

# **Bashing Blackstone: The Reconstructionists' Attack in America's Culture War**

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**Sir William Blackstone**, the eminent Eighteenth Century English law professor and author of *Commentaries on the Laws of England*, **has wielded incalculable effects on law in America** for the past 225 years. His *Commentaries* were the law textbook in Great Britain and the United States well after their initial publication. "Bashing Blackstone" is an invisible but critical dimension of the Reconstructionists (liberal/activist) attack in America's Culture War. We Constitutionalists must therefore arm ourselves with a basic knowledge of Blackstone and his *Commentaries*.

## **I. Why Study Blackstone's Commentaries?**

*Commentaries on the Laws of England* (published between 1765 and 1769) by Sir William Blackstone (1723-1780) has been abandoned in the Humanistic jurisprudence (legal and constitutional philosophy) that permeates contemporary anti-Judeo-Christian judicial decisions.<sup>1</sup> Blackstone also is virtually absent from American legal education today. What, then, is the significance of Blackstonian thought to today's law?

The answer is simple. **Blackstone's *Commentaries* are one of the most complete, consistent, humanly authored expositions of the Judeo-Christian worldview of law ever written.** Blackstone's immeasurable influence on both English and American law was universally recognized until well into the Twentieth Century, although the "bashing of Blackstone" in America began after the Civil War. Christopher Columbus Langdell a militant evolutionist who became Dean of the Harvard Law School in 1870, thought Blackstonian principles had to be ripped from American law not because they were wrong, but because they were a bulwark of protection against the growing Humanistic movement headed by Langdell and other elitists.<sup>2</sup>

But Blackstone's jurisprudential views were not quickly eliminated. In the views of distinguished observers, "The influence of Blackstone's *Commentaries* on the laws of England . . . was phenomenal and as great in American as in England";<sup>3</sup> and "Upon Blackstone's *Commentaries*, United States Supreme Court Justice John Marshall and other early American jurists built the American legal system."<sup>4</sup> Indeed, in the most notable of Marshall's decisions, he cited Blackstone several times to advance the concept of Constitutional supremacy over the power of judges.<sup>5</sup> This fact is especially important today since judicial supremacists still cite *Marbury* as the source of judicial power. We *must* forcefully and consistently insist that these judges exercise judicial review only if they understand and apply this power within the *entire* context of Marshall's – i.e., Blackstonian – philosophy.

Statistics also demonstrate Blackstone's influence in America. Drs. Donald S. Lutz and Charles S. Hyneman analyzed the various sources read and cited by our Founding Fathers; Blackstone was by far the most-cited English/American scholar.<sup>6</sup> The American Revolution was a revolt

against the *politics* of English government, but not its legal *foundations*; the *Commentaries*, in fact, were cited nearly 10,000 times in the reports of American courts between 1789 and 1915.<sup>7</sup>

In the world of Humanistic scholarship today, these facts are ignored because history in general is scorned as central to the process of interpreting the US Constitution. But Humanists as well as the rest of us constantly cite history. The only question is *whom* they cite and *when* that which they cite occurred. The principles of Blackstone's *Commentaries* infuse our Constitution, and their revival deserves our most careful attention today.

## II. Who Was Sir William Blackstone?

William Blackstone was born in 1723, several months after his father's death. His mother died when he was 12 years old. Considered a poor orphaned boy, he nonetheless received an excellent education, supported by prominent individuals, and did well in his studies. The legal profession eventually claimed him; he was entered as a student of law in the Inns of Court at the Middle Temple<sup>8</sup>; and in 1746 he joined the bar.

In 1750 Blackstone received the degree of Doctor of Civil Law and left the practice of law for academic life. In 1758 he was elected the first Vinerian Professor of Law at Oxford. Blackstone was highly regarded by his contemporaries who shared our Judeo-Christian worldview. Professor Frederic Maitland declared that "Bracton ["Father of Common Law"]<sup>9</sup> was rivaled by no English juridical writer till Blackstone arose five centuries afterwards. Twice in the history of England has an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole."<sup>10</sup> But his ideas drew some criticism, particularly from Jeremy Bentham, the empiricist whose views were antithetical to the Judeo-Christian worldview and significantly contributed to attacks on this worldview by later Humanists.

Blackstone wrote the *Commentaries* to organize and explain English law as it had come to exist by the late 1800s. He desired to reach not only "the Profession of the Common Law; but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Polity of their own Country"<sup>11</sup> and "to render the whole [of his analysis of the Common Law] intelligible to the unformed minds of beginners . . ."<sup>12</sup> Blackstone first presented his material as lectures, but after students sold notes purporting to be his thoughts, he published his own edition, in four volumes.

## III. What Are the Principles of the Commentaries?

Several foundational principles are expressed in both the Judeo-Christian worldview and Blackstone's *Commentaries*. These principles, summarized below, reveal the extent to which American law has repudiated Blackstone.<sup>13</sup>

**A. There are different types of law in the universe.** Blackstone's classification of law into six types is foundational to the rest of his philosophy and is consistent with the Judeo-Christian system of law:

1. **Law as the order of the universe.** "Thus when the Supreme Being formed the universe, and created matter out of nothing, He impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put the matter into motion, He established certain laws of motion, to which all movable bodies must conform . . ."<sup>14</sup>

2. **Law as a rule of human action.** “. . . the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior.”<sup>15</sup>

3. **Law of nature.** “These are the eternal, immutable laws of good and evil, to which the Creator Himself in all His dispensations conforms; and which He has enabled human reason to discover, so far as they are necessary for the conduct of human actions.”<sup>16</sup>

4. **Revealed law.** “The doctrines . . . delivered [by an immediate and direct revelation] we call the revealed or divine law, and they are to be found only in the Holy Scriptures . . . . Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.”<sup>17</sup>

5. **Law of nations.** [A]s it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many . . . . [the regulation of their interaction] is the law of nations . . . [it] depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements . . . .”<sup>18</sup>

6. **Municipal law.** “[This is] a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”<sup>19</sup> But no human authority can act without limits.”<sup>20</sup>

**B. God is the Creator** of the universe, man, the very concept of law, and several universal laws; and his original Creation was *ex nihilo* (“out of nothing”). Blackstone was certainly *not* an evolutionist! But the evolutionistic fervor of later legal scholars was a major force in America’s abandonment of Judeo-Christian/Blackstonian jurisprudence in the Twentieth Century.

**C. God has built into the universe fundamental laws** that are fixed, immutable, and must be obeyed.

**D. Man is a dependent creature** who is not to disobey God’s fixed laws but is given free will and reason to discover and choose his actions within the limits of God’s laws.

**E. Man’s reason is corrupt** and cannot, by itself, discover and apply God’s law.

**F. God is not only the Creator, but a Being of infinite power, wisdom, and goodness.**

**G. God created man and His fundamental laws in such a way that man can be happy only when he is obeying God’s law.**

**H. Revealed law, natural law, and human law exist in a clear and inseparable relationship to one another.**

**I. The purpose of human law** is to “command what is right, prohibiting what is wrong.”

**J. Human law is not to violate God’s law,** but is to decide what are right and wrong in regard to “things in themselves indifferent” (i.e., actions that are not intrinsically right or wrong but are declared so by human lawmakers).

**K. Human law’s most effectual tool** for producing right conduct and preventing wrong conduct is sanctions – punishment.

**L. At the time of Creation, God gave man dominion over all the earth, but changes in society ultimately necessitated the emergence of individual property ownership.**

**M. There are three primary personal rights:**

- **Personal security.** The right . . . consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.<sup>21</sup>
- **Personal liberty.** This personal liberty consists in the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.<sup>22</sup>

- **Right of private property: law of the land.** [This right] consists in the free use, enjoyment, and disposal [by man] of all his acquisitions, without any control or diminution, save only by the laws of the land.<sup>23</sup>

**N. Human judges are empowered to interpret the will of the legislature by certain distinct standards,<sup>24</sup> including:**

- The usual meaning of words;
- Context of the words being interpreted;
- Subject matter of the law;
- Effect of the interpretation—absurd meanings must be avoided;
- The reason for the law—why it was promulgated.

#### **IV. The Dangers of Bashing Blackstone**

The dangers of rejecting the principles of Blackstone’s *Commentaries*, and the Judeo-Christian worldview they reflect, are monumental. Two scholars of widely varying perspectives – Alexander Solzhenitsyn, the Russian dissident; and David Easton, the influential, secular American political scientist – agree on the dangers that America faces. Solzhenitsyn asserts that Western society, including American society, has suffered a critical decline and deterioration. A key contributor to this perilous situation has been the rise of a de-spiritualized and irreligious humanism, which presages the impending downfall of Western society absent a reversal of Western attitudes, including renewed faith in a Supreme Being.

Easton attempts to analyze and explain political systems with a model that emphasizes “stress.” He argues that “stress” is a major enemy of a political system that can lead to the system’s failing: “Major tendencies toward output failure [by the political system] are set in motion by internal dissension and conflict among members of the political system. Cleavages [diversity of opinions and attitudes] may so divide the members of the political system [including the judicial system] that they find themselves unable to cooperate, negotiate, or compromise their differences. Cleavage... is a central condition in inducing output failure by government and undermining support [for government] in other ways as well.<sup>25</sup>

The principles of Blackstone’s *Commentaries* are a bulwark against the “impending downfall” of our society, and the cement that prevents lethal cleavages from rending America in two. We can re-establish our Constitution and culture on Blackstonian/Judeo-Christian principles, or we can continue bashing Blackstone, and destroy America as we know it. There are no other options.

#### **FOOTNOTES**

<sup>1</sup>Blackstone, Sir William, *Commentaries on the Laws of England*, William Carey Jones, editor (Baton Rouge: Claitor’s Publishers, 1976). All citations of the *Commentaries* are to this edition.

<sup>2</sup>Herbert W Titus, “God, Evolution, Legal Education, and Law,” *Journal of Christian Jurisprudence*, 1980, 11

<sup>3</sup>Lee Cameron McDonald, *Western Political Theory*. (New York: Harcourt, Brace, Jovanovich, Inc, 1968), 360

<sup>4</sup>Herbert W Titus, “Moses, Blackstone and the Law of the Land,” *Christian Legal Society Quarterly*, vol. 1, no.4, Fall, 1980, 5

<sup>5</sup>*Marbury v Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)

<sup>6</sup>Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth Century American Political Thought," *American Political Science Review*, vol. 78 (1984), 184

<sup>7</sup>"Concerning the *Commentaries*," in the *Commentaries*, xxvii

<sup>8</sup>"Inns of the Court" have existed for centuries as England's agency for the legal education of barristers (England's upper level of lawyers), calling candidates to the bar, disciplining the profession, and even disbarring barristers. They were originally lodging places for law apprentices but later came to occupy extensive districts.

<sup>9</sup>Henry Lord Bracton was a Thirteenth Century English jurist whose writings and fervent commitment to advancing the fledgling Common Law system earned him the title "Father of the Common Law." "Common Law" has prevailed in England and much of the world influenced by English jurisprudence for more than 800 years, It is distinguished from the "Civil Law System," which is based in old Roman Law and which survives in some forms where the imperial nations of southern and southwestern Europe dominated.

<sup>10</sup>Frederic Maitland, quoted in the *Commentaries*, "Introduction," xxvi.

<sup>11</sup>*Commentaries*, xv

<sup>12</sup>*Commentaries*, 35

<sup>13</sup>See also, by Virginia Armstrong: "The US Constitution and a 'Trio of Truths,'" *Rare Jewel Magazine*, May/June 2004, pp 29-31; "Sodomy, Survival, and the Supremes," *Rare Jewel Magazine*, July/August 2004, pp 27-29; "Curbing the Courts," *Rare Jewel Magazine*, October/November 2004, pp 32-33

<sup>14</sup>*Commentaries*, "Introduction," 38-39

<sup>15</sup>*Ibid.*, 39

<sup>16</sup>*Ibid.*, 40-41

<sup>17</sup>*Ibid.*, 42-43

<sup>18</sup>*Ibid.*, 43. But Blackstone certainly did not consider world government or a "global community" to be either possible or desirable

<sup>19</sup>*Ibid.*, 44

<sup>20</sup>*Ibid.*, 54. God-given rights and duties cannot be violated.

<sup>21</sup>*Commentaries*, Book I, 129.

<sup>22</sup>*Ibid.*, 134

<sup>23</sup>*Ibid.*, 138

<sup>24</sup>*Commentaries*, "Introduction," 60-62

<sup>25</sup>David Easton, *A Systems Analysis of Political Life*. (Chicago: University of Chicago Press, 1965), 276-277