.

188. For example, admiralty, attorney & solicitor, bailiff, chancery, constable, coroner, corporations, courts & jurisdictions inferior, fees, judge, jury and jurors, office & officers, office of the king, orders of the justices of the peace, parliament, powers, rules of court, sessions general & quarter, statutes in general and the exposition thereof, statutes of hue & cry, term time & computation.

authority (alehouses), and English officials (authority). Revealing the degree to which an “American” law had developed by the mid-1780s, the list also reminds us that many cases and issues that appeared in English legal texts were viewed as irrelevant by American readers.

Overall, Madison’s selection reveals his tendency towards enthusiasm at the outset of a project and boredom by the end. (Recall that Hamilton is the author of the last twenty essays of *The Federalist*.)¹⁸⁹ *A* comprises the first twelve pages. *B*, *C*, *D*, and *E* each take four to five pages. But by page 31 (*F*), Madison has tired of the project. Indeed, he copied page 32 upside down. The entire rest of the alphabet of heads (*F–W*) are copied into the nine pages. To put it differently, Madison took thirty pages to copy approximately 300 pages—and then spent less than ten pages copying nearly 500 pages. He skips an increasing number of heads and, by *W*, Madison omits *Wager of Law*, *Warranty*, *Waifs*, *Estrays*, &c., *Weights and Measures*, *Wills and Testaments*, *Witnesses*, *Words*. He concludes with only one case under *Writ*.

Surprisingly, certain heads held no apparent interest. He skipped *Law, common & civil* and with it the case on the theoretical rationale for English law in the American colonies (*Blankard*). He omitted *Aliens* and its discussion of “Turks and Infidels” that “tho’ there be a Difference between our Religion and theirs, that does not oblige us to be Enemies to their Persons; they are the Creatures of God, and of the same Kind as we are, and it would be a Sin in us to hurt their Persons.”¹⁹⁰ And he omitted *Villeins and Villenage*. Although villeins was a category unique to England, the only two cases listed in the section involved slavery. As noted above, in *Smith v. Browne and Cooper*, Holt held “that as soon as a Negro comes into England, he becomes free.” Yet, in Virginia, “by the Laws of that Country, Negroes are saleable.”¹⁹¹ The following case, *Smith v. Gould*, involved an extended discussion of whether trover lay “not for a Negro, for that the Owner had not an absolute property in him; he could not kill him as he could an Ox.” The case report distinguished property in slaves as having only a civil, as opposed to natural, existence. Although the result implied slavery was a recognizable form of property, Salkeld ended the entry with the argument “Men may be the Owners, and therefore cannot be the Subject of Property.”¹⁹² The cases could be read to suggest that slavery was only legal where authorized by positive

189. See *The Federalist*, ed. J. R. Pole (Indianapolis: Hackett, 2005), xlii–xlvii.

190. *Reports* (3rd ed.), 1:46 (case 2).

191. *Reports* (3rd ed.), 2:666 (explaining that “Negroes by the Law and Statutes of Virginia, are saleable as Chattels”).

192. *Ibid.*, 2:666–67.

law and that slavery itself was legally problematic. Jefferson copied *Smith*, and Adams commented upon the cases in the margin of his Notes. Madison was completely silent.

Madison's selection of cases was driven by his apparent plan to copy relevant heads. With respect to approximately eighty of the heads, Madison copied the first case, and often the first case was the only case copied. Given that Salkeld arranged the cases in chronological order under each head, the first was not necessarily the most important. This consistent preference suggests that Madison was determined to copy certain heads and unwilling to copy a head without a case. Thus in a certain number of instances, he simply copied the first nonirrelevant case to go under a head even though the case was not significant. In this sense, Madison's interest in Salkeld was about selecting heads.

To complete the project—but apparently bored by it—Madison compulsively added a one sentence entry under *Writ*.¹⁹³ The sentence must have annoyed him. By the end of page 39, Madison had resorted to squishing words to avoid starting a new page. The last entry on page 39 under *Uses & Trusts* reveals his typical tendency to write progressively smaller. The final head, however, could not fit. Madison wanted to end by including the final head in Salkeld thus he copied it onto the verso side of 39—with one line of explanation. This single entry testifies to Madison's compulsiveness.

Where Madison copied more than the first head, his selection methodology becomes possible to discern. With respect to the first head, *Abatement*, he copied the cases 1, 5–10, 12–13, 15–17, 19–21. Under *Actions sur le case, sur assumpsit*, Madison copied cases 1–9, 11, 14–20. The choice was not random. Further study (and a better grasp on eighteenth-century English law than I have) would reveal finer contours of Madison's mind. Nonetheless, the omissions under *Abatement* might be explained thus: *Pease v. Parsons* (2) (inexplicable Latin pleading); *Jones v. Bodinner* (3) (privilege of attorney of the Common Pleas); *Newton v. Rowland* (4) (privilege of attorney of the Common Pleas); *Michaelmas*, 1 Ann. B.R. (11) (court rule on payment—no margin note); *Lett v. Mills* (14) (the proper way to plead that someone was a knight); *Lawrence v. Martin* (18) (privilege of attorney of the Common Pleas). At the outset, Madison was also selecting cases based on their relevance to American law.

By the end of the Notes, he continued to be selective under heads, but here it is his inclusion of a case other than the first case that helps define his

193. See Notes, 40 (“Writ. Touchins case. 12 W III (1) / In all continued writs the alias must be tested the day the former was returnable.”).

mind. Take the last full page, 39. Madison includes a number of cases about computing time. Under *Term time & computation*, Madison includes cases 2, 3, and 8. Case 1 was an internal court rule—cases 2, 3, and 8 all involved how one counted time—a Madison obsession. Under *Trespass*, case 3 was explicable because the first two cases were even more irrelevant. Under *Trial*, he summarizes 2, 3, 4, 5, 14, and 17 in three lines. Under *Variance*, cases 1 and 7. One would assume that case 7 held some intrinsic interest to him. In fact, it did:

Information for libel. Held 1. *tenor* is a transcript. 2. *not* for *nor*, tho' does not alter sense if fatal variance, the rule being that omission or change of letter which makes another word, the variance is fatal; aliter where the word remains the same. 3. a difference between words *spoken & written*. in former case there can not be a *tenor*, & it is sufficient if so many words be proved as are in themselves actionable. aliter in debt on bonds; for on *non est factum*, any variance is fatal. 4. in pleading libel or other writing may be described either in the very words, or by its meaning & substance.¹⁹⁴

The case's discussion of language led Madison—even though bored with the project—to copy it.

Perhaps most disappointing to a reader looking for a protoconstitutional mind, is the relative paucity of obvious and relevant cases. A constitutional connection can be found in the English common-law criminal matters that interested Madison. Foreshadowing perhaps the Fifth Amendment, Madison copied in a case of an indictment for treason, “you shall not ask a witness or a juror any question y^t w^d make a man discover what tends to his shame, crime, infamy or misdemeanor.”¹⁹⁵ Madison also copied a number of the cases under *Habeas Corpus*.¹⁹⁶ Yet he omits, for example, *Parkhurst v. Foster* with its argument, “It is against common Right to quarter Soldiers on any Man against his will” and Holt's agreement because “the Case was so plain, that there was no Occasion for giving Reasons.”¹⁹⁷ At other times, the constitutional connection, if one exists, is attenuated. Another copied case involved a riotous assembly and whether “obscene words” were spoken in a “playhouse” or another venue.¹⁹⁸ Perhaps a First Amendment historian could tease out a connection, but on first reading the connection to the future amendment seems slight. Madison included rights rhetoric but not where one might expect. A

194. Notes, 39 (*Dom. Regina v. Dr. Drake*).

195. Notes, 17 (*Anon.*).

196. Notes, 32 (header omitted) (page upside down in original).

197. *Reports* (3rd ed.), 1:388.

198. Notes, 33 (*Regina v. Cranage*).

right appears with *Highways, rivers, bridges*: “The subject has a right to fish in all navigable rivers, as he has in the sea.”¹⁹⁹

The proto-constitutionalist mind is more apparent with respect to cases on legislatures and elections. Thus Madison copied under *Parliament*: “No action lies at Comon law vs officer for false return of members to Parliam^t unless where ye right is determined or canot [*sic*] be determined in Parliam^t. Judges may Judge of parliamentary matters incident to matters cognizable by them.”²⁰⁰ Yet even in these instances, Madison’s version lacked a certain dramatic flair. In the *Reports*, the five lengthy paragraphs of *Ashby v. White* included Holt’s ringing words of dissent:

No Laws can be made to affect him or his Property but by his own Consent, given in Person if he be chosen, or by his Representative if he is a Voter: That if the Plaintiff has a Right, he must in Consequence have a Remedy to vindicate that Right; for want of Right and want of Remedy is the same Thing. If a Statute gives a Right, the Common Law will give a Remedy to maintain that Right; a Fortiori where the Common Law gives a Right, it gives a Remedy to assert it.²⁰¹

Madison wrote, “Case by voter for refusing to receive his vote in election for members of parliament. Gould Powys && [*sic*] Powel agst Holt adjudged the action not maintainable. This jdgt was after reversed in H. of Lords by a majority of 50 agst 16.” Holt’s rhetoric and rationale was ignored.

Moreover, Madison’s interest in legislative issues may have arisen from his work in the Virginia legislature. Many entries in the Notes are easily matched with his contemporary concerns. In December 1784, Madison introduced a bill to replace the county justices of peace with an assize system and continued to work on bills for the courts of assize through 1786. Various copied cases relate to court procedures and suggest an effort to figure out possible issues and configurations of court systems.²⁰² He also drafted a bill opening the navigation of the James River—perhaps related to his copying of “the subject has a right to fish in all navigable rivers, as he has in the sea.”²⁰³ The relationship between the Notes and his legislative efforts, however, should not be overemphasized. Madison was on the

199. Notes, 32 (*Warren v. Matthews*).

200. Notes, 37 ([*Prideaux v. Morris*; *Regina v. Paty*]).

201. *Reports* (3rd ed.), 1:20–21.

202. See, for example, Bill for the Establishment of Courts of Assize (James Madison introduces December 2, 1784); Bill to prevent the further operation of the Laws concerning Escheats and forfeitures from British subjects (James Madison on drafting committee). *PJM*, 8:163–74.

203. *PJM*, 8:191–94 (Bill for opening and Extending the Navigation of James River (James Madison’s hand)); Notes, 32.

drafting committee for the *Act Concerning the Appointment of Sheriffs*, but he skips *Sheriffs* completely.²⁰⁴

Nonetheless, the significant interest in criminal law likely related to Madison's pledge to Jefferson to introduce a revisal of Virginia law originally prepared by Jefferson, Wythe, and Edmund Pendleton in the late 1770s.²⁰⁵ In May 1784, Madison introduced a resolution to print the original report and in October 1785 led the effort to obtain passage of the revisal.²⁰⁶ He worked for three days a week for three months on the bills.²⁰⁷ Rives commented, "Among his papers, we find, in notes and references to legal authorities, abundant traces of the great amount of labor which the performance of this duty cost him."²⁰⁸ Most of these notes unfortunately have vanished. The passage of the bill concerning religious freedom became Madison's great success; the failed bill on crimes and punishments, his great disappointment. As Kathryn Preyer explained, it is hard to discern whether the bill was a "realistic crime bill" or a "harshly reactionary measure."²⁰⁹ Madison wrote that "our old bloody code is by this

204. For legislation introduced by Madison, see *PJM*, 8:512–14.

205. See, for example, Notes, 34 (*Duke's Case*) ("Jdgt cannot be given vs any man in his absence for corporal punishm^t, there is no such precedent."); *Reports* (3rd ed.), 1:400; *PJM*, 8:48 (editorial note). On the history of the revisal, see "Some Virginia Law Books in a Virginia Law Office," *Virginia Law Register* 12 (1926): 385; Kathryn Preyer, "Crime, the Criminal Law and Reform in Post-Revolutionary Virginia," *Law and History Review* 1 (1983): 53–85, reprinted in *Blackstone in America: Selected Essays of Kathryn Preyer*, ed. Mary Sarah Bilder, R. Kent Newmyer, and Maeva Marcus (Cambridge: Cambridge University Press, 2009), 147–84; *PTJ*, 2:308. In November 1784, the draft was published by the legislature: *Report of the Committee of Revisors appointed by the General Assembly of Virginia in MDCCLXXVI* [1784], 4–5 (listing the 126 separate bills).

206. See *PJM*, 8:47–49, 514; 9:193–96.

207. Madison to Thomas Jefferson, Jan 22, 1786, *PJM*, 8:472–73.

208. Rives, *Life and Times*, 2:76.

209. Preyer, "Crime," 70. Although the revisors had been influenced in particular, by Beccaria, they had ended up with a bill with often extreme results: punishments that denied burial to the body; dissection after hanging for petty treason (including a husband's murder of his wife); gibbeting for the challenger in a duel (hanging the body for public display); death by poison, a means of murder usually associated with slaves, for death by poison; for maiming or intentional bodily injury, *lex talionis* with monetary compensation. One amendment in Madison's handwriting would have replaced *lex talionis* with hard labor and financial compensation; see [amendment to sec. xv], *PJM*, 17:510–11. The other amendment related to the counterfeiting provisions and seems to have been intended to more specifically cover the types of actions covered; see [amendment to sec. xvi], *ibid.* For other problems with Jefferson's draft, see Charles T. Cullen, "Completing the Revisal of the Laws in Post-Revolutionary Virginia," *Virginia Magazine of History & Biography* 82 (1974): 84, 86. In 1796, a revised criminal bill was passed with graduated sentences and the elimination of benefit of clergy; see Preyer, "Crime," 76–79.

event fully restored.”²¹⁰ The Notes helped Madison situate the revisal’s approach within English criminal law.

The private Madison also appears in the Notes. Madison copied cases related to his personal situation. A “junior” himself, he copied, “Addition of *Junior* necessary to son unless otherwise distinguished from father.”²¹¹ As eldest son, Madison would become his father’s executor; the two lengthiest entries involved devises and debts with respect to estates, executors, and administrators.²¹² Given his dependence on the Virginia legislature for payments, he was not surprisingly interested in cases about salaries for various offices.²¹³

Sex, of course, was not a head in Salkeld. Nonetheless, Madison managed to copy a significant number of cases related to the subject. Perhaps recalling the end of his engagement to Kitty Floyd, he copied “On breach of promise to marry, action lies for man as well as woman, also for scandalous words per quod he lost his marriage.”²¹⁴ Madison similarly copied many of the cases involving cohabitation.²¹⁵ Lastly, he seemed particularly interested in bastards—but what motivated his fascination with the subject has to remain purely speculative.²¹⁶

Another subject—time—held equal interest. Under various heads, Madison copied cases that showed the difficulty of figuring out precisely what was a year or a week. For example, under *Age*, he wrote, “It has been adj^d that if one bee [*sic*] born the first of February at eleven at night, & ye last of Jany in his 21 year at one in the morning he makes

210. Madison to Thomas Jefferson, Feb. 15, 1787, *PTJ*, 11:152.

211. Notes, 2 (*Lepiot v. Browne*).

212. Notes, 23 (*Scattergood v. Edge*); Notes, 29–30 (*Wankford v. Wankford*). Wankford is one of the lengthiest cases, covering ten printed pages (Salkeld, *Reports* (3rd ed.), 1:299–309).

213. See Notes, 36 (*Godolphin v. Tudor*).

214. Notes, 5 (*Harrison v. Cage*).

215. See, for example, Notes, 6 (*Hasser v. Wallis*), 15 (*Warr v. Huntley*, cohabitation; *Robinson v. Greinold*, separation; *Haydon v. Gould*, marriage by layman and cohabitation). He copied a number of other cases involving feme soles and feme covert; see, for example, Notes, 2 (*Lynch v. Hooke*, *Hetherington v. Reynolds*), 14 (*Baron & Feme*), 18 (*Best v. Stamford*), 30 (*Shardelow v. Naylor*).

216. Notes, 15 (*Pride v. Earls of Bath*, distinction based on case of bastard eigne & mulier puisne (the concept distinguishes a child born after the parents marry from a sibling born prior to the marriage); *Regina v. Murray*, wife has child while husband is at sea is bastard; *Inter Paroch St. George & St. Margaret*, whether children of woman separated from husband by divorce a mensa et thoro (e.g., by act of law) are bastards; however, children of separated couple without sentence are legitimate) (the first part of the sentence is not legally correct), 36 (*Rex v. Albertson*, another case where wife has child while husband is at sea).

his will of lands & dies, he was of age and will good.”²¹⁷ In another example, Madison explained that where an insurance policy dated September 3, 1697, was to insure for “one year *from ye day of the date thereof*” and the insured died at 1 a.m. on September 3, 1698, the words “excludes ye day” and the insurer is liable.²¹⁸ One of the best examples of direct influence relates to this case. According to Madison’s Convention notes, on September 13, 1787, Madison moved to amend a constitutional requirement of ten days for return of a bill. He wanted to insert “the words ‘the day on which’—in order to prevent a question whether the day on which the bill be presented, ought to be counted or not as one of the ten days—.”²¹⁹ The members were “very impatient” with Madison. Madison recorded Gouverneur Morris’s statement: “The amendment is unnecessary. The law knows no fractions of days—.”²²⁰

While the reader of the Notes has the vague sense that Madison may not have completely understood the Latin procedures that he copied, his mind seemed deeply engaged with two substantive areas of the law. Many of the cases involve bills of exchange or other commercial paper transactions. The clarity with which Madison ticks through various situations involving indorsers and drawers reveals an appreciation for the realities of commercial paper and a grasp of the relevant law.²²¹

A similar connection appears in Madison’s rendering of wills and property cases—and particularly in the interpretation of estates and future interests.²²² He repeatedly carefully transcribed the disputed language that resulted in contrary estates interpretations. His explanations of the rationales are succinct and easily followed. He seems to have been quite fascinated by the ways in which English estates law had developed rules by which to interpret testator intent. One case was summarized simply as “where a particular estate is expressly devised, a contrary is not to be implied by subsequent words.”²²³ An anecdote “frequently mentioned” by Jefferson emphasizes this interest. Near the end of his life, Madison apparently had sat with Jefferson and “some of the most distinguished judges and lawyers of the State” on a board to establish the

217. Notes, 8 (*Anon.*).

218. Notes, 39 (*Sir Robt Howard’s Case*); see also *ibid.*, 39 (*Asmole v. Sergeant Goodwin*) (where rule requires pleading in four days, “Sundays and Holidays are to be computed”); *ibid.*, 38 (*Goodwin v. Peek*) (holding that, where the first scire facias had been tested on October 24 and returned on November 7, “15 days *inclusive* sufficient.”).

219. Farrand, *Records*, 2:608.

220. *Ibid.*

221. See Notes, 14, 15–16.

222. See Notes, 8, 9, 18, 23–26, 29–30, 34–35, 39.

223. Notes, 24 (*Popham v. Banfield*).

location of the University of Virginia.²²⁴ A deed was passed among everyone, but only Madison correctly asked a question “founded upon some rather recondite doctrine with regard to the limitations of real estate, whether the deed was good in law.”²²⁵ Years later, his law study remained useful.

Summarizing

An important purpose of commonplacing was to learn to summarize legal cases. Salkeld’s *Reports* were explicitly aimed at “Students” as well as Barristers and “Practicers of the Law.”²²⁶ They helped a student learn how to select relevant material. The volume’s marginalia provided the holding as it related to the topic. The reports were succinct summaries of the lengthy, complicated cases. The facts of the case were often little more than a sentence or two long. The argument was often only the most essential issue. The decision and explanation were again succinct and precise.

Nonetheless, Madison summarized Salkeld with even greater brevity. He disliked writing everything down. He did not use a known shorthand system but relied extensively on conventional abbreviations.²²⁷ He uses the ampersand (& for *and*), superscripts (*abatemⁱ* for *abatement*), the tilde (*E^xr* for *Executor*), and the thorn (*y^e*, *yⁱ* for *the* and *that*). (This same technique can be observed in his copy of an October 24, 1787 letter to Jefferson.)²²⁸ He often decapitalized capital letters. He skipped case names often by the end.²²⁹ He made the occasional error.²³⁰ In one place he leaves out a “not,” leaving the case appearing to stand for the opposite result.²³¹ He omitted occasional heads.²³² He did not indicate

224. Rives, *Life and Times*, 1:526n1 (professor and Coke on Littleton).

225. *Ibid.*, 1:526–527n1.

226. Salkeld, *Reports* (4th ed.), 1:title page.

227. On shorthand at the time of the Convention, see Marion Tinling, “Thomas Lloyd’s Reports of the First Federal Congress,” *William and Mary Quarterly* 18 (1961): 519.

228. Madison to Jefferson, October 24, 1787, JMP, series 1, http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=03/mjm03.db&recNum=69&itemLink=%2Fpamem%2Fcollections%2Fmadison_papers%2Fmjmsr1.html&linkText=6.

229. See, for example, under “Parliament” where he simply numbers (1) (3) and omits the names of *Prideaux vs. Morris* and *Coundell vs. John*; under “Trial” where he again uses numbers only “(2 &3) &4) (5) (14) (17” [*sic*]).

230. When he did make mistakes, he tended to cross out lines or insert a phrase; see, for example, Notes, 3 (*Tuberville v. Stampe*) (inserting after “Case” superscripted words: “on custom of the realm”).

231. See, for example, Notes, 18 (*Anon.*): “Held, that if a Trustee or E^xr buy in debts or mortgages for less yⁿ is due on them, he shall [not] be allowed the benefit of them”; Salkeld, *Reports* (3rd ed.), 1:155.

232. See appendix: Assets, Assignment, Habeas Corpus, Indictments, Jury and Jurors.

where volume 2 began. He also sometimes replaced the second parentheses of a case number with a dot: (5· instead of (5). But whether this discrepancy indicates a secret notation or was sloppiness remains a mystery.

He adopted certain habits. The name of the Crown had often been Latinized and Madison replaces “King” with *Rex*; despite copying a case in which the substitution of *King* for *Regis & Regina* had created an unamendable variance.²³³ Similarly, he repeatedly used the term *aliter*.²³⁴ Salkeld used the term but also used *otherwise* or *but if*. Madison repeatedly, however, employed *aliter* in cases that involved distinctions, and the term seemed to emphasize these points. Madison distinguished between language that could be simplified and language essential to common-law lawyering. He did not translate essential Latin and Law French phrases.²³⁵ Madison followed Salkeld’s practice of using *he* as an explicitly gender neutral pronoun to refer to rules covering men and women.²³⁶ Thus, although a case involved the defendant, Lady Honoria Gerrard, Madison described the rule as “If defendant *appear* by wrong name, he is estopped to plead misnomer.”²³⁷

In these Notes, Madison favored a subject-verb-object sentence style. The syntax is noticeably different from the more clause-ridden style of Salkeld (and from much of Madison’s later writing). He particularly liked the numbering of reasons that Salkeld had often included.²³⁸ Again, not surprising to those who are familiar with Madison’s work, he added numbers even when there were none, and on occasion he renumbered reasons after silently omitting some of them.²³⁹ His silent omission

233. Notes, 8 (*Thomson v. Crocker*). Salkeld was inconsistent in using both *King* and *Rex*.

234. Madison used it in the first case, *West v. Sutton*, in which it appears in Salkeld: “Where alienee is pleaded in abatement tis triable where the writ is brought, viz on replication ought to conclude to the Country[.] aliter where it is pleaded in bar, ergo in that case the replic. must conclude et hoc par. est ver” (Notes, 1; Salkeld, *Reports* (3rd ed.), 1:2). The *cf.* signal comprehends certain aspects of this idea of diversity or distinction.

235. See, for example, Notes, 1 (*Duncombe v. Church*): “Held that want of a *prout patet per recordum* is only a matter of form, and helped by general demurrer because without such conclusion, if a record be pleaded, the other side may reply *nul tiel record*.”

236. On the relevance of this choice to constitutional questions, see Natelson, “Founders’ Hermeneutic,” 1244n13–14 (describing debate over whether the Constitution originally permitted a woman to be elected president).

237. Notes, 2 (*Stroud v. Lady Gerrard*); Salkeld, *Reports* (3rd ed.), 8. Madison used *she* in rules applying to women only. See, for example, *ibid.*, 2 (*Lynch v. Hooke*): “If feme covert be arrested by wrong name & give bail bond by that name, she is not estopped from pleading misnomer.”

238. See, for example, Salkeld, *Reports* (3rd ed.), 1:127 (*Lambert v. Pack*); Notes, 16 (listing seven reasons).

239. On adding numbers, compare, for example, Salkeld, *Reports* (3rd ed.), 1:132–33 (*Hill & al. v. Lewis*) with Notes, 16 (Madison numbering eight reasons; no numbers in

of reasons emphasizes that he was not a literal or completely reliable copyist.

A comparison of particular cases among the extant eighteenth-century law commonplaces would produce interesting observations. Here, let me briefly note that Madison's entire style of summarizing differed significantly from Jefferson's. Take *York v. Stone*.²⁴⁰ Jefferson classified the case as one involving equity and therefore copied it into his separate Equity Commonplace. He copied the holding from the marginalia such that it emphasized mortgage. He summarized the reasoning behind the rule:

7. a mortgage does not revoke a will in toto: but it severs a jointenancy. the reason in both cases is the same, to the advantage of the mortgagor. *York v. Stone*, 1 Salk. 158.²⁴¹

Madison adopted a different approach. He emphasized joint-tenancies. He flipped the holding so that it emphasizes severance. He copied but does not draw out the underlying similarity in reasoning:

York vs. Stone & al 8 Ann. In Canc. (10)

Held that a mortgage severs a jointenacy, tho' it does not revoke a will. for jointenancies are odious in Equity. and that it may be for ye benefit of mortgagor yt. Will s^d not be revoked, but not so y^t jointenacy s^d be in danger of going from his representatives to the survivor.²⁴²

original); Salkeld, *Reports*, 1:137–38 (*Coleman v. Sherwin*) with Notes, 16 (Madison numbering three reasons with fewer in original); compare Salkeld, *Reports*, 1:176 (*Toler's Case*), with Notes, 19 (Madison numbering two reasons with none in original). On omitting numbers, see Notes, 33 (*King v. Chandler*) (listing only three of five reasons given on a conviction of deer-stealing and omitting statement by Holt that “the Right of an *Englishman* of being tried . . . was taken away”); Salkeld, *Reports* (3rd ed.), 1:378.

240. Salkeld reports the case: *York contra Stone & al*. Nov. 16, Mich. 8 Ann. In Canc. // [Marginalia] A Mortgage does not revoke a Will in toto, but severs the Jointenancy of the Trust of a Term. // Three Persons being jointly interested in the Trust of a Term of Years, one of them mortgaged his third Part; and the Question was, Whether the Jointenancy was severed in this Case: It was admitted to be a settled Point in Chancery, That if H. makes his Will, and devises his Land to one in Fee, and after mortgages his Land to another in Fee. this is no total Revocation, but the Equity of Redemption shall pass by the Devise: But Cowper, Lord Chancellor held, That a Jointenancy is an odious Thing in Equity; that as to the Case of the Will, it might be for the Benefit of the Mortgagor, that this Will should not be revoked; but that it is to the Disadvantage of the Mortgagor, that the Jointenancy should continue; because, if he happened to dye first, all his Estate and Interest goes from his Representatives to the Survivor, unless it be construed a Severance” (Salkeld, *Reports* (3rd ed.), 1:158).

241. ECB (No. 7).

242. Notes, 18.

Madison's summary nearly misses that the rationale behind the distinction is the same.

When material did not interest Madison that much or perhaps when he did not completely understand it, he tended to copy it verbatim. While on occasion he copied the marginalia holding, more often his verbatim comments come from the case report itself. Indeed, his tendency to skip the marginalia—which usually had the holding—suggests that he was not that interested in reconstructing the common law as a system of rules. Similarly, he was not that interested in prior authority, and his copying of citations is highly idiosyncratic and seems to follow few patterns.

When Madison was interested in material, he tended to rework it. He substituted favorite words of his for those in the *Reports*.²⁴³ In general, the more interested he appears to have been in the material, the less likely he copied it verbatim. In a summary worthy of a modern contracts class, Madison reduced a complicated set of facts to “plf declared ye dft sold him horse such a day & place. & then & there warranted horse to be sound. where upon he paid money; & avers horse had but one eye. dft pleaded non warranty.”²⁴⁴ On occasion, something about the case was of such interest to him that he left the entire purpose of the case out. In a case under *Apprentice*, Madison copied “If it had been a new question, he [Holt], s^d have held otherwise; but after so many orders affirmed in this Court, ‘tis too late to unsettle it now.”²⁴⁵ The actual particularities of the order—a discharge of an apprentice made without first applying to a single justice—were rendered irrelevant to the idea of the importance in certain situations of respecting the precedent of court procedures.

Madison's Mind

As I noted earlier, the survival of the Notes is serendipitous. Madison lived long enough to control his papers. He gathered back his letters from many correspondents. As the editors of the *Madison Papers* note, he “eliminated documents which, in his opinion, had no historical importance” and left those mostly on “public affairs.”²⁴⁶ The private and publicly irrelevant character of the Notes offer an uncensored glimpse of Madison's mind. To be sure, student law notes are not as interesting as romantic

243. See, for example, Notes, 2 (*Poulter v. Cornwall*) (Madison employing *omission*); Salkeld, *Reports* (3rd ed.) (not using word).

244. Notes, 21 (*Butterfield v. Burroughs*). “Money” may be incorrect transcription.

245. Notes, 9 (*Rex v. Johnson*).

246. *PJM*, 1:xv–xvii.

correspondence or letters to a family member or epistolary political discussions, but they do provide a remarkable degree of insight into how someone individualized a standard task.

Two final comments about the Notes relate to their bearing on the public, political persona of Madison. In current scholarship, Madison is as famous for his comments on constitutional interpretation as he is for his understanding of American politics, political theory, and political science.²⁴⁷ The Notes underscore that his interest in constitutional interpretation arose out of a larger fascination with, to use H. Lewis Ulman's phrase, the "problem of language."²⁴⁸ Even as a youth, Madison loved language. In an early hand, Madison copied "A Poem published . . . upon the Tropes of Rhetoric."²⁴⁹ Rhetoric was a popular subject, and the "New Rhetoricians" mounted "a collective effort to explain literature and literary form in the light of semiotics and the structure of language."²⁵⁰ As James Engell emphasizes, "much of the new rhetoric depends on a realization that words are imperfect and slippery signifiers."²⁵¹

Salkeld, with its emphasis on language, intent, and construction, was an engaging source for such a mind. Madison thus copied cases about distinctions between oral statements and written ones,²⁵² acts based on records or

247. For various interpretations of Madison's post-1787 approaches to constitutional interpretation, see Gary Rosen, *American Compact: James Madison and the Problem of Founding* (Lawrence: University Press of Kansas, 1999), 156–77; Neal Riemer, *James Madison: Creating the American Constitution* (Washington, D.C.: Congressional Quarterly Press, 1986), 87–98, 145–50.

248. H. Lewis Ulman, *Things, Thoughts, Words, and Actions: The Problem of Language in Late Eighteenth-Century British Rhetorical Theory* (Carbondale: Southern Illinois University Press, 1994); see Michael G. Moran, "Introduction," in *Eighteenth-Century British and American Rhetorics and Rhetoricians: Critical Studies and Sources*, ed. Michael G. Moran (Westport, Conn.: Greenwood Press, 1994), 4–5 (discussing interest in "the interpretive act").

249. James Madison, *James Madison Commonplace-book [1762–1796]* (Massachusetts Historical Society). This book is described in *PJM*, 1:4–6.

250. James Engell, "The New Rhetoric and Romantic Poetics," in *Rhetorical Traditions and British Romantic Literature*, ed. Don H. Bialostosky and Lawrence D. Needham (Bloomington: Indiana University Press, 1995), 217 (including Adam Smith, George Campbell, Joseph Priestley, Hugh Blair, James Beattie, Thomas Gibbons, Lord Kames, Thomas Sheridan, and Robert Lowth). As Carey McIntosh points out, "the New Rhetoric did not think of itself as a school or movement" and the term is a twentieth-century innovation (Carey McIntosh, *The Evolution of English Prose, 1700–1800: Style, Politeness, and Print Culture* [Cambridge: Cambridge University Press, 1998], 157).

251. Engell, "New Rhetoric," 228. He adds, "This helps to explain the neoclassical and eighteenth-century obsession with clarity—not that writers and critics trusted words, but that they distrusted them and their possible abuses so much."

252. See Notes, 13 (*Lord Mohuns Case*): "If a man be found guilty of murder by Coroner's inquest, we sometimes bail him, because he proceeds upon depositions in writing

not,²⁵³ and differences depending on parchment or paper.²⁵⁴ He copied cases in which the presence of one word mattered.²⁵⁵ He copied cases in which the court concluded that the law should vary from the strict rule²⁵⁶ and those in which the court concluded that it could not vary from the strict rule.²⁵⁷ Disputes between the “intent of the Testator” and “the danger of suffering latitude of exposition,”²⁵⁸ cases where words were not taken according to their strict meaning,²⁵⁹ and theories on how to resolve matters “capable of different meanings,”²⁶⁰ were copied. What problems arose from the uncertainty of words?²⁶¹ How did one interpret words in statutes?²⁶² When should *may* be interpreted as

which we may look into. otherwise if found guilty by Grand Jury because Ct. cannot take notice of their evidence which they are by oath to conceal”; *ibid.*, 39 (*Dom. Regina v. Dr. Drake*): “a difference between words *spoken* & *written*. in former case there can not be a *tenor*. & it is sufficient if so many words be proved as are themselves actionable . . . in pleading libel or other writing may be described either in the very words, or by its meaning & substance.”

253. See Notes, 20 (*The Mayor of Thetfords Case*): “Tho’ a corporation can not do an Act *in Pais* without their common seal, yet they may do an act upon record, and ye reason is because they are estopped by ye record to say it is not their act.”

254. See Notes, 22 (*Hill v. Aland*): “Where a writing is only evidence, & ye action not founded on it, as a note which is evidence on parol contract, dft. has no right to copy.”

255. See Notes, 17 (*Anon.*): “A certiorari was to remove an order vs J.S touching *foreign* salt. which being removed appeared to be an order touching salt (without foreign) & it was held not to be removed, there being no such order.”

256. See Notes, 18 (*Anon.*) (distinguishing debts by “design of ye settlement”); see also *ibid.*, (*Whitecomb v. Jacob*): “for money has no ear marks to guide equity.”

257. See Notes, 8 (*Thomson v. Crocker*): “Writ of error recited Jdgt in curia of the *King*, when in the record it was *Regis & Regina*. variance not amendable. 1. it w^d make new writ. 2^{dly} 8. H. 6. authorises amend^{ts} only precedent to ye Jdgt. 3^{dly} Writ of Error is comission to Ct & they cannot amend their own Comission”; see also Notes, 21 (*Cone v. Bowles*): “All statutes that give costs are to be taken strictly, as being a kind of penalty.”

258. Notes, 23 (*Blisset v. Cranwell*).

259. Notes, 22–23 (*Milford v. Smith*): where will devises “*all estates given & granted*” will passes only estates “intended to be conveyed by the deed & fine; for the will had reference to deed & grant here not to be taken strictly but largely for any agreement.”

260. See Notes, 31 (*Wyat v. Aland*): “that where a matter is capable of different meanings, that shall be taken w^{ch} will support, not y^t which will defeat, the declaration or agreement.”

261. See Notes, 10 (*Winter v. Garlick*): “Award to pay costs of ‘a suit now depending in an inferior court’ bad for uncertainty. To pay such costs as the Master shall tax is good”; *ibid.*, 31 (*Rex v. Stocker*): indictment using Latin pleading to allege fabrication “held naught on demurrer for uncertainty.”

262. See Notes, 35 (*Mayor & Comonalty of London v. Wilks*): “A Merchant includes all sorts of traders as well as properly merchant adventurers. . . . A merchant-Taylor is a comon term”; *ibid.*, 31 (*Pope v. Sd Leger*): “Wager concerning rule of a game, not within ye Stat. of Gaming.”

shall?²⁶³ What did particular words mean?²⁶⁴ What even counted as an “act.”²⁶⁵ Repeatedly the Notes reveal Madison’s fascination with these problems of language.

Madison’s interest extended to Virginia law. Perhaps even as he wrote the Notes, in March 1784, Madison wrote Randolph about the “most difficult point of discussion” in a treason trial. Did “the terms, ‘Treason &c.’” refer “to those determinate offences so denominated in the latter Code, or to all those to which the policy of the several States may annex the same titles and penalties.” Madison concluded, “Much may be urged I think both in favor of and agst. each of these expositions.” Madison embraced realistic uncertainty: “The truth perhaps in this as in many other instances, is, that if the Compilers of the text had severally declared their meanings, these would have been as diverse as the comments which will be made upon it.”²⁶⁶ His work on the Virginia revisal demonstrates similar concern.²⁶⁷ Madison’s notes on the criminal-law bill praised its “salutary innovations” of “proportion,” “compensation to injd. party,” and “perspicuity & certainty.”²⁶⁸

263. Notes, 38 (*Rex & Reg. v. Barlow*): “Where a Stat. directs ye doing a thing for sake of justice or ye public good *may* has the force of *shall*.” On the may/shall distinction, see Robert A. Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* (Washington, D.C.: AEI Press, 1997), 85 (suggesting that interweaving emphasized “all the formulations are imperative, and almost all are negative); Nora Rotter Tillman and Seth Barrett Tillman, *A Fragment on Shall and May* (working paper 2008), available at http://works.bepress.com/seth_barrett_tillman/21/.

264. Notes, 33 (*Regina v. Smith*): “*Usitata*; ‘used’ speaks ye present as well as the past time.”

265. Notes, 37 (*Anon.*): “An Act printed by ye King’s printer is always good evidence of ye act to a Jury; but was never to be a record yet: you must get an exemplification under ye Great Seal, & then plead it exemplified, & then no man can deny it.”

266. Madison to Randolph, Mar. 10, 1784, *PJM*, 8:3–4.

267. See Madison to Thomas Jefferson, January 22, 1786, *PJM*, 8:472–73; Rives, *Life and Times*, 2:46, 2:75.

268. [Madison,] [Notes on Criminal Law Bill]. In the Library of Congress, the notes appear labeled as Edmund Randolph, Notes, Common Law, 1790, LC, http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=04/mjm04.db&recNum=704&itemLink=D?mjm:1:/temp/~ammem_IIK!:: They do not appear to be Randolph’s handwriting. The editors of the *Madison Papers* were uncertain where to place this document and located it in 1800. Madison’s emphasis on proportionality and the repeated references to the elimination of benefit of clergy suggest the earlier 1780s revisal effort. The numbers at the bottom of the second page (11, 19, 26, 30, 31, 33, 34) correspond to appropriate sections of the crime bill. The descriptive categories of the notes (petty treason, murder, mayhem, rape, sodomy, manslaughter, arson, burglary, grand larceny, larceny, robbery) also correspond to the crime bill. Witchcraft is the only significant category not covered in bill 64. The amendments listed on page 1 refer to sections 15 and 16 of the bill 64. See *PJM*, 17:510–511; A Bill for proportioning crimes and punishments in cases heretofore capital, chap. 64, *Report of the Committee of Revisors*, at 46–47 (sec. 11 (defining murder and manslaughter by intent only), 19 (crimes at sea given hard labor and payment for loss), 26 (crimes relating to

Madison cared about *perspicuity*. In one sense, he was not unusual in this regard, for *perspicuity* occupied the minds of late eighteenth-century rhetoricians.²⁶⁹ The word reappears in letters written during the Philadelphia Convention and his later correspondence.²⁷⁰ In *Federalist* 37, Madison famously wrote, “Perspicuity therefore requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them.”²⁷¹

commercial paper to be treated like crimes on the money or goods themselves), 30 (accessories), 31 (penalty for refusal to plead), 33 (attainder not working corruption of blood), 34 (saving of widow’s dower)); see also *PTJ*, 2:492–507. The bill’s stated purpose was to make punishments explicit and proportionate, to decrease significantly the number of capital crimes, to provide for compensation, and to eliminate benefit of clergy in most instances; see Jeffrey K. Sawyer, “Benefit of Clergy in Maryland and Virginia,” *American Journal of Legal History* 34 (1990): 49–68; Preyer, “Crime,” 53–85.

269. Perspicuity is “clearness of statement or exposition; freedom from obscurity or ambiguity; lucidity” in *Oxford English Dictionary*, 2nd ed. (Oxford: Oxford University Press, 1989–), 11:608 (2). For works, see James Burrow, *A few thoughts upon pointing and some other helps towards perspicuity of expression* ([London]: J. Worrall and B. Tovey, 1768); Quintilian, *Quintilian’s Institutes of the Orator* (London: B. Law and J. Wilkie, 1774): 2:35–39 (chapter on perspicuity); George Campbell, *The Philosophy of Rhetoric* (London: W. Strahan and T. Cadell and W. Creech, 1776), 2:5–92 (chapter on perspicuity); Joseph Priestley, *A Course of Lectures on Oratory and Criticism* (London: J. Johnson, 1777), 3, 143, 281–88; Hugh Blair, *Lectures on Rhetoric and Belles Lettres* (Dublin: Whitestone, Colles, Burnet, Moncrieffe, Gilbert, 1783), 1:217–40 (Lecture X); John Quincy Adams, *Lectures on Rhetoric and Oratory* (Cambridge: Hilliard and Metcalf, 1810), chap. 26 (“On Perspicuity”), 161–84; see also James L. Golden and Edward P. J. Corbett, *The Rhetoric of Blair, Campbell, and Whately* (Carbondale: Southern Illinois University Press, 1990), 1–18.

270. For use of term at the Convention, see, for example, Farrand, *Records*, 1:138–39 (Madison, June 6) (suggesting judicial interpretation in the revisionary function would bring perspicuity), and 2:74 (Madison, July 21) (suggesting inclusion of judiciary with revisionary power would provide assistance in “preserving a consistency, conciseness, perspicuity, & technical propriety in laws”); see also 3:88 (describing Charles Pinckney). Madison also returned to use the term in *Letters of Helvidius*, No. V (1793) in describing interpretation of *government*. See *Writings of James Madison*, ed. Gaillard Hunt (New York: G. P. Putnam’s Sons, 1906), 6:177, 180. See also Madison to W. T. Barry (August 4, 1822), *ibid.*, 9:103, 105 (referring to framing of laws); Madison to A. B. Woodward (September 11, 1824), *ibid.*, 9:206, 207 (referring to essay observations). In Jefferson’s famous letter about whether one generation of men has a right to bind another he urged Madison to turn to the problem and develop it with that “perspicuity & cogent logic so peculiarly yours” Jefferson to Madison, dated September 6, 1789, *PJM*, 12:382, 386 [RC].

271. [James Madison], “Concerning the Difficulties Which the Convention Must Have Experienced in the Formation of a Proper Plan” (January 11, 1788), *The Federalist* (Pole), 196. On this passage, see John P. Kaminski, *James Madison: Champion of Liberty and Justice* (Madison, Wis.: Parallel, 2006), 7.

Yet, he was not an idealistic philosopher as much as he was a pragmatic politician—or perhaps, student of the common law. In the Virginia revisal process, he wrote his father of the “difficulty of suiting” a bill to “every palate, & the many latent objections of a selfish & private nature which will shelter themselves under some plausible objections of a public nature to which every innovation is liable.”²⁷² Madison thus did not believe that perspicuity could be obtained. Again from *Federalist* 37,

But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.²⁷³

He concluded, “this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.”²⁷⁴ This interpretation could not escape the problems of “the obscurity arising from the complexity of objects,” “the imperfection of the human faculties,” and most importantly, “the medium through which the conceptions of men are conveyed to each other.”²⁷⁵ In short, interpretation could not avoid the inherent problem of language. Madison’s Notes repeatedly reinforce this point.

A second and related point about the Notes returns us to Madison’s status as a demi-lawyer. Madison wrote and spoke extensively on constitutional interpretation; yet, he never was a lawyer or a judge. He embraced with relative comfort constitutional interpretation carried out by nonprofessionals (often himself). At the Convention, he supported proposals for a negating power and council of revision.²⁷⁶ In Congress in 1789, he suggested departmentalism.²⁷⁷ Throughout congressional debates during the 1790s over the constitutionality of legislation, Madison advanced various interpretations of the Constitution. Later in the 1790s, he contemplated state interposition.²⁷⁸ Yet he never completely rejected

272. Madison to James Madison Sr., December 3, 1784, *PJM*, 8:172. He grasped the “dilatatory artifices” that were employed to obscure discussion on the merits; see Madison to Thomas Jefferson, January 22, 1786, *PJM*, 8:472–73.

273. *Federalist* (Pole), 196.

274. *Ibid.*

275. *Ibid.*

276. See Charles F. Hobson, “The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government,” *William and Mary Quarterly*, 36 (1979), 215–35.

277. *PJM*, 12: 237–239, 255–45 (over removal power).

278. Banning, *Sacred Fire of Liberty*, 387–394.

judicial review and, as the editors of the *Madison Papers* point out, suggested that the “‘judicial bench, when happily filled,’ was ‘the surest expositor of the Constitution.’”²⁷⁹ Excellent and extensive scholarship has debated whether Madison was consistent or inconsistent in these views, whether he changed his views over time or remained true to some deep core belief (described variously, for example, as popular sovereignty or separation of powers), and whether these views were consonant with or opposed to the Founding vision (whatever that might be).²⁸⁰ This study does not attempt to contribute significantly to the debates within this work.

But this small study may help to further illuminate Madison’s understanding of himself. In a book devoted to exploring the apparent contradictions in Madison’s thought, Lance Banning suggests that the problem with the scholarly disputes has been that “our interpretive container simply would not hold the founder’s understanding of himself.”²⁸¹ Although recent studies have continued to demonstrate the relationship between his study during the 1770s and 1780s and his later political thought, demilawyer status plays no role.²⁸² Jack Rakove has argued that “the framers worried about how the Constitution would be interpreted not as lawyers but as legislators.”²⁸³ Yet in Madison’s mind, these two categories may have been blurrier than we tend to view them today.

For Madison, I think significant law study without professional status may have been critical to his self-understanding. Could he have arrived at his varied approaches to constitutional interpretation without some

279. *PJM*, 11:285 (quoting letter dated 1834?).

280. See, for example, *James Madison: Philosopher, Founder, and Statesman*, ed. John R. Vile et al. (Athens: Ohio University Press, 2008) (particularly essays by Vile, Brown, Hoff, and Read); *James Madison: The Theory and Practice of Republican Government*, ed. Samuel Kernell (Stanford, Calif.: Stanford University Press, 2003) (particularly essays by Iain McClean, Samuel Kernell, John Ferejohn, and Jenna Bednar); *James Madison and the Future of Limited Government*, ed. John Samples (Washington, D.C.: Cato Institute, 2002) (particularly Joyce Malcolm); Rosen, *American Compact* (particularly chap. 6, “The Legitimate Meaning of the Constitution”); McCoy, *Last of the Fathers* (particularly chap. 4); Robert Allen Rutland, *James Madison: The Founding Father* (Columbia: University of Missouri Press, 1987), 97–98, 156–68; Neal Riemer, *James Madison: Creating the American Constitution* (Washington, D.C.: Congressional Quarterly Press, 1986) (particularly 131–56).

281. Banning, *Sacred Fire of Liberty*, 8.

282. See, for example, David Nordquest, “Madison and Philosophy: His Coursework and his Statesmanship,” and Craig Grau, “More than an Intellectual Scribe: The Political Drives and Traits of James Madison,” in John R. Vile et al., *James Madison*, 3–20, 21–36; Iain McLean, “Before and after Publius: The Sources and Influence of Madison’s Political Thought,” in Kernell, *James Madison*, 14–40.

283. Rakove, *Original Meanings*, 343.

study of law?—I doubt it. Could he have advocated these positions as a lawyer?—possibly. But he might not have been so uncertain or ambivalent. His law student and demi-lawyer status supported and made easier his ambivalent feelings about the location and boundaries of constitutional interpretation. Indeed, why would Madison—as insightful at the problems of language as the next man and with some significant study of the law—cede constitutional interpretation to others? How could someone for whom interpretation and language had been a lifelong love give it up because certain visions of post-1787 American constitutional structure suggested only judges and lawyers were supposed to participate? Even in *Federalist* 37, we see the guarded suggestion that *discussions* can help to ascertain meaning: “New laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.” Nevertheless, Madison also grasped—particularly as time passed—that the way in which constitutional questions were presented in litigation rather than as legislation might prove significant.

In an older, imperial world in which a Privy Council reviewed colonial legislation on its face for constitutional conformity, a law student or demi-lawyer such as Madison could play an important role.²⁸⁴ In a new American world of judges, cases and controversies, a new Supreme Court, a developing Supreme Court bar, and a growing American constitutional tradition, a demi-lawyer may have desired but also been less certain about a role. Just as Madison never “formed any absolute determination” to become a lawyer, so he hesitated to form an absolute determination about the role of lawyers and judges in the new republic.²⁸⁵

Appendix

Madison’s Selection of Heads from Salkeld’s *Reports*

This list represents the heads as they were printed in the front material for the third edition of Salkeld’s *Reports* (1731–1732).²⁸⁶ Brackets indicate heads for which Madison copied material but inadvertently omitted the head. A strike through indicates a head which Madison did not copy.

284. Bilder, “English Settlement and Local Governance,” 63–103.

285. Adair, “James Madison’s Autobiography,” 198.

286. Salkeld, *Reports* (3rd ed.), vols. 1 and 2, table of general titles [appears following table of cases]. Italics in original have not been shown. All *s*’s have been rendered as *s*. “Vide” references have been omitted. Entries under *I* and *J* have been left together as in original.

[Volume One]

Abatement
Account
Action in general
Action sur le Case
Action sur le Case sur Assumpsit
Actions popular
Admiralty
Administrator
~~Advowson~~
Age
~~Ale-houses~~
Aliens
Amendment
Amerciament and Fines
~~Antient Demesne~~
~~Annuity, Pension~~
Appeal
~~Appearance~~
Apportionment and Division
Apprentice
Arbitrament
Arrest of Judgment
Arrest de Corps
[Assets]
[Assignment]
Assize
Attachment
~~Attainder~~
Attorney and Solicitor
Attornment
~~Audita Querela~~
Avowry
~~Authority~~
Bail in Civil Cases
Bail in criminal Cases
Bailiff
Bankrupts
Bargain and Sale of Goods
Baron and Feme
Bastard
Bills of Exchange

~~Bishops, Archbishops~~

Breach in Actions of Debt, Covenant, Case, &c

~~By-laws~~

~~Carrier~~

Certiorari, Recordari

Challenge

Chancery

~~Chaplain~~

~~Charitable Uses~~

~~Churches, Chapels, Churchwardens, &c~~

~~Church of England, Religion, Dissenters, &c~~

~~Common~~

Condition

~~Confession~~

~~Conspiracy~~

Constable

Contempt

Continuance and Discontinuance

~~Convictions~~

~~Conuzance of Pleas~~

Copyhold and Copyholder

Coroner

Corporation

Costs

~~Cottages and Inmates~~

Covenant

Courts and Jurisdictions inferior

~~Customs~~

Damages

Debt

Deceit

Declaration

Deeds and Charters

~~Default~~

~~Defence~~

Demurrer

~~Deodand~~

Departure

Detinue

Devise

Discent

~~Discontinuance of Estate~~

Disseisin, Seisin
Distress
~~Distribution~~
Dower
Ejectment
Entry forcible
Error
Escape
~~Eserow~~
~~Estoppel~~
Evidence
~~Excommunicato capiendo~~
Executors
Execution
Exposition of Words
Extinguishment
~~Fairs, Markets and Tolls~~
~~False Latin~~
~~Failer of Record~~
Fees
Felony
~~Fences, Inclosures~~
~~Fines~~
Forgery
~~Franchises, Liberties, &c.~~
Gaming
~~Gaol~~
Grants
[Habeas Corpus]
~~Heir~~
~~Heriot~~
Highways, Rivers, Bridges
~~House and Building~~
~~House of Corrections~~
Jeofails
Imparlance
Incident, Appendant and Appurtenant
[Indictments, Informations, Inquisitions, &c]
~~Infant~~
~~Inns and Inn-keepers~~
~~Inrolment~~
Jointenant and Tenants in Common

Joint and Several
~~Journies Account~~
Issue General
~~Issues and Profits~~
Judge
Judgments
~~Jurisdiction~~
[Jury and Jurors]
~~Justices of Peace~~
~~Justification~~
[Volume Two]
~~Law Common, Canon, Civil, &c.~~
Leases
Legacy
~~Libellus Famosus~~
Limitations
~~London and the Customs thereof~~
~~Lunatick, Idiot~~
Mandamus
Marriages
~~Marshal and Marshalsea~~
Master and Servant
Merchants and Merchandize
Money
~~Monopoly~~
~~Monstrans de Droit~~
Mortgages
Motion
~~Names of Purchase and Dignity~~
Novel Assignment
~~Nisi Prius~~
Nonsuit
~~Notie~~
Nusances
Oaths and Affidavits
~~Obligation~~
~~Occupant and Occupaney~~
Offices & Officers
Office for the King
Orders of Justices of the Peace.
Outlawry
Oyer and Shewing of Deeds

~~Pardon General and Special~~
~~Palatine Counties of Chester, Durham, &c.~~
~~Parish, Ton, Vill, &c~~
Parliament
~~Parson, Vicar, and Curate~~
Pauper
Payment and satisfaction
~~Peers of the Realm~~
Perjury
Pleas and Pleadings
~~Pledge and Bailment~~
~~Poor, Poor's Rate, Vagrants, &c.~~
Powers
Prescription
~~Presentation, Admission, Institution, Induction~~
~~Principal and Accessary~~
~~Privilege of Persons~~
~~Privilege of Place~~
~~Prohibition and Consultation~~
Proof
Property
~~Quantum Meruit~~
~~Quare Impedit~~
Que Estate
~~Recognizance, Statutes, Elegit, Extent, &c.~~
Records
~~Common Recoveries~~
Recusants
Release and Defeasance
Remainder
Rents
Repleader
Replevin and Homine Replegeiando
Request
Rescue
Restitution
Return of Writs
Reversion
Revocation
Riots, Routs, and Unlawful Assemblies
Rules of Court
Scire facias

~~Service and Suit~~

Sessions General and Quarter

~~Sheriffs~~

Statutes in General and the Exposition thereof

Statutes of Hue and cry

~~Subsidies, Taxes and Customs~~

~~Surrender~~

~~Tail~~

Tender & refusal, Amends

Term time and Computation

~~Traverse~~

Treason

Trespass

Trial

~~Trover~~

~~Tithes~~

Variance

~~Verdicts~~

~~View~~

~~Villeins and Villenage~~

~~Visne~~

~~Universities and Schools~~

~~Void and Voidable~~

Uses and Trusts

~~Usury and Extortion~~

~~Wager of Law~~

~~Warranty~~

~~Waifs, Estrays~~

~~Weights and Measures~~

~~Wills and Testaments~~

~~Witnesses~~

~~Words~~

Writs