James Madison, Law Student and Demi-Lawyer

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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
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...

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. 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.

For this project, Madison presented a problem. He was, as Jack Rakove states, “not a lawyer.” 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. Madison’s

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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). 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.”

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


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

their path to law school teaching—but many of us, regardless of practical experience, can technically claim the title lawyer. 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.

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.” 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.”

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.” 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. 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.”
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

15. Ibid., 198.
16. Ibid., 200.
17. His library eventually had nearly 4,000 volumes. Most were sold by John Payne Todd.
“books & the order” in which you intend to read them. 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.” 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.” 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. Whether the law section reflects Madison’s reading or Madison’s solicitation of wider input is unknown.

21. Ibid.
22. Ibid., 101.
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

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”).
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.
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. 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. Yet, the land posed difficulties for Madison, who wanted “to depend as little as possible on the labour of slaves.” 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.”

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.” During the winter, he entered “on the course of reading which I have long meditated.” The great quantity of snow meant that Madison had “pursued my intended course of law-reading with fewer interruptions than I had presupposed.” 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.” 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.”

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.
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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{45} Rives knew Madison and had himself studied law with Jefferson.\textsuperscript{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.”\textsuperscript{47}

For Jefferson, law was “to be acquired from books.”\textsuperscript{48} As he noted, all one needed were the “books to be read, and the order in which they are to be read.”\textsuperscript{49} While Jefferson’s law reading lists would become increasingly wide-ranging and formidable, his early list reflected conventional advice.\textsuperscript{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.\textsuperscript{51}

In the 1780s, the one book that Madison recorded reading was Coke on Littleton.\textsuperscript{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

\textsuperscript{43} Madison to Randolph, July 26, 1785, \textit{PJM}, 8:327, 328.
\textsuperscript{44} See Madison to Jefferson, December 10, 1783, \textit{PJM}, 7:401 (describing sending “draught on your library”).
\textsuperscript{45} Rives, \textit{Life and Times}, 2:19.
\textsuperscript{46} See Drew McCoy, \textit{Last of the Fathers} (Cambridge: Cambridge University Press, 1989), 331–32.
\textsuperscript{47} Jefferson to John Garland Jefferson, June 11, 1790, \textit{PTJ}, 16:481; Jefferson to James Monroe, June 11, 1790, \textit{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).
\textsuperscript{49} Ibid.; see Jefferson to John Garland Jefferson, June 11, 1790, \textit{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.”
\textsuperscript{51} \textit{PTJ}, 16:481; see also Jefferson to Herault, July 5, 1787, \textit{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).
\textsuperscript{52} Madison to Edmund Randolph, March 10, 1784, \textit{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

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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]).

Colonial newspapers abound with booksellers’ notices of Salkeld’s *Reports* for sale. Even as late as 1798, law student Joseph Story learned that Salkeld should be one of the first reports read. 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.” 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. Six editions between 1717 and 1795 confirmed the value of the *Reports*. Other reports such as Vaughan and Raymond were considered less than accurate.

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,

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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.”).


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


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).


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 Wylly (e-mail from Laura Stalker, Huntington Library); Jaspar 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' some kind of action will lie for a Negro . . . I cannot say indeed y' these Cases are well reported, which must not surprise, as Sir Edward Coke observes y' there are [] erroneous Cases, in y' most accurate of all Reporters Plowden.”

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.

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. He told Jefferson that he planned to “import som[e] law-books” from London and Paris. He also was looking for “good books” on public law, the “constitutions of the several existing confederacies,” and “the Law of nature and Nations.” His notes on confederacies would later be used for *The Federalist Papers*.


73. Madison to Thomas Jefferson, February 17, 1784, *PJM*, 7:421.
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.” 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’ttee appointed to revise the laws.”

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. In the October 1784 session of the Virginia legislature, Madison chaired the committee for Courts of Justice. 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. 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.

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,” chiefly with a view of gaining from the Office of the Attorney [General Randolph] some insight into the juridical course of practice.” In February, Madison was granted an LLD from George Wythe at William and Mary. With admission to the Virginia bar controlled by the

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).
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 subsis-
tence” 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 distaste-
ful 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 revisal. 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?

86. Madison to Randolph, July 26, 1785, PJM, 8:328.
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.\textsuperscript{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.”\textsuperscript{91}

Although Rives knew Madison, he based these specific conclusions on an examination of a set of Madison’s notes on Salkeld’s \textit{Reports}. In 1858, Inman Horner, a Virginia lawyer, undertook to compare “the Manuscript Digest of Mr. Madison” with “the original Reports of Salkeld.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{94}

Unfortunately, these notes subsequently went missing. In 1962, the \textit{Madison Papers} editors included a listing for the manuscript in volume 1 but declared it “not found.”\textsuperscript{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 \textit{Reports}: a manuscript by Thomas Jefferson in the Library of

\textsuperscript{90} Rives, \textit{Life and Times}, 1:526.
\textsuperscript{91} Ibid., 512, 524.
\textsuperscript{93} Horner to Rives, November 27, 1858; see \textit{PJM}, 1:70.
\textsuperscript{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 is eminence as a Statesman,” with Rives, \textit{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, \textit{Life and Times}, 2:ix).
\textsuperscript{95} \textit{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” (\textit{PJM}, 1:71).
Congress, Thomas Jefferson Papers. 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.” The Notes were not reproduced in the printed Jefferson papers. Although they were microfilmed along with the other Jefferson papers, Jefferson scholars have not emphasized them.

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


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/mtjhtml/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.


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.\textsuperscript{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.\textsuperscript{102} Which attribution was correct? Could Rives and Horner have mistakenly assumed that notes taken by Jefferson were those of Madison?\textsuperscript{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.\textsuperscript{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).

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


\textsuperscript{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].

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. 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. 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. 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.

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.


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/mtjserv.html&linkText=6; with Notes, 7, http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=292&itemLink=/ammem/mtjhtml/mtjserv7.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/mtjserv5.html&linkText=6; with Notes, 10, http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=295&itemLink=/ammem/mtjhtml/mtjserv7.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/mtjserv5.html&linkText=6; with Notes, 6, http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=291&itemLink=/ammem/mtjhtml/mtjserv7.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.”\footnote{Wilson, “Jefferson’s Early Notebooks,” 440, 435; see Wilson, “Handwriting,” 193. For examples of round and Italian hands, see Ray Nash, \textit{American Writing Masters and Copybooks: History and Bibliography through Colonial Times} (Boston: Colonial Society of Massachusetts, 1959), plates III–V.} Madison’s early hand is far more ornate than his later hands.\footnote{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)).} 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.\footnote{See Notes, 21, http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=306&itemLink=%2Fammem%2Fmtj7html%2Fmtjser7.html&linkText=6. His Notes for Plan of Government (1788) also reveal use of the “y” and “y’s” 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))).} When taking draft notes, he used a shorthand filled with superscript abbreviations, in particular “y” and “y’s”—“that” and “the.”\footnote{Wilson, “Jefferson’s Early Notebooks,” 440, 435; see Wilson, “Handwriting,” 193. For examples of round and Italian hands, see Ray Nash, \textit{American Writing Masters and Copybooks: History and Bibliography through Colonial Times} (Boston: Colonial Society of Massachusetts, 1959), plates III–V.} Indeed, the editors of the \textit{Madison Papers} noted in the volume for 1784–1786 that they had expanded the thorns.\footnote{Wilson, “Jefferson’s Early Notebooks,” 440, 435; see Wilson, “Handwriting,” 193. For examples of round and Italian hands, see Ray Nash, \textit{American Writing Masters and Copybooks: History and Bibliography through Colonial Times} (Boston: Colonial Society of Massachusetts, 1959), plates III–V.} Words such as \textit{Stat., Parliament, Habeas corpus, case of,}
necessary, judge are identical to other examples in Madison’s writing from the 1780s.\textsuperscript{116} The style of page numbering is similar to the style Madison used for other early notes.\textsuperscript{117}

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

\textsuperscript{116} For \textit{Stat.}, compare Notes, 38 (near bottom of page), http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=323&itemLink=%2F mammem%2Ffmtjhtml%2Ffmtjsr7.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@lit(mjm012448)). For habeas corpus, compare Notes, 32, http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=317&itemLink=%2F mammem%2Ffmtjhtml%2Ffmtjsr7.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=mtj7&recNum=02/mjm02.db&itemLink=r?ammem@mjm:@FIELD(DOCID документов BAND(@lit(mjm012402))), For Case of, compare Notes, 19, http://memory.loc.gov/cgi-bin/ampage?collId=mtj7&fileName=mtj7page059.db&recNum=304&itemLink=%2F mammem%2Ffmtjhtml%2Ffmtjsr7.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=mtj7&recNum=02/mjm02.db&itemLink=r?ammem@mjm:@FIELD(DOCID документов BAND(@lit(mjm012448))); see \textit{PMJ}, 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=%2F mammem%2Ffmtjhtml%2Ffmtjsr7.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&itemLink=r?ammem@mjm:@FIELD(DOCID документов BAND(@lit(mjm012075))); and 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=mtj7&recNum=02/mjm02.db&itemLink=r?ammem@mjm:@FIELD(DOCID/documents 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=%2F mammem%2Ffmtjhtml%2Ffmtjsr7.html&linkText=6, with Madison, Notes for 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&itemLink=D@lit(mjm21:temp/-ammem_jkF2.

\textsuperscript{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/documents BAND(@lit(mjm0127 8)))).
late in life, Madison successfully “faked” Jefferson’s handwriting in altering a letter.\textsuperscript{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.\textsuperscript{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.\textsuperscript{120} Nevertheless, one interesting comparison did arise. In their important study of \textit{The Federalist Papers}, Frederick Mosteller and David Wallace suggested that \textit{also} was an important marker word for Madison, at least as against Hamilton’s writing.\textsuperscript{121} The Notes show a repeated use of \textit{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.”\textsuperscript{122} Or, adding to the fourth rationale in a case, “also that if disseisee [sic] devises, and after re-enters, ye devise is good.”\textsuperscript{123} Interestingly, this use of \textit{also} appears in occasion in Salkeld itself.\textsuperscript{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.\textsuperscript{125}

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

\textsuperscript{118} PTJ, 7:451; see Wills, \textit{James Madison}, 162.
\textsuperscript{119} See, for example, Frederick Mosteller and David L. Wallace, \textit{Applied Bayesian and Classical Inference: The Case of the Federalist Papers}, 2nd ed. (New York: Springer-Verlag, 1984).
\textsuperscript{120} See Mosteller and Wallace, \textit{Applied Bayesian}, 195, 243–48 (discussing variations among texts).
\textsuperscript{121} Ibid., 244, 252.
\textsuperscript{122} Notes, 5 (\textit{Harrison v. Cage}).
\textsuperscript{123} Notes, 24 (\textit{Bunter v. Coke}).
\textsuperscript{124} Compare Salkeld, \textit{Reports} (3rd ed.), 1:71; Notes, 9 (\textit{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.”).
\textsuperscript{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,” \textit{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


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).

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


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.).


law commonplace of Josiah Quincy Jr. 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? 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. 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. Even in legal scholarship on the Constitutional Convention, the influence of common-law traditions has been difficult to establish.


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


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.” Ann Blair’s scholarship on note taking provides an analytical approach to discussing notes. She explains, “To the cultural historian, . . . note taking is most interesting at a level between that of the universal and that of the individual.” Blair suggests that all note taking involves “basic maneuvers”: storing, sorting, summarizing, and selecting. 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.” 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 plusiers 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.
146. Ibid.
147. Ibid.
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. The first edition (1717–1718) had typographical errors that do not appear in the Notes. The second edition (1721–1722) lacked citations included in the Notes. 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


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 CW124040138 (vol. 1) and CW125289115 (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).\textsuperscript{152} This typographical error was fixed in the fourth edition, although the fourth is extremely close to the third.\textsuperscript{153} By the fifth edition (1773), so many citations appear added by George Wilson that Madison’s limited selection seems unlikely.\textsuperscript{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.\textsuperscript{155} The Monticello library

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.

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, un rushed, 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 common places were substantial in terms of their size or the number of volumes. The


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.


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 conveniencey 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).

An Abridgment of the Common Law (1725–1726) emphasized cases arranged in “clear and Alphabetical METHOD, under Proper Heads.” Giles Jacob produced the succinct The Common Law Common-placed (1726). Matthew Bacon’s five-volume New Abridgment of the Law (1736–1766) followed commonplace headings. 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.

The alphabetical approach to the common law was not merely “the want of any better system.” John Locke’s influential work on humanistic commonplacing promoted alphabetical arrangements. William Holdsworth remarked on “the extent to which the alphabet has dominated the literature of English law.” 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.” Although the method began to be abandoned in the early nineteenth-century United States, the alphabetical arrangement still underpins the West Digest System. Indeed, regardless of a treatise’s arrangement, an alphabetical index remains necessary.

165. Giles Jacob, The Common Law Common-placed: 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-placed . . . ([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).
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.
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 Hoefflich 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]).
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.
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, property, criminal law, procedure, torts, and institutions and personnel. 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 attainted), English citizenship (aliens), English regulatory

183. For example, account, assignment, bankrupts, bargain and sale of goods, bills of exchange, covenant, joint and several, merchants, merchandise, 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, dissent, disseisin, dower, ejectment, executors, grants, highways (rivers, bridges), incidents (appellant, appurtenant), joint-tenants and tenants in common, leases, legacy, marriage, master and servant, mortgages, nusances, oyer and shewing of deeds, records, rents, trespass, uses and trusts.

185. For example, arrest de corps, americaments & 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.)\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{192} The cases could be
read to suggest that slavery was only legal where authorized by positive

\textsuperscript{190} Reports (3rd ed.), 1:46 (case 2).
\textsuperscript{191} Reports (3rd ed.), 2:666 (explaining that “Negroes by the Law and Statutes of
Virginia, are saleable as Chattels”).
\textsuperscript{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 yt wd 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

195. Notes, 17 (Anon.).
196. Notes, 32 (header omitted) (page upside down in original).
right appears with *Highways, rivers, bridges*: “The subject has a right to fish in all navigable rivers, as he has in the sea.”

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 Parliam1 unless where ye right is determined or canot [sic] be determined in Parliamt. Judges may Judge of parliamentary matters incident to matters cognizable by them.”

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.

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. 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.” The relationship between the Notes and his legislative efforts, however, should not be overemphasized. Madison was on the
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.
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 Revival 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 adjd 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

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).
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 coverts; 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.”).
220. Ibid.
221. See Notes, 14, 15–16.
222. See Notes, 8, 9, 18, 23–26, 29–30, 34–35, 39.
location of the University of Virginia. 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.” 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.” 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. He uses the ampersand (& for and), superscripts (abatemt for abatement), the tilde (Exr for Executor), and the thorn (ȳ, ȳ for the and that). (This same technique can be observed in his copy of an October 24, 1787 letter to Jefferson.) He often decapitalized capital letters. He skipped case names often by the end. He made the occasional error. In one place he leaves out a “not,” leaving the case appearing to stand for the opposite result. He omitted occasional heads. He did not indicate

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225. Ibid., 1:526–527n1.
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.
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 Exr buy in debts or mortgages for less ȳ 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 jointenancy, tho’ it does not revoke a will. for jointenancies are odious in Equity. and that it may be for ye benefit of mort-  
gagor yt. Will s’d not be revoked, but not so y’jointenancy s’d be in danger of  
going from his representatives to the survivor.\(^{242}\)

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\(^{240}\) 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.

\(^{241}\) 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).
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


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, and differences depending on parchment or paper. He copied cases in which the presence of one word mattered. He copied cases in which the court concluded that the law should vary from the strict rule and those in which the court concluded that it could not vary from the strict rule. Disputes between the “intent of the Testator” and “the danger of suffering latitude of exposition,” cases where words were not taken according to their strict meaning, and theories on how to resolve matters “capable of different meanings,” were copied. What problems arose from the uncertainty of words? How did one interpret words in statutes? 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 wd make new writ. 2dly 8. H. 6. authorises amendâª only precedent to ye Jdgt. 3dly Writ of Error is com˜ission to Ct & they cannot amend their own Co˜ission”; 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 wch will support, not y¹ 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 & Co˜onality of London v. Wilks): “A Merchant includes all sorts of traders as well as properly merchant adventurers… A merchant-Taylor is a co˜on term”; ibid., 31 (Pope v. Sd Leger): “Wager concerning rule of a game, not within ye Stat. of Gaming.”
shall? What did particular words mean? What even counted as an “act.” 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.” His work on the Virginia revisal demonstrates similar concern. Madison’s notes on the criminal-law bill praised its “salutary innovations” of “proportion,” “compensation to injd. party,” and “perspicuity & certainty.”

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.”


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_IKIl:. 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. The word reappears in letters written during the Philadelphia Convention and his later correspondence. 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.”

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.


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.” 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.

He concluded, “this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.” 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.” 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 negativing power and council of revision. In Congress in 1789, he suggested departmentalism. 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. Yet he never completely rejected

272. Madison to James Madison Sr., December 3, 1784, *PJM*, 8:172. He grasped the “dilatory 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.
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.”

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). 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.”

Although recent studies have continued to demonstrate the relationship between his study during the 1770s and 1780s and his later political thought, demi-lawyer status plays no role. Jack Rakove has argued that “the framers worried about how the Constitution would be interpreted not as lawyers but as legislators.” 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?).


281. Banning, Sacred Fire of Liberty, 8.


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 study 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. 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.

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). Brackets indicate heads for which Madison copied material but inadvertently omitted the head. A strike through indicates a head which Madison did not copy.

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.
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
Conszance 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
Escrow
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.
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