

Blackstone and His American Legacy

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Abstract

William Blackstone in his *Commentaries on the Laws of England* (1765-1769) set forth themes that have contributed to several current American laws. His influence on the institution of law in America was profound. The morals and values inherent in the *Commentaries* are a major part of Blackstone's appeal to Americans and a reason why the *Commentaries* became the major resource for American statutory and case law for more than a century after the Constitution was written.

This paper is about the contributions of Blackstone's *Commentaries* to the U.S. Constitution and to American legal practice and education. It addresses key values of Blackstone and how these values applied to three areas in which Blackstone influenced American law and government. Those areas are: 1) the division of powers into executive, legislative and judicial as written in the U.S. Constitution; 2) Blackstone's influence on American law and leaders in law and government such as John Marshall and Abraham Lincoln; and 3) legal education in America. Blackstone's impact on American society is still evident and the moral content of his legal ideas is a major reason for this influence.

William Blackstone's four volumes *Commentaries On The Laws of England*, published from 1765-1769, clarified and explained the English common law. The *Commentaries* were popular in England and also had a strong impact on the legal system in America. This paper is about the great influence of the *Commentaries* on the U.S. Constitution, American law and leaders, and legal education.

Warden (1938) wrote, 'The law was particularly inexact in Blackstone's day because the common law was still in the formative stages. People in various sections of England held varying beliefs as to what the law was on particular subjects' (p. 152). Blackstone's *Commentaries* solidified legal thinking. They sold widely in England, and even more so in America, where most lawyers and judges for at least a century, the authors of the Declaration of Independence, the Federalist Papers, and the framers of the U.S. Constitution in 1787 took the *Commentaries* as the main authority on the British Constitution and all common law (p. 140-159).

Boorstin calls Blackstone's *Commentaries* 'a classic – perhaps the most important single book – in the history of the common law' (Boorstin, 1941, p. viii) and compares it to Justinian's *Institute* (Justinian I, trans. 1987), written 14 centuries earlier. He states that Justinian's role in the reception of the civil, or Roman, law in Western Europe (see Curzon, 1979, p. 59) was matched by Blackstone's role in the reception of the common law in America (Boorstin, 1941, p. ix).

Blackstone, born in 1723, became a lawyer after studying architecture and mathematics at Oxford University, and receiving what he considered an inadequate legal education at the Inns of Court in London. In 1753, having been denied an appointment as Professor of Civil Law, he organised a private course in English Law at Oxford: the first series of lectures on English Law ever presented at an English University (Alschuler, 1994, p. 897). The lectures, published as the *Commentaries*, were his major work and an immediate success (Walker, 1980, p. 136). Blackstone became the first Vinerian Professor of English Law in 1755, a Member of Parliament for Westbury in 1761, and for the last ten years of his life was a Judge of Common Pleas. He died in 1780 (Cross & Hand, 1971, p. 391).

The *Commentaries*, published from 1765- 1769, quickly came to influence American law, including the U.S. Constitutional Convention in Philadelphia in 1787. The division of powers in the U.S. Constitution and other American laws reflect the *Commentaries*, often very closely. Still, certain American ideas, such as religious freedom, the right to public assembly, free speech and accommodating slavery became part of the U.S. Constitution, and ran counter to certain ideas in the *Commentaries* (Altschuler, 1996, p. 20-36). As in Australian legal history, which has not been 'merely an appendix to English legal history' (Windeyer, 1959, p. 296), so also in American history the framers of the U.S. Constitution addressed the unique legal lessons of their country.

Blackstone affected American law not only in the writing of the U.S. Constitution, but also in legal practice. After a discussion of Blackstone's values, the impact of Blackstone's *Commentaries* on the U.S. Constitution and the shaping of American law and legal education will be addressed.

Blackstone's Values

At the heart of the *Commentaries* is a core of social and moral values which Blackstone felt had to be defended. 'These central beliefs ... enabled him to make the *Commentaries* a persuasive, rational, exposition of the laws of England'. His values begin with natural law, a gift from God which garners us liberty as individuals. For Blackstone, liberty means both individual free will and also absolute and subordinate individual rights. Then, liberty gives people the free will and rights to build a constitution with a division of powers and the right to fair laws. The resulting legal system should allow for the free will of individuals, without infringing on the rights of others (Boorstin, 1941, p. 8, 156).

Natural Law

Blackstone (1765/1979) stressed the importance of natural law. 'The law of nature is a supreme, unvariable and uncontrollable rule of conduct to all men' (Vol. 1, p. 39). He stated that, 'the law of nature, being co-eval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times' (Vol. 1, p. 41). Professor Duncan Kennedy noted that Blackstone 'affirmed the congruence of the natural law and the law of England, so that there never was a need for the judge to choose between the two' (Kennedy, 1979, p. 241).

Blackstone, a practising member of the Church of England, saw natural law as given by God. The Enlightenment view of natural rights, derived from reason and experience, was different in origin and in application from Blackstone's view of natural law. 'The eighteenth-century Enlightenment's doctrine of 'natural rights' is not at all identical with the venerable Catholic and Anglican doctrine of natural law, nor with Blackstone's version of natural law' (Kirk, 1994, p. 1040).

Blackstone (1765/1979) noted, 'In a democracy, where the right making of laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found Popular assemblies ... generally mean to do the thing that is right and just' (Vol. 1, p. 49). Blackstone's concept of natural law seems to reflect what is fair and just, especially in a democracy, as noted above. The idea of passing a fair law is supported by the concept of natural law which Blackstone enunciated so clearly. The concept of fairness influences many American laws, such as due process as found in the Fifth and Fourteenth Amendments to the U.S. Constitution.

Liberty

For Blackstone, the overall concept of liberty flows from natural law and includes individual free will and the three absolute rights of life, liberty and property as well as the subordinate rights (Vol. 1, chap. 1). He wrote, 'the absolute rights of man ... are ... summed up in one appellation ... the liberty of mankind. This natural liberty ... being a right inherent in us as birth, and one of the gifts of God to man at his creation, when He imbued him with the faculty of free will' (Vol. 1, p. 125). Blackstone's values of free will, absolute rights and subordinate rights are found in the U.S. Constitution. This connection is noted as Blackstone's values are further discussed below.

Free Will

Free will for Blackstone meant that an individual was both free to make laws, and also to disobey laws he or she considered against the just natural law, as long as he or she is willing to pay the penalty (Boorstin, 1941, p. 158). Blackstone reasoned, 'the alternative is offered to every man; either abstain from this, or submit to such a penalty. And his conscience will be cleared whichever side of the alternatives he thinks proper to embrace' (1765/1979, Vol. 1, p. 58). This idea could be seen to justify the American Revolution itself in defying the *Stamp Act* and other taxation by England, as well as later civil disobedience by Martin Luther King and others in the Civil Rights Movement of the 1960's.

Absolute Rights

Blackstone (1765/1979) held that there are three absolute rights for the individual. The absolute rights are (a) life (which can mean personal security), (b) liberty, and (c) property. These three absolute rights are mentioned, probably due to the influence of Blackstone, in the Fifth and Fourteenth Amendments of the U.S. Constitution. 'The absolute rights of every Englishman, ... as they are founded on nature and reason, so they are co-eval with our form of government; though subject at times to fluctuate and change; their establishment (excellent as it is) being still human' (Vol. 1, p. 123). He felt that society must protect these rights; 'the principal aim of society is to

protect individuals in the enjoyment of those absolute rights which were vested in them ... ' (Vol. 1, p.124).

Life (Personal Security)

'The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation' (Vol. 1, p. 127). 'Both life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them' (Vol. 1, p. 130). Personal security, in addition to protecting one's enjoyment of one's life and limbs, also furnishes necessities. 'For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community' (Vol. 1, p. 131). The right to personal security as noted by Blackstone has been considered recently in America, to apply to stop discrimination such as harassment (Robertson, 1999).

Liberty

The second absolute right, liberty, is a specific right to go where one chooses, which is one of three absolute rights which flow from the larger, encompassing idea of freedom or liberty. 'This personal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law' (Blackstone, 1765/1979, Vol. 1, p.134).

Blackstone condemns slavery in the section of the *Commentaries* which discusses the liberty right. '[T]his spirit of liberty is so deeply implanted in our constitution... that a slave... the moment he lands in England, becomes a free man' (Vol. 1, p. 127). Many of the framers of the U.S. Constitution owned slaves. Blackstone's anti-slavery position was not made part of the U.S. Constitution. It was not until nearly a century after the U.S. Constitution was ratified, after the Civil War, that the Thirteenth Amendment made slavery unlawful, and the Fourteenth Amendment conferred full citizenship on the newly freed slaves.

Property

For Blackstone, property was probably seen as the most important of the three absolute rights. 'So great, moreover, is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community' (Vol. 1, p. 139). To Blackstone, property is an absolute right vested in the individual by natural law as opposed to John Locke's idea that property rights depended on a social compact, on society's recognition that the owner 'had made something his own by mixing his labor in it' (Burns, 1985, p. 67).

Blackstone stated that, by natural law, 'every man has ... a power over his own property' (1765/1979, Vol. 1, p. 448). Reflecting these words of Blackstone's, the Taking Clause of the Fifth Amendment to the United States Constitution states, 'private property [shall not] be taken' (Garnett, 1999, p. 120).

England was becoming rich from trade and commerce when Blackstone wrote the *Commentaries*. 'This growth of the commercial form of property enabled Blackstone to make

property the quintessence of all man's natural rights' (Boorstin, 1941, p. 183). Blackstone noted, 'The English know better than any other people upon earth how to value at the same time these three great advantages, religion, liberty, and commerce' (1765/1979, Vol. 1, p.261).

Subordinate (Auxiliary) Rights

Blackstone argued that the three absolute rights of life (personal security), liberty, and property, would be 'dead letters' without the five auxiliary rights (Cottrol & Diamond, 1991, p. 323, n. 46; Blackstone, 1765/1979, Vol. 1, p. 140).

Blackstone's subordinate or auxiliary rights are listed below with the place they are included in the U.S. Constitution.

- a) The constitution, powers, and privileges of parliament. (U.S. has a written Constitution, with legislative powers in Article II)
- b) The limitation of the king's prerogative. (U.S. has checks and balances on the executive branch, including impeachment, power to override a veto, and federal judges appointed for life, not subject to executive control)
- c) Applying to the courts of justice for redress of injuries. (U.S. provides for this in the judicial powers, Article III)
- d) The right of petitioning the king, or either house of parliament, for the redress of grievance. (U.S. provides for this in the First Amendment, Article I, the Legislative provisions, and in the outgrowth of administrative law from the executive powers in Article II)
- e) The right of having arms for defense. (The Second Amendment calls for this)

(Blackstone, 1765/1979, Vol. 1, pp. 140-143)

Just as with the absolute rights, all of Blackstone's subordinate rights are recognised in the U.S. Constitution, as noted above.

U.S. Constitution

The most distinctive feature of the British Constitution in the 18th century was the separation of powers of government (Holdsworth, 1938, Vol. 10, p. 713). Blackstone's description of this in the Commentaries closely resembles the structure of government later established in Article I, Article II, and Article III of the U.S. Constitution.

The U.S. Constitution consists of a brief Preamble, then two major parts. The first major part is the Articles which set up the structure of the American government in three branches, legislative, executive and judicial. The second part consists of the Amendments of the Constitution, including the Bill of Rights which is the first Ten Amendments and which was ratified by the constitutional convention along with the Preamble and the Articles in 1787.

Since the U.S. Constitution was ratified, 17 other Amendments have been added, so that now there are 27 Amendments. Blackstone's *Commentaries* seem to have influenced the

Preamble, the Articles and the Bill of Rights of the Constitution, as well as some of the Amendments added later, such as the Thirteenth and Fourteenth.

The Preamble

The Preamble, which begins, ‘We the People of the United States ...’, includes as one of the purposes of the U.S. Constitution, to ‘secure the Blessings of Liberty to ourselves and our Posterity’. This has the sound of Blackstone’s natural law idea of liberty as a blessing from God, and his closing words to his students in the last lines of the *Commentaries*. ‘The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves who enjoy it, their ancestors who transmitted it down, and to their posterity’ (Blackstone, 1765/1979, Vol. 4, p. 443).

The Articles of the U.S. Constitution

‘In setting up the three-fold system of the Constitution Blackstone influenced the [1787 U.S. Constitutional] convention especially. ... The members of the Convention seemed to have taken the *Commentaries* ... as a guide in their task’ (Warden, 1938, p. 337).

Montesquieu (1750/1949) held that the separation of powers was the reason the British Constitution was excellent. Without a separation of powers, ‘there is no liberty’ (Vol. 11, p. 151). For Blackstone, who appreciated the separation of powers, the great merit of the British Constitution was the theory of checks and balances (Windeyer, 1959, p. 247). In the British Constitution, ‘all the parts of it form a mutual check upon each other. The three parts, each part regulates and is regulated by the rest’ (Blackstone, 1765/1979, Vol. 1, p.154).

‘While the whole is prevented from separation and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate ... they jointly impel the government in a direction ... which constitutes the true line of liberty – the happiness of the community’ (Blackstone, 1765/1979, Vol. 1, p.154-155). As Blackstone noted above, the executive power (king or queen) in the British Constitution connected the three branches of government by playing a role in each one. This was made a part of the U.S. Constitution also, with the executive (president) checking and being checked by each branch.

This separation of powers in the British Constitution is closely paralleled in Article I (Legislature), Article II (Executive) and Article III (Judicial) of the U.S. Constitution.

Article I - Legislature

The U.S. Constitution in Article I established the two-house legislature to be similar to the two houses of Parliament that Britain’s Constitution provided for. The House of Representatives corresponds to the House of Commons and the Senate to the House of Lords. Blackstone regarded the division of the legislative power between the king, the House of Lords and House of Commons as essential (Vol. 1, p. 155).

Blackstone wrote that a branch at least of the British bicameral legislative power, the House of Commons, should reside in the whole body of the people (Vol. 1, p. 158). The U.S. House of Representatives reflects Blackstone’s idea of one house for the people. Each state’s

number of representatives and thus the number of electors (equal to the number of representatives plus the two senators) to elect a president is determined by a population count (U.S. Const. art. I, §2).

To determine how many people to count in taking the census of a state, the framers debated how to count the number of slaves in a state. In 1787, slavery was legal in America. A compromise was agreed to regarding counting slaves in a state census. The U.S. Constitution, in recognising ‘three fifths of other persons’ (U.S. Const. art. I, § 2, in reference to slaves) to be counted, reflected an accommodation. Those framers who did not want to count the slaves in the census of a state (mainly from northern states) compromised with those who wanted to count the number of slaves in a state in the census (mainly from southern states). This three-fifths designation was changed nearly a century later with the Fourteenth Amendment. The Senate, comparable to the House of Lords, is composed of the same number (two) of senators from each state, large or small, and each senator has one vote (U.S. Const. art. I, § 3).

In the *Commentaries*, the two British legislative houses hold checks on each other and on the executive. ‘In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both. And the executive power is checked by the two houses, which have the power of impeachment and punishing the conduct of the king’s counsellors’ (Blackstone, 1765/1979, Vol. 1, p. 154, 155).

The U.S. Constitution, similarly, provides for the House of Representatives and the Senate to keep checks on each other, by requiring both houses to sign a bill before it becomes law, and the president can veto the legislation both houses pass. The executive power is checked by a possible two-thirds legislative override of the veto. (U.S. Const. art. I, § 7) Impeachment of the president by Congress is provided for (U.S. Const. art. I, § 4), which adapts the impeachment process of the British executive in the *Commentaries* to the U.S. executive. Just as the British king may address the Parliament, the American President may deliver a state of the union address to Congress yearly (U.S. Const. art. II, Sec.3).

Blackstone wrote, ‘that no one should sit or vote in either house, unless he is 21 years of age’ (1765/1979, Vol. 1, p. 162). The U.S. Constitution states that a person must be 25 years of age to sit in the House of Representatives (U.S. Const. art. I, § 2) and 30 years old for the Senate (U.S. Const. art. I, § 3).

In the *Commentaries*, Blackstone (1765/1979) makes a division, in which the British Constitution holds that the executive branch can make treaties and run foreign matters and Parliament shall be primarily responsible for domestic matters (with checks on each by each other) (Vol. 1, p. 252). This same division between duties was placed in the U.S. Constitution in Article I. Authority over the domestic affairs is granted to the legislative branch with checks and balances.

Blackstone wrote, ‘with regard to taxes: it is the right of the house of commons that all grants or subsidies begin in the house’ (Vol. 1, p. 169). Copyright is mentioned in the *Commentaries* as ‘the natural claim of a man to the product of his labor’ (Vol. 2, p. 406-408). The U.S. Constitution also has revenue bills begin in the lower house, and asserts the power of Congress to collect taxes and establish copyright laws (U.S. Const. art. I, § 8).

Blackstone (1765/1979) had a strong belief in legislatures and the statutes they produced. To Blackstone, the legislatures and the monarchy kept checks on each other. '[O]ne of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them' (Vol. 1, p. 237).

Article II - Executive

On executive power, Blackstone wrote, 'The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen' (Vol. 1, p. 190). The U.S. Constitution's language is, 'The executive power shall be vested in a President of the United States of America' (U.S. Const. art. II, § 1). This sentence is the basis for administrative law in America, which covers the regulations of Federal departments, Executive Orders and other laws made by the executive branch.

As noted above, the executive branch (king) as seen in the *Commentaries* gives a certain cohesion to the three divisions of power, by being given some role in both the legislative and judicial branches. The British model for this in the *Commentaries* was utilised in the U.S. Constitution, where the president has some duties, subject to checks, in all three branches (Warden, 1938, p. 338).

In the *Commentaries*, the king is 'the fountain of justice and general conservator of peace of the kingdom' (Blackstone, 1765/1979, Vol. 1, p. 266). In the U.S. Constitution, the president 'shall take care that the laws be faithfully executed, and shall commission all officers of the United States' (U.S. Const. art. II, § 3). In the *Commentaries*, 'our kings have delegated their whole judicial power to the judges', whom the king appoints, and 'the judges are continued in their offices during good behavior' (Vol. 1, p. 268). In the U.S. Constitution, the president appoints, with the consent of the Senate, all federal judges (U.S. Const. art. II, § 2), who 'shall hold their offices during good behavior' (U.S. Const. art. III, § 1).

Blackstone (1765/1979) wrote, 'with regard to foreign affairs, the king is the representative of his people, what is done by the royal authority, with regard to foreign affairs is the act of the whole nation. The king sends ambassadors to foreign states' (Vol. 1, p. 252, 253). It is also the king's prerogative to make treaties and alliances with foreign states (Vol. 1, p. 257). The U.S. Constitution also gives authority over foreign affairs to the president, to make treaties, set foreign policy, and appoint ambassadors (U.S. Const. art. II, § 2).

In the *Commentaries*, 'The king is considered... the first in the military command' (Blackstone, 1765/1979, Vol. 1, p. 261). The U.S. Constitution states that, 'The president shall be considered the Commander in Chief of the Army and Navy' (U.S. Const. art. II, § 2). However, the *Commentaries* provide for the king to declare war and raise and support armies (Blackstone, 1765/1979, Vol. 1, p. 258, 262) and the U.S. Constitution establishes that Congress shall declare war and raise and support armies (U.S. Const. art. II, § 8).

Article III - Judicial

Blackstone (1765/1979) regarded the independent position of the courts as the most essential safeguard of constitutional liberty. He wrote, 'In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists our main preservation of the public liberty; which cannot long subsist in any state, unless the administration of common justice be in some degree separated from both the legislative and also the executive power' (Vol. 1, p. 269). The U.S. Constitution, Article III, establishes the judicial branch as separate from the legislative and executive branches.

Blackstone supported the positive nature of juries, and wrote that a jury means 'the unanimous consent of twelve of his neighbours' (Vol. 1, p. 379). In the *Commentaries* he described jurors and different trials by juries and traced the origin of juries to the earliest Saxon colonies (Vol. 3, p. 349). He stated, 'Upon these accounts the trial by jury ever has been, and I trust ever will be looked upon as the glory of the English law, and it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases' (Vol. 3, p. 379). Reflecting this support for the right to a jury for crimes, the U.S. Constitution provides, '[t]rial of all crimes, except in case of impeachment, shall be by jury' (U.S. Const. art. III, § 2).

Court access was an important subordinate right for Blackstone, both in common law and equity courts (called Chancery courts). The use of both common law and equity courts was mentioned at length in the *Commentaries*. Blackstone referred to common law and equity as 'the separate jurisdictions now existing in England, but which never were separated in any other country in the universe' (1768, Vol. 3, p. 441). Blackstone noted the differences between common law and equity, such as; in equity there is no jury, often the mode of proof is the conscience, and the injunction was named as a remedy in equity (Vol. 3, pp. 432-438). None of these applied to common law.

Perhaps because of the influence of the *Commentaries* on the framers of the U.S. Constitution, both law and equity are included in the U.S. Constitution. 'The judicial power shall extend to all cases, in law and equity, arising under the Constitution' (U.S. Const. art. III, § 2). In 1938, the U.S. Supreme Court joined equity and law, so that today equity and law may be heard in the same court, by the same judge, but with different rules (Miles, 1997, chap. 1).

Thus the first three Articles of the U.S. Constitution set up the separation of powers and checks and balances in nearly the same manner as the *Commentaries* portrayed the British Constitution, regarding the same three branches of government, as found in the *Commentaries*. The similarity is striking. Certain critics of Blackstone's *Commentaries*, including Bentham held that the British executive power and the separation of powers were never in fact as Blackstone described them in the *Commentaries* (Bentham & Harrison, 1776/1967, p. 71, 72). Supporters of Blackstone counter that Blackstone wrote what was the law of England and not the actual experience (Windeyer, 1959, p. 246-249). The U.S. Constitution, especially in the division of powers, reflects what Blackstone wrote in the *Commentaries*.

Four other Articles are listed after the division of powers in the U.S. Constitution. Article IV deals with the States, and Article V with proposing Amendments to the Constitution. Article VI

states that 'the Constitution shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby'. Article VII establishes how to ratify the Constitution.

The Bill of Rights

The second major part of the U.S. Constitution, as ratified with the Preamble and Articles in 1787, is the Bill of Rights, which is the first Ten Amendments to the U.S. Constitution. This U.S. Bill of Rights limits government power over individual rights. It is probably influenced by the English Bill of Rights of 1688 which limits the king or queen's power over individual rights and which Blackstone commended in the *Commentaries* (Blackstone, 1765/1979, Vol. 1, p. 129, 144).

In the English Bill of Rights of 1688, the divine right of kings was countered with natural law and individual rights. It stopped the power of the king from ever dispensing Parliament, and listed individual rights not to be interfered with by the crown, such as no cruel and unusual punishment. The framers of the English Bill of Rights adopted the theory that the government was the agent of the people, and could be dismissed by the people (Holdsworth, 1938, Vol. 10, p. 284). Blackstone wrote that the English Bill of Rights of 1688 recognises 'all and singular the rights and liberties asserted and claimed in the said declaration to be in the true, ancient and indubitable rights of the people of this kingdom' (1765/1979, Vol. 1, p. 128).

The U.S. Constitution, in establishing the U.S. Bill of Rights, used certain of the rights listed in the English Bill of Rights, and added new rights of individuals from government power, such as freedom of religion and freedom of assembly. Blackstone's *Commentaries* had an impact on the U.S. Bill of Rights, including the listing of certain subordinate rights, such as the freedom to petition and the right to bear arms (also in the 1688 English Bill of Rights, for Protestants only). The *Commentaries* also note ideas later seen in the U.S. First Amendment, such as freedom to petition and freedom of the press. Blackstone wrote that the liberty of the press is essential to the nature of a free state, and this means putting no previous restraints on publications. However, publishing what is improper or illegal may result in a fair trial and possible censure (Vol. 4, chap. 11). The U.S. Constitution took a wider view of freedom of the press, and held that government could not restrain the press either before or after publication.

The U.S. Constitution's Second Amendment on the right to bear arms, and the Fifth Amendment in which all of Blackstone's absolute rights are mentioned, show Blackstone's influence, as do the Amendments that refer to juries (Fitzgerald, 1982, p. 1224-1229). The Fifth Amendment provides for an indictment by a Grand Jury before trial is held for 'a capital, or infamous crime'. The Sixth Amendment provides for an 'impartial jury' in 'all criminal prosecutions'. The Seventh Amendment establishes, 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'. These are among the first Ten Amendments, known as the Bill of Rights, which was ratified with the Preamble and Articles in 1787 as the U.S. Constitution.

All later Amendments, from the Eleventh through the Twenty-seventh Amendment, have been passed after the U.S. Constitution was ratified. They were added to the original Ten Amendments in the Bill of Rights, and all Amendments are listed together in the U.S. Constitution, after the Articles. Some later ones, such as the Thirteenth and Fourteenth Amendments, bear the

influence of the *Commentaries*. Thus, Blackstone's influence on the U.S. Constitution was significant.

Blackstone's Influence On American Legal Leaders And Laws

Blackstone had great influence on American law, and on government and legal leaders. Although he (1765/1979) denied in the *Commentaries* that Americans had the common law rights of British subjects (Vol. 1, p. 105) and voted for the Stamp Act as a Member of Parliament (Vol. 1, p. iv), through his *Commentaries* he unintentionally 'taught American Revolutionaries their rights' (Alschuler, 1996, p.15). The *Commentaries*, published in America in 1772, became the 'fountain head' of much of American common law (Alschuler, 1996, p. 2).

The *Commentaries* became 'both the only law school and the only law library most American lawyers used to practise law in America for nearly a century after they were published. For generations of American lawyers, including Abraham Lincoln ... the only law most American lawyers studied and knew, with the scarcity of law books and the limitations of life on the frontier, the *Commentaries* became the bible of American lawyers' (Boorstin, 1941, p. ix, 4). Blackstone was received differently in the U.S. from other common law countries. An Australian author, writing on Blackstone's bicentenary in 1980, hoped that this event 'will be treated in Australia with respect, if not with reverence, as in the United States it will be most certainly' ('Bicentenary', 1980, p.186).

Abraham Lincoln, with almost no formal education, read Blackstone's *Commentaries* as a young store clerk, decided to become a lawyer on the strength of the *Commentaries*, and referred to them all his life. Blackstone's strong statements against slavery were likely influential in Lincoln's own position. Lincoln reflected Blackstone in his speeches, including his Gettysburg Address. Lincoln always advised the *Commentaries* as the first and foremost study for young men who have chosen to be lawyers. Lincoln admired Blackstone for his philosophy and values (Warden, 1938, p.334).

Chief Justice John Marshall of the U.S. Supreme Court, who shaped U.S. law and government for 30 years in the early growth of America, read the *Commentaries* first when he was sixteen. His parents had ordered the *Commentaries* as a present, with the hope that Marshall would become a lawyer. He was a backwoods farmer in frontier Virginia and fought in the war to win American Independence. He loved the style of the *Commentaries*, and said, 'this legal classic is the poetry of law, just as Pope is logic in poetry'. Marshall's opinions were in many respects 'an echo of Blackstone'. He relied on the *Commentaries* from the U.S. Supreme Court bench to apply the ideas present there to develop torts and contract laws and other key issues such as federal government power over the states. Thus, Blackstone influenced the later development of these laws in the U.S. (Warden, 1938, p. 325-329).

U.S. Supreme Court Justice Hugo Black worked to impress upon the American judicial system that the Fourteenth Amendment applies the Bill of Rights to the States, in the major racial desegregation cases of the 1950's and 1960's. For Black, the use of due process and equal protection in such cases was considered as reflecting natural law as understood by Aristotle, Thomas Aquinas, Blackstone and others (Miles, 1997, p. 15).

Blackstone's descriptions in the *Commentaries* of the types of courts and traditions concerning lawyers seem to have influenced American legal practice. He gives specific descriptions of the types of courts, jurisdiction and the duties of judges and lawyers. Blackstone noted that attorneys are officers of the respective courts in which they are admitted, and wrote that the Statute for Hen. IV. C. 18 (1403) holds that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned and sworn to do their duties. Blackstone noted that a lawyer is not answerable for any matter by him spoken related to the cause in hand and suggested in his client's instruction. Counsel guilty of deceit or collusion are punishable with possible imprisonment and perpetual silence in the court (1768, Vol. 3, chap. 3). These practices are followed today in U.S. law.

In modern times, when a question arises about the meaning of the U.S. Constitution, judges and scholars still turn to Blackstone to understand the U.S. Constitution. For example, Biegon (1996), in his article about presidential immunity in civil actions, refers to the *Commentaries*. Also, the U.S. Supreme Court cites Blackstone in its opinions about 10 times a year (Alschuler, 1996, p.16).

Legal Education In America

Blackstone helped shape the structure of legal education in America by suggesting the beginning of law schools, by emphasising the teaching method of clear lectures, by teaching the content of both legal substance and procedures and by developing a plan for a law school at Oxford University.

In the mid 18th century, British legal education was in decay (Cross & Hand, 1971, p. 391). On the eve of the publication of Blackstone's *Commentaries*, one barrister wrote, 'the laws, by their number, their bulk, and their obscurity, are become almost a wilderness to the professors'. The *Commentaries* 'gave legal literature at least a veneer of scholarly respectability' (Lemmings, 1998, p. 242, 249, 252).

Watson (1988) wrote, 'What must be emphasised for Blackstone's treatment is that he wished to set forth a systematic exposition of English law for teaching purposes.... To make law systematic ... he had to treat substantive law separately from procedure'. Thus, Blackstone in the *Commentaries* treated substantive law as legal rights, and covered them in volumes 1 and 2. He treated legal procedure as a matter of remedy for wrongs, and called them legal wrongs and covered them in volumes 3 and 4 (p. 810).

Blackstone took his plan for a College of Law at Oxford University to the Oxford Convocation. However, the Convocation rejected it. It is from Blackstone's plan for this College that the first law schools, including Harvard Law School, were established in America (Warden, 1938, p.347). The American law schools, which grew from Blackstone's plan as it was adapted to the U.S. have had a great effect on American legal practice and judicial decisions.

Conclusion

Blackstone, in his *Commentaries on the Laws of England* (1765-1769), exposed and explained ideas that were taken seriously by early American lawyers and the writers of the American

Declaration of Independence and the U.S. Constitution. His influence is still important today in the U.S. Constitution, American law practice, government and legal leaders and legal education.

The legacy Blackstone left to America in his influence on the U.S. Constitution is a monument in itself. In a difficult time for the nation, such as the resignation of President Richard Nixon during the 1970's Watergate problems, or the long uncertainty of which candidate won a presidential election in 2000, an American leader can assure the American people, as former President Gerald Ford has, 'Our Constitution works'. Blackstone's *Commentaries* certainly assisted at the creation of the U.S. Constitution.

Even if Blackstone's *Commentaries* is an unread classic, the very phrases which the lawyer uses every day attest to the pervasive influence of Blackstone in American laws (Boorstin 1941, p. iv). This is much like the pervasive influence in American universities of John Henry Newman's *The Idea Of The University* (1927 version), which explains concepts which are used regularly by academics who often consider the work an unread classic. Many ideas in Blackstone's *Commentaries* have become woven into the fabric of American law.

References

- Alschuler, A. W. (1994) Sir William Blackstone and the shaping of American law. 144 *New L. J.* 896.
- Alschuler, A. W. (1996) Rediscovering Blackstone. 145 *U. Pa. L. Rev* 1.
- Bentham, J., & Harrison .W. (Ed.) (1967) *A Fragment On Government*. Oxford, England: Basil Blackwell. (Original work published 1776).
- Bicentenary of the death of Sir William Blackstone. (1980) *Australian Law Journal*, 54(4), 185-186.
- Biegon , B. E. (1996, May) Presidential immunity in civil actions: An analysis based upon text, history and Blackstone's Commentaries. 82 *VA. L. Rev.* 677.
- Blackstone, W. (1979) *Commentaries on the Laws of England: A facsimile of the first edition of 1765-1769, with an introduction by Stanley N. Katz.* (Vols. 1-4). Chicago: The University of Chicago Press.
- Boorstin, D. J. (1941) *The Mysterious Science of the Law, An Essay on Blackstone's Commentaries*. Boston: Beacon Press.
- Burns, R. P. (1985) Blackstone's theory of the 'absolute' rights of property. 54 *U. Cin. L. Rev.* 67.
- Cottrol, R. J., & Diamond, R. T. (1991, December) The Second Amendment: Toward an Afro-Americanist reconsideration. 80 *Geo. L. J.* 309.
- Cross, L., & Hand, G. (1971) *The English Legal System*. (5th ed.). London: Radcliffe & Cross.
- Curzon, L. (1979) *English Legal History*. (2nd ed.). Plymouth, England: MacDonald & Evans.
- Fitzgerald, P. (1982, June) An English bill of rights? Some observations from her majesty's former colonies in America. 70 *Geo. L.J.* 1229.
- Gareau, D. M. (1995) Opening the courthouse doors: Allowing a cause of action to arise directly from a violation of the Ohio Constitution. 43 *Clev. St. L. Rev.* 459.

- Garnett, P. W. (1999, Winter) Forward-looking costing methodologies and the Supreme Court's Takings Clause Jurisprudence. 7 *CommLaw Conspectus* 119.
- Holdsworth, W. S. (1938) *A History of English Law, 1903-1938*. (6th rev. ed., Vol. 1-12). Boston: Little, Brown.
- Justinian, I. (1987) *Justinian's Institutes*. (P. Birks & G. McLeod, Trans. with an introduction). Ithaca, NY: Cornell University Press.
- Kates, D. B., Jr. (1983) Handgun prohibition and the original meaning of the Second Amendment. 82 *Mich. L. Rev.* 204.
- Kennedy, D. (1979) The structure of Blackstone's Commentaries. 28 *Buff. L. Rev.* 205.
- Kirk, R. (1994) Natural law and the Constitution of the United States. 69 *Notre Dame L. Rev.* 1035.
- Lemmings, D. (1998) Blackstone and law reform by education: Preparation for the bar and lawyerly culture in eighteenth-century England. 16 *L. and Hist. Rev.* 211.
- Miles, A. S. (1997) *College Law*. (2nd ed.). Northport, AL: Sevgo Press.
- Montesquieu, C. (1949) *The Spirit of the Laws*. (T. Nugent, Trans.; introduction by Franz Neumann). New York: Hafner. (Original work published 1750)
- Newman, J. H. (1927) *The idea of a university defined and illustrated: I. In nine discourses delivered to the Catholics of Dublin. II. In occasional lectures and essays addressed to the members of the Catholic University*. London: Longmans.
- Robertson, J. E. (1999, Winter) Cruel and unusual punishment in United States prisons: Sexual harassment among male inmates. 36 *Am. Crim. L. Rev.* 1.
- Turner, R. (1994) *Judges, Administrators and The Common Law In Angevin England*. London, England: Hambledon Press.
- Walker, D. (1980) *The Oxford Companion to Law*. Oxford, England: Oxford University Press.
- Warden, L. C. (1938) *The Life of Blackstone*. Charlottesville, VA: Michie.
- Watson, A. (1988) The structure of Blackstone's Commentaries. (Sir William Blackstone's Commentaries on the Laws of England) 97 *Yale L. J.* 5.
- Windeyer, V. (1959) *Lectures on Legal History*. (Rev. ed.). Sydney: Law Book Company of Australia.