Some implications of William Blackstone's Biblical grounding of property rights for American jurisprudence

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Opsomming

Enkele implikasies van William Blackstone se Bybelse begronding van die reg op eiendom vir die Amerikaanse regsleer

In sy kommentaar op die Engelse gemenereg, verklaar die Engelse skrywer, William Blackstone, dat die reg op eiendom die emosies van die mensdom opwek en dat niks die verbeelding van mense aangryp soos die aansprake van individue op eiendom nie. Volgens Blackstone is die reg op eiendom in die natuurorde gegrondves, maar die wyse van beskerming van eiendomsreg en die oordrag daarvan word sosiaal bepaal. Die reg op eiendom vorm een van die sleutelregte volgens

Blackstone. Hy wy 'n groot deel van sy kommentaar op die Engelse gemenereg aan die begronding daarvan, die beperkings wat regtens daarop geplaas mag word en die verpligtinge wat individue onderling jeens mekaar het. Hierdie opstel gee 'n oorsig van Blackstone se begronding van eiendomsreg en fokus veral op enkele aspekte van die onteiening van eiendom in die Amerikaanse reg en die voortgaande belang wat Blackstone se standpunte steeds in dié verband het.

1. Introduction

In 1979 the Calgary Institute for the Humanities published a compilation of articles under the title, *Theories of Property: Aristotle to the Present.*[1] The editors gathered sixteen writings on property stretching across centuries of academic literature. The articles included essays analysing the views of some of the great philosophers of the ages including Aquinas, Rousseau, Bentham, Mill, Hayek and Nozick.[2] In this list of prominent philosophers on property rights, one absence is particularly notable. The contributions of William Blackstone, author of the monumental treatise on English law, remain unaddressed beyond a few definitional references and a brief section on Bentham's lifelong diatribe against Blackstone.[3] Similarly, in Alan Ryan's 1984 self-claimed perusal of the "career of private property as a central institution of western society", Blackstone's name appears rarely and only in contrast to the philosophers on which Ryan focuses. These philosophers include Locke, Rousseau, Kant, Hegel, Mill and Marx.

So why has Blackstone so often received a brush-off in discussions of property rights? Are his writings so minimal on the topic that they do not deserve analysis? Are they so confusing that writers would prefer to ignore them than to become entangled in their midst? Or, is it simply that Blackstone's other viewpoints, for example about the place of natural law in the common law, are so infinitely more important than his discussion on property that it hardly needs be addressed?

1 Parel, A. & Flanagan, T. 1979.
2 Parel, 1979: iii.
3 Parel, 1979: 225.

The answers to some of these questions may be too complex to address in one essay but one thing is certain, Blackstone saw great value in studying property rights, and he emphasised them in his lectures and writings. At the end of his lecture manuscript, Blackstone offers this advice to young students studying the law: "the student who makes the law his profession must attend to such books as treat of that part of the law which was laid down in the 2nd and 3rd parts of this course of lectures viz. the rights of property and the redress of injuries."[4] Blackstone also spent more time addressing property rights during his lectures than any other topic.[5] Given the importance Blackstone placed on the study of property rights and the amount of time he devoted to this subject, it seems only right that proper analysis should be devoted to his views on property and to their impact on subsequent generations.

The primary purpose of this article, therefore, is to examine the relevance of Blackstone to modern legal study by considering his views on property rights and their impact on the American system of law, with specific reference to issues related to immanent domain. The article begins with a broad overview of the theoretical background that provides the foundation to Blackstone's views. It then addresses Blackstone's theory of the grounding for property rights as well as the influence these views had on American property rights views. Ultimately this essay assesses Blackstone's place in property rights discussions and his importance in the development of property law.

2. Blackstone's views on the social contract and the establishment of society

Blackstone's views on natural rights (inclusive of the right to property) are firmly embedded in his view on natural law and the establishment of civil society. Similar to Dutch, English and German authors of the seventeenth and eighteenth centuries, Blackstone

4 Holdsworth, W.S. 1932: 272.

5 Holdsworth, 1932:271. According to records examined by the author, Blackstone devoted sixteen lectures to rights of persons, 11 lectures to rights of property real, 6 lectures to rights of property personal, and thirteen lectures to public wrongs.

took the maxim *pacta sunt servanda* and applied it to the sovereign's right to govern. The social contract in Blackstone's theory became the vehicle for justifying the sovereign's right to govern in terms of which each person agreed to give up the freedom he/she had in the state of nature (prior to the founding of society) in order to gain the advantages of a single settled rule over all. The individual person's consent bound him/her in such a way that it justified (or authorised) the rule of the sovereign. The commands of the sovereign, in the form of laws, derived their binding force from the original compact.

This theory not only provided a new approach in the place of the previous medieval ideas on the origins of political authority and the law-making powers of rulers, but it also promoted the idea that a consideration of the limits of the sovereign's power could be determined on a consideration of its true source, thus enabling the defining of the powers of the sovereign. Consequently a host of social contract theories were advanced for circumscribing the powers of rulers. All these theories were in agreement however on the aspect that the future members of a society to be created jointly decide to unite in an independent political society and that this union is accomplished by entering into a contract establishing the state, through a so-called *pactum unionis.* At this point social contract theories diverge: the first approach settles for one contract only, the legislative power of the sovereign deriving from the single pact (Thomas Hobbes). The second states that the members of the community bound together by a contract also enter into a contract with an inchoate sovereign through a *pactum subjectionis* (John Locke).

The second approach was most commonly used by theorists to limit the powers of the sovereign on the basis that the members of the society to be established agreed to obey the sovereign only if he governed in accordance with the paramount purpose of the social union, which paramount purpose was usually considered to be the protection of certain fundamental rights like the rights to liberty, life and property.

The issue as to what makes this fundamental compact binding and enforceable led to a renewed interest in and emphasis on the

foundational importance of natural law theory. Natural law theory was relied upon in an effort to "go beyond" the power of the sovereign and to identify a source of law existing before the inception of the sovereign, making the social contract binding and from which the sovereign obtains the authority to legislate.

Theoretically Blackstone follows a route somewhere between the social contract theories of Hobbes and Locke. Blackstone's point of departure is that the nature of society and civil government, as well as the inherent right that belongs to the sovereignty of a state (wherever that sovereignty be lodged), have to be determined from the position of individual persons prior to the formation of the civil state.[6] Because of the desires and fears of individual persons, human beings entered into an original contract and chose the ablest person to govern them.[7] Although Blackstone never seriously believed that a so-called state of nature actually existed from which individuals, actuated by their desires and fears, were motivated to form human society, because human society reflected a social nature from its beginning: the sense of their weakness and imperfection kept human beings together, thereby demonstrating the necessity of the union among human beings.[8] To Blackstone, therefore, the human being's sense of insecurity served as the solid and natural foundation, as well as the cement of civil society.[9] Although the original contract of society may in no instance have been formally expressed at the "first institution of a state", yet according to "nature and reason must always be understood and implied, in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the

6 Blackstone, W. Commentaries (1765-edition): Volume I, Introduction, Section 2 (page 46) (cited as: Bl. Comm. (1765): 1, Introduction, 2 (46)).
7 Bl. Comm. (1765): 1, Introduction, 2 (47).
8 Bl. Comm. (1765):1, Introduction, 2 (47).
9 Bl. Comm. (1765):1, Introduction, 2 (46-47).

community; without which submission of all it was impossible that protection should be certainly extended to any".[10]

The second contract, the *pactum subjectionis*, in Blackstone's thought, is taken by the royal coronation oath. To Blackstone it is a maxim of English law that protection and subjection is a reciprocal act flowing from the original contract whereby the civil state is established.[11] The principal duty of the king under the original contract is to govern according to law. Blackstone adds that the principle *nec regibus infinita aut libera postestas* is consonant with the principles of natural law, of liberty, of reason, of society and consequently "has always been esteemed an express part of the common law of England, even when the prerogative was at the highest".[12] Blackstone cites Bracton in support of the principle that the king ought not to be subject to man, but to God, and to the law, "for the law maketh the king", and "the king also hath a superior, namely God, and also the law, by which he was made a king".[13] Blackstone relies upon Bracton's view that the "king of England must rule his people according to the decrees of the laws thereof: insomuch that he is bound by an oath at his coronation to the observance and keeping of his own laws".[14] Furthermore, the king is also bound to statutory stipulations to the effect "that the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of the realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are ... ratified and confirmed accordingly".[15]

To Blackstone, the terms of the original contract between king and people are couched in the coronation oath, which, by statute, is to

10 Bl. Comm. (1765):1, Introduction, 2 (47-48).
11 Bl. Comm. (1765):I, 6 (227-228).
12 Bl. Comm. (1765):I, 6 (227).
13 Bl. Comm. (1765):I, 6 (227).
14 Bl. Comm. (1765):I, 6 (227).
15 Bl. Comm. (1765):I, 6 (227).

be administered to every king or queen who succeeds to the imperial crown of the realm, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their part reciprocally take the oath of allegiance to the crown.[16]

In essence the coronation oath is a fundamental and original express contract which places the king under the obligation to govern his people according to law, to execute judgment in mercy, and to maintain the established religion.[17] Blackstone's views on the nature of the contract establishing civil society and the contract according to which the legislature is instituted are fundamentally aimed at setting up the legislative function through general consent – which is a "fundamental act of society".[18] The original contract contains two agreements: the act instituting society because of the insecurity of the people, and the coronation oath which binds the ruler and the people. In order to illustrate the practical implications of the binding nature of the coronation oath, Blackstone cites the example of King James II who was assumed by both houses of Parliament to have subverted the constitution of the kingdom by breaking the original contract between the king and the people, and, "by the advice of the Jesuits and other wicked persons", violated the fundamental laws, and, by drawing him out of the kingdom, abdicated the government and left the throne vacant.[19]

Thus the social contract binds and consolidates the individual members of the community into a corporate body governed by laws, based on the reciprocal undertakings of the parties to the contract: "For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by

16 Bl. Comm. (1765):I, 6 (227-228).
17 Bl. Comm. (1765):I. 6 (229).
18 Bl. Comm. (1765):1, Introduction, 2 (52).
19 Bl. Comm. (1765):I, 2 (148).

any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law."*[20]

3. Blackstone's theory of natural law

To Blackstone the law of nature represents those precepts in the form of universal moral principles, immutable in their application, valid for all times and places, to which all human beings are subject and which are accessible by human reason. The laws of nature are essentially principles of divine law, reflecting the fundamental duties to which human beings are subject for their own well-being.[21] Because the principles of the law of nature are impressed upon the minds of human beings in the form of duty-based moral precepts, they have the nature of maxims which should be adhered to.[22] The precepts of the law of nature are foundational to legal systems to the extent that also the primary rules of the law of nations should be "weighed and compared with" the precepts of the law of nature.[23]

Because the law of nature is coeval with mankind and dictated by God himself, it is superior in obligation to all other laws; it is binding over all the globe in all countries, and at all times. Therefore, the law of nature is foundational (constitutive) to laws made by human

20 Bl. Comm. (1765):1, Introduction, 2 (52).

21 To this end Blackstone describes the "one paternal precept" involved in the law of nature as being the human person's desire to "pursue his own true and substantial happiness", and, "(t)his is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it" (Bl. Comm. (1765):1, Introduction, 2 (41)).

22 Bl. Comm. (1765):1, Introduction. (1765): 2 (41).

23 Bl. Comm. (1765):1, Introduction, I (36).

legislatures, and no human laws are of any validity if contrary to the law of nature. Furthermore, such positive laws as are valid derive all their force and all their authority, mediately or immediately, from this original. But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, "whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness".[24]

All human laws depend upon the two manifestations of divine law: the law of revelation (the moral law) and the law of nature. Because all human laws are dependent upon the law of nature, no human laws should contradict the tenets of natural law. However, because the law of nature and the revealed law are indifferent in a number of instances, human persons are left at their liberty in a number of respects. In those instances where the law of nature and the moral law are indifferent, human laws should be enacted to the benefit of society. Herein is situated the greatest force and efficacy of human laws, for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the law of nature and the moral law. In the case of murder, which is expressly forbidden by the divine "and demonstrably by the natural law", the "unlawfulness of this crime" arises, and those human laws "that annex a punishment to it do not at all increase its moral guilt".[25]

Because human reason is affected through man's fall into sin, natural law serves as the guide to steer human actions towards human well-being. Human reason is the agent through which man has to consider the methods which will tend "most effectually to our own substantial happiness".[26] Because of the frailty, imperfection and blindness of human reason, God has revealed to human beings the laws in the holy scriptures, which divine laws "are found upon comparison to be really a part of the original law of nature, as they

24 Bl. Comm. (1765):1, Introduction, 2 (41).
25 Bl. Comm. (1765):1, Introduction, 2 (42).
26 Bl. Comm. (1765):1, Introduction, 2 (40).

tend in all their consequences to man's felicity".[27] Blackstone adds that these divine laws are not necessarily accessible by human reason: "But we are not from thence to conclude that the knowledge of those truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages."[28] The divine law is also more authoritative than the tenets of the law of nature: "As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together."[29]

The law of nature is also normative for the law of nations (*jus gentium*). If man were to live in a state of nature, says Blackstone, unconnected with other individuals, there would be no occasion for any other laws than the law of nature, and the law of God. Neither could any other law exist: for a law always supposes some superior who is to make it, and, in a state of nature, we are all equal, without any other superior but He who is the author of our being. Because mankind was formed for society and human beings are not able to live alone, and because humankind cannot possibly be united in one great society and are divided into many separate states, commonwealths, and nations, entirely independent of each other, yet liable to mutual intercourse, a third kind of law arises to regulate this mutual intercourse, called "the law of nations", which, as none of these states acknowledges a superiority in the other, cannot be dictated by any, but which "depends entirely upon the rules of

27 Bl. Comm. (1765): 1, Introduction, 2 (42).
28 Bl. Comm. (1765):1, Introduction, 2 (42).
29 Bl. Comm. (1765):1, Introduction, 2 (42).

natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject; and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium* ".[30]

4. The natural rights of man

Blackstone identifies three categories of natural (or absolute) rights attached to the human person: the right to natural liberty, the right to property and the right to physical security. These natural rights are rights of divine and natural origin, and are therefore called natural rights, because they do not need the aid of human laws "to be more effectually invested in every man than they are"[31], neither do they need the additional strength of human laws to be inviolable. On the contrary, no human legislature has the power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture.[32] Neither do divine or natural duties (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from also being declared to be duties by the law of the land. Only with regard to things in themselves indifferent, do the human laws determine human actions right or wrong according to the will of the legislature: "These become either right or wrong, just or unjust, duties or misdemeanours, according to the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life."[33] Blackstone cites the example of the civil duty to obey superiors as an instance where, although it is a doctrine of revealed as well as natural religion, it is the province of

30 Bl. Comm. (1765):1, Introduction, 2 (43).
31 Bl. Comm. (1765):1, Introduction, 2 (54).
32 Bl. Comm. (1765):1, Introduction, 2 (54).
33 Bl. Comm. (1765):1, Introduction: 2 (55).

human laws to determine in which instances and to what degrees they shall be obeyed.[34]

The absolute rights based on divine and natural law also form the basis for a spectrum of auxiliary rights of the subject for example the right to bear arms for defence "suitable to their condition and degree, and such as are allowed by law" under the natural right of resistance and self-preservation, "when the sanctions of society and laws are found insufficient to restrain the violence of oppression".[35]

The absolute nature of the natural rights provides the holder of such rights not only with a right *in abstracto* but also with the mechanisms *in concreto* for enforcing such rights. If, for example, writes a commentator, the legislature should forget its duty and the natural rights of an individual, and should take the private property of that individual and transfer it to another, "where there was no foundation for a pretence that the public was to be benefited thereby, I should not hesitate to declare that such an abuse of the right of *eminent domain* was an infringement of the spirit of the constitution and therefore not within the general powers delegated by the people to the legislature".[36]

The natural rights of the subject bring with them the duties of the supreme power in the state to protect such rights. The nature of society and government demands that the sovereign power use its authority to make and enforce laws for the protection of the subject's natural rights. The reciprocal nature of the respective rights and duties of the rulers and the subjects entails that the individual has the duty of obedience towards sovereign power as the manifestation of the will of the whole; on its part the community should guard the rights of each individual member, and that in return for this protection, each individual should submit to the laws of the community, "without which submission of all it was impossible that protection should be certainly extended to any".[37]

34 Bl. Comm. (1765):1, Introduction: 2 (55).
35 Bl. Comm. (1765):I, 1 (139).
36 Bl. Comm.(1765): 700, remarks by George Sharswood, Chief Justice of the Supreme Court of Pennsylvania.
37 Bl. Comm. (1765):1, Introduction, 2 (48).

The state should make clear to the subjects their absolute and relative duties, in order that public tranquillity be promoted and secured: "Thus far as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. For since the respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity."[38]

Blackstone makes clear that the natural rights of the subjects need no sanction by human beings, neither can they be abridged or destroyed by human lawmakers: "Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture."[39]

Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the

38 Bl. Comm. (1765):1, Introduction, 2 (52-53).
39 Bl. Comm. (1765):1, Introduction, 2 (54).

law of the land. The case is the same in regard to crimes and misdemeanours that are forbidden by the superior laws, and therefore styled *mala in se,* such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. "For that legislature in all these cases acts only, as was before observed, in subordination to the great law-giver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong. But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanours, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life."[40]

Irrespective of their nature, all natural rights flow from and are based upon fundamental moral duties. The fundamental moral duties emanate from the moral law and give rise to reciprocal rights in those persons to whom duties are owed. So for example, A has the duty to refrain from taking the property of B, C and D, thereby giving rise to B, C, and D having the fundamental right to property. The state has a fundamental duty to protect such duty-based rights as emanate from the moral law. Two aspects need elucidation: first, rights do not emanate from the same subject as the person carrying the duty, and second, natural rights are not grounded in the carrier of the right but in the moral duty transcending both the subjects of duties and rights.

Blackstone's duty-based theory of rights has important consequences for both state authorities and for the subjects. The rights of persons that are commanded to be observed by the positive law are of two sorts: first, such as are due *from* every citizen, which are usually called civil *duties;* and, secondly, such as belong *to* him, which is the more popular acceptation of *rights* or *jura.* Both may indeed be comprised in this latter division; for, as all social duties

40 Bl. Comm. (1765):1, Introduction, 2 (55).

are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. "But I apprehend it will be more clear and easy to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are reciprocally the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people."[41]

5. Blackstone's view of property rights

5.1 Natural law foundations of property rights

Blackstone's views on property rights are derived from a compilation of sources that state the backbone of early English jurisprudence. In the second volume of his *Commentaries,* dedicated to the "rights of things", Blackstone includes references to legal philosophers like Edward Coke and Locke, English monarchs, and early Roman practices. Blackstone also relies heavily on biblical references to assert that God was the original grantor of property rights to mankind.[42] Although property was originally held in common by mankind, Blackstone states that each person took from this common ownership such things as "his immediate necessities required".[43] Even at this time, however, when all property was held in "common", Blackstone claims that in reality there was never total common ownership. By "the law of nature and reason", each individual acquired sole possession over something when he was using it.[44] Thus, whoever acquired first occupation or use of something, acquired at least temporary possession of it. Blackstone explains that as time passed and the population on the earth increased, it became necessary to establish more permanent ownership rights in

41 Bl. Comm. (1765):I, 1 (119).
42 Bl. Comm. (1765):2, 1 (3). Blackstone concludes that mankind was originally granted property rights in Genesis 1:28 when God gave Adam and his descendents dominion over the world.
43 Bl. Comm., 2, 1 (3).
44 Bl. Comm. (1765):2, 1 (3).

order to avoid innumerable conflicts and races establishing first ownership of something.[45] Private ownership was established over flocks in order to provide groups that were historically foragers with consistent sources of food.[46] Delineating property rights over animals created a type of domino effect over other possessions. For example, flocks needed water so private property had to be established over wells.[47]

According to Blackstone, because of its vast availability, land remained in common ownership for the longest period of time. Eventually, however, it became increasingly difficult for people to find open lands and soil that had not been destroyed by previous occupants. Human beings, once again using reason and ingenuity, turned to the art of agriculture, which in turn encouraged the idea of more permanent property in soil. As Blackstone astutely points out, "who would be at the pains of tilling it [land], if another might watch an opportunity to seize upon it and enjoy the product of his industry, art and labour?"[48] Clearly the policy of use establishing temporary ownership was no longer tenable in an age where agriculture became the norm. And so, as Blackstone artfully summarised:

> Necessity begat property; and in order to insure that property, recourse was had to civil society, which brought along with it a train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties.[49]

Blackstone appears to be positing that the purpose of the state, civil society, and other public institutions, against the background and basis for their existence, came from the need to protect private property.

Blackstone takes his analysis of the foundations of private property a step further by suggesting that these civil institutions, for example

45 Bl. Comm. (1765):2, 1 (4-5).
46 Bl. Comm. (1765): 2, 1 (5).
47 Bl. Comm. (1765):2, 1 (4-5).
48 Bl. Comm. (1765):2, 1 (7).
49 Bl. Comm. (1765):2, 1 (8).

the English legislature, realised that in order to encourage usefulness and goodness in people, property rights could not simply die with the owner.[50] As a result, inheritance laws and testamentary laws were established. These laws provided incentives to both the giver and the inheritor, to use and improve on property in the most profitable fashion for society.

The legislature also saw that to promote the good end of society and provide for the peace and security of individuals in the most organised fashion, it was best to assign "every thing capable of ownership a legal and determinable owner".[51] In other words, the legislature saw the benefits that society derives from established private property rights.

Blackstone summarises his viewpoint in the first volume of the *Commentaries*, when he writes, "The origin[] of private property is probably founded in nature … but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty."[52]

Blackstone, therefore, takes a dual perspective on the foundation of property rights. Property was originally granted generally to human beings by God and through reason, natural law and the legislature, human beings have developed private property rights in such a way as to achieve the best, ordered society.

5.2 American property law and Blackstone

5.2.1 American court cases

The question remains, then, as to Blackstone's influence on Anglo-American jurisprudence, particularly on the development of property laws. Because Blackstone's *Commentaries* were published at a

50 Bl. Comm. (1765):2, 1 (9-12).
51 Bl. Comm. (1765):2, 1 (15).
52 Bl. Comm. (1765):1, 1 (134).

seminal point in the creation of the new republic, the bulk of this examination will focus on the United States.

In a brief search of American court cases involving property, Blackstone is cited in over two hundred decisions. The significance of these citations varies largely by the case. For example, in *Carter v. United States,* in which the Supreme Court was addressing procedural issues involving the crimes of larceny and robbery, Blackstone is cited twice but only for definitional purposes.[53] On the other hand, Justice Thomas, in his dissent in the highly controversial case of *Kelo v. City of New London,* relied heavily on Blackstone and his view on the rights to private property.[54]

In the majority of these cases, however, Blackstone is cited primarily as a source of definitions and historical background rather than as the reasoning behind the court's holding.[55] Based on this, it would seem that Blackstone's influence on American jurisprudence, and in particular American property law, was minimal and therefore scholars are justified in leaving his writing out of discussions. It is only when one takes a deeper look into history that the extent of Blackstone's influence on the American legal system is laid bare. Blackstone's greatest impact on early American jurisprudence was not as a cited case source for judges and litigators. Rather, Blackstone affected American jurisprudence indirectly through the thinking of those who formed and interpreted the laws.

5.2.2 Early American thinkers

The first American edition of the *Commentaries* appeared in 1772 and sold over 1400 copies.[56] Among those who purchased this first American edition of Blackstone's work were sixteen signers of the

53 *Carter v. United States* 530 U.S. 255 (2000).

54 *Kelo v. City of New London, CT* 545 U.S. 469, 505-523 (2005).

55 See, e.g., *Central Virginia Community College v. Katz* 543 U.S. 356, 370 (2006), 126 S.Ct. 990, 1001 (2006); *Pasquantino v. U.S.* 544 U.S. 349, 356 (2005), 124 S.Ct. 1766, 1772 (2005); *Rakas v. Illinois* 439 U.S. 128 (1978), 143, 99 S.Ct. 421, 431 (1978), *Geer v. State of Conn.* 161 U.S. 519, 526 (1896), 16 S.Ct. 600, 603 (1896).

56 Alschuler, A.W. 1996:5. The first American edition was published by Philadelphia printer, Robert Bell.

Declaration of Independence, six delegates to the Constitutional Convention, the first Chief Justice of the Supreme Court (John Jay), a major general of the American Revolution (Nathaniel Greene), and the second President of the United States (John Adams).[57] Even before the first American edition appeared, over 1000 copies of the English edition had sold in the American colonies.[58] In 1803, St. George Tucker published a second American edition. Although Tucker criticised some tenets of Blackstone that he found to be out of line with the New Republic's form of government, he emphasised that Blackstone was a good foundation for studying law.[59]

John Marshall, who eventually became Chief Justice of the Supreme Court and is considered by many as one of the most influential jurists in all of American history, read the *Commentaries* four times before he was twenty-seven years old.[60]

James Kent, the first law professor at Columbia University and author of the *Commentaries on American Law* said of Blackstone's writing, "[T]he work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer."[61]

Other noted American readers of Blackstone's work include Abraham Lincoln, Andrew Hamilton, John Rutledge, and Robert Morris.[62]

As Daniel Boorstin, a legal history scholar explained, "In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they

57 See Alschuler, 1996:5; Nolan, 1976:205. Nathaniel Greene was also one of the leading voices in calling for a Declaration of Independence from England. He wrote, "Heaven hath decreed that tottering empire Britain to irretrievable ruin and thanks to God, since Providence hath so determined, America must raise an empire of permanent duration, supported upon the grand pillars of Truth, Freedom, and Religion, encouraged by the smiles of Justice and defended by her own patriotic sons.... Permit me then to recommend from the sincerity of my heart, ready at all times to bleed in my country's cause, a Declaration of Independence, and call upon the world and the great God who governs it to witness the necessity, propriety and rectitude thereof."

58 Alschuler, 1996:5.

59 Alschuler, 1996:14.

60 Alschuler, 1996:5.

61 Alschuler, 1996:6.

62 Nolan, D. 1976:295.

constituted all there was of the law."[63] Boorstin claimed that the extent of the impact of the *Commentaries* on the development of American institutions was second only to that of the Bible.[64]

In a young country where the laws were new and in their most raw form, Blackstone became a source for interpretation and guidance. His *Commentaries* were read by many of the early judges whose holdings determined the course of the common law.[65] During the years where formal legal education was virtually nonexistent, students and scholars turned to Blackstone to gain a grasp on the entirety of the law.[66] In this way, the immensity of Blackstone's influence on American law is immeasurable.

5.2.3 American legal education

In the development of American legal education, Blackstone's writings have also played an important role. Before Blackstone's *Commentaries*, legal education consisted primarily as an examination of legal procedure and an apprenticeship in the field.[67] Blackstone offered something more by focusing on the common law and examining the reasoning behind the current state of the law. In this way, he revolutionised American legal education. The case law method, the method used in virtually every legal classroom in the United States, developed as an outgrowth of Blackstone's approach. Blackstone wrote of his view on legal education:

> If practice be the whole of what he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rules of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* [the law is written; as the law is written, so it is applied] is

63 Boorstin, D.J. [1941] 1996: 4.
64 Boorstin, [1941] 1996: 4f.
65 Nolan, 1976: 307. Nolan here includes a list of several judges who had a great impact on the early American legal system: John Marshall, James Wilson, Joseph Story, James Kent, and James Iredell.
66 See generally Nolan, 1976: 317-321.
67 Nolan, 1976: 312.

> the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori* [prior, before], from the spirit of the laws and the natural foundation of justice.[68]

Blackstone advocated a separate university devoted entirely to the study of law as a science. His attempts to gain acceptance of such an idea in England failed but almost two centuries later, the United States would adopt the idea, resulting in the birth of the modern American law school.

5.3 Eminent domain

5.3.1 The meaning of public use

The extent of the government's power to exercise eminent domain is one of the predominant property law issues in 21st century America. Eminent domain, which is considered to be an essential attribute of sovereignty, is the power of government to appropriate private property for public uses.[69] The Fifth Amendment of the United States Constitution acknowledges this power. The Amendment reads, in part, that private property shall not "be taken for public use, without just competition".[70]

Out of this simply worded clause, two primary debates have emerged. The first is the meaning of the phrase "public use". The second is what constitutes a governmental "taking". In both interpretational debates the original intent of the framers, and prior to the founding, the writings of William Blackstone, can be enlightening and useful.[71]

For decades, the meaning of the phrase "public use" has been a point of contention among scholars, litigators, and judges. The traditional or "narrow interpretation" argument proposes that public

68 Bl. Comm. (1765):1, Introduction (32) (also note Nolan, 1976:313).

69 See *Wheat Ridge Urban Renewal Authority v. Cornerstone Group* 176 P.3d 737, 742 (2007). Note that eminent domain and the police power are core governmental powers that are reserved to the sovereign and cannot be abrogated by contract.

70 U.S. Constitution, Amendment V. This amendment was applied to the states through the due process clause of the fourteenth amendment in *Chicago, B. & W.R.R. v. Chicago*, 116 U.S. 226 (1899).

71 Note Galgano, G. 1998:217ff. on eminent domain and his reference to Blackstone.

use was intended to signify actual use by the public. The broader interpretation, which has become prevalent in the modern American legal system, is that the framers intended public use to mean an advantage or benefit to the public or for a public purpose. The United States Supreme Court formally accepted this latter interpretation in 1954 in the case of *Berman v. Parker*.[72]

Although the Supreme Court has officially acknowledged the "public benefit" understanding of public use, the debate over the original intent behind this phrase continues. The debate became especially relevant after the highly controversial eminent domain case of *Kelo v. City of New London, Connecticut* in 2005, in which Justice Thomas argued in the dissent for a return to the original meaning of "public use".[73]

In a debate over the original intent behind the phrase, "for the public use", it is only reasonable to examine the origins of the policy of eminent domain and to consider those writings and philosophers who influenced the men who penned the phrase.

The concept of eminent domain in Anglo-American jurisprudence began to take form during the shift in England from a feudal system to private ownership.[74] As property was no longer all under the king's possession as it had been in the feudal system, a need for the king to have authority to procure lands for public purposes became evident. According to several scholars, the Dutch seventeenth-century political philosopher, Hugo Grotius, was the first to give a name to the concept of eminent domain.[75] In his writings on the powers of the sovereign, Grotius noted the sovereign's

72 *Berman v. Parker*, 348 U.S. 26 (1954). In this case, the Supreme Court held that land condemned as part of an urban renewal programme could be sold or leased to private parties. Essentially this allowed for the taking of property from one private party and giving it to another private property as long as it was done in a way that the net gain was for the benefit of the general public.

73 *Kelo v. City of New London, CT*, 545 U.S. 1158 (2005).

74 Rubin, R. 1983:168.

75 See, e.g. Melton, B.F. 1996:70.

authority to use, alienate, and destroy private property for public use (*utilitas*).[76] He hedged the authority, however, by insisting that the state has a moral obligation to provide compensation for the land it seizes through eminent domain.[77]

A century later, William Blackstone, who was highly influenced by the work of Grotius, articulated a similar understanding of the sovereign's authority to exercise eminent domain.[78] In the first volume of his *Commentaries*, Blackstone writes:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community … the law permits no man, or set of men, to do this without consent of the owner … In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce … Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained ... and even in this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[79]

Eminent domain is an example of where the natural law of the right to private property, "a claim to the total exclusion of the right of any other individual in the universe", is limited by the social contract. Following the reciprocity of protection and subjection, the sovereign has a duty to protect the property rights of the citizens while the citizens agree, in cases of public need, to exchange their rights for compensation in order to promote the good of society.

As early as 1641, American legislators were using language similar to that of Blackstone when articulating the eminent domain laws of the New Republic. In the Massachusetts Body of Liberties, the first

76 Rubin 1983:168, referring to Grotius' work, *The Rights of War and Peace* (A.C. Campbell trans., 1901).
77 Rubin, 1983:169.
78 Wigmore, J.H. 1919:538.
79 Bl. Comm. (1765):1, 1 (135).

legal code instituted by English colonists in America, the authors wrote,

> No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unless it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinary rates of the Countrie do afford. And if his Cattel or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompensed.[80]

In formulating the takings clause of the Fifth Amendment, the framers appear to have adopted the concept of eminent domain promulgated by Grotius, Blackstone, and the early American colonists. While the sovereign has the power to acquire private lands for public purposes, this must be for a "public use" and the owner must receive "just compensation". It is entirely reasonable to assume that the framers, many of whom received their legal education from the writings of Blackstone, would follow in his footsteps and outline a narrow construction of the power of the sovereign to exercise eminent domain.

Several early American state constitutions also contain grants of eminent domain power to their respective governments. States rarely utilised this power and when they did, it was to provide essential public goods such as public roads, ferries, and railroads.[81] Several states tried to expand this power by, for example, appropriating property for the creation of private roads, but such uses were repeatedly debated and litigated throughout the early centuries.[82]

Furthermore, in the immediate aftermath of a bloody revolutionary war against a sovereign the colonists considered tyrannical, it is

80 Quoted in Melton, 1996:71-72. The author here, however, argues for an understanding of this quote that does not follow the natural language of the writing. He holds that it is possible the writers had public benefit in mind and were simply using the term public use in the same way Grotius did, which might have been intended to mean public benefit. The plain language and contemporary writings of a similar vein would suggest, however, that the authors intended the clear meaning – that property could be taken for public *use* provided that compensation was given.

81 *Kelo v. City of New London, CT* 545 U.S. 469, 512 (2005).

82 *Kelo* at 513-514.

unlikely that the framers would grant the federal government a broad power to seize private property for alternative private uses. In a modern welfare state like the United States, however, it is understandable how an amendment intended to limit the power of government has been construed as one that confers upon government the power basically to control the redistribution of wealth.[83]

The transition in the American court system from a traditional understanding of public use to a broad interpretation of the phrase developed over several centuries. William Blackstone, to varying degrees, is cited in a number of these cases.

As early as 1903, however, Blackstone's view that there must be strict limits on the power of eminent domain was considered to be the "conservative" view in America.[84] In *Pennsylvania Telephone Company v. Hoover*, the Superior Court of Pennsylvania quoted Blackstone at length when discussing the power of eminent domain.[85] The court refers to Blackstone's viewpoint – that eminent domain should be used solely by the legislature and only in cases of necessity and with the greatest amount of caution – as one that is "in this day of liberal interpretation … old-fashioned and conservative".[86] Ironically, in this case the court proceeded to follow a more "conservative" interpretation, stressing the need for a public *necessity* to exist in order for property to be confiscated by the government.[87]

Over time the "old-fashioned" sense of the term public use was disregarded as a more liberal, modern understanding of the phrase became popular. One of the first Supreme Court cases where the broader interpretation was articulated was in *Fallbrook Irrigation Dist. V. Bradley*.[88] In considering whether the appropriation of pro-

83 See generally O'Connor's dissent in *Kelo v. City of New London, CT* 545 U.S. 469 (2005).
84 *Penn Tel Co. v. Hoover* 24 Pa. Super. 96, 1904 WL 3270 (Pa. Super.)
85 *Penn Tel Co. v. Hoover* 24 Pa. Super. 96, 1904 WL 3270 (Pa. Super.)
86 *Penn Tel Co. v. Hoover* 24 Pa. Super. 96, 1904 WL 3270 (Pa. Super.)
87 *Penn Tel Co. v. Hoover* 24 Pa. Super. 96, 1904 WL 3270 (Pa. Super.)
88 *Fallbrook Irrigation Dist. v. Bradley* 164 U.S. 112, 161-162.

perty for the building of an irrigation ditch met the constitutional public use standard, the Court needed only to note that the irrigation ditch was intended to be used in general by all landowners in the district. Instead, the Court included a broad dictum that declared that cultivating lands was for a public purpose and was a matter of public interest and therefore met the Fifth Amendment requirement.[89] In his dissenting opinion in *Kelo*, Justice Thomas follows the chain of cases that grew out of the dictum in *Bradley.* This chain led to the cases of *Berman v. Parker* (holding that condemnations for the purpose of clearing slums constituted a "public use") and *Hawaii Housing Authority v. Midkiff* (holding that land redistribution constituted a "public use"), which were used by the Court to justify the outcome in one of the most recent contentious eminent domain cases, *Kelo v. City of New London.*[90] *Kelo* is an example of the consequence of the shift from the original meaning of public use to the new, broad definition of the phrase.

Kelo involves a $5.35 million bond granted by the state of Connecticut to the city of New London, to aid in its revitalisation, particularly in the Fort Trumbull area. A month after the state issued the grant, a pharmaceutical company, Pfizer Inc., announced its intent to build a massive new research facility immediately adjacent to the proposed revitalisation site. In 2000, the City approved the New London Development Corporation's (NLDC) renewal plan. The 90-acre plan included a plot dedicated to research and development office space, contiguous to Pfizer's new facility. The City also gave the NLDC permission to use its eminent domain authority to acquire private property as needed to complete the revitalisation. The NLDC was able to negotiate with most of the 115 private property owners affected by the plan but several refused to give up their land. The NLDC initiated condemnation proceedings against the remaining landowners. In response, Susette Kelo and eight other New London citizens brought an action claiming that this appro-

89 *Fallbrook Irrigation Dist. v. Bradley* 164 U.S. 112, 161-162.
90 *Kelo v. City of New London, CT* 545 U.S. 469, 519 (2005).

priation of their property was unconstitutional under the public use requirement of the Fifth Amendment. Relying on *Midkiff* and *Berman,* the Supreme Court disagreed, holding that a costly urban renewal project – an economic development – met the standard for public use since it would result in a benefit to the community.[91] The Court states that public use, which it defines as public purpose, is satisfied as long as the purpose is "legitimate" and the means not "irrational".[92]

In his dissent, Justice Thomas points to the danger of such a decision and relies on Blackstone to encourage the Court to return to the original meaning of "public use". Thomas states that *Kelo* is simply the newest addition in a line of cases that have distorted the purpose of the Public Use Clause from one that limits the government's power to exercise eminent domain, to one that allows for basically any justification to seize private property.[93] As both Thomas and O'Connor point out in their dissenting opinions, there would be no purpose for the "public use" phrase if government could use eminent domain to take property for both public and private aims.[94] Thomas argues that the natural and historical reading of the clause is that the government may only take property in cases where the public has a right to employ it, and not simply if there is a possible public benefit that may result from its taking.[95] Thomas quotes Blackstone at length to support the idea that public necessity, and only public necessity in certain cases, should give government the right to seize private property.

5.3.2 Taking versus regulation

The second debate that surrounds the issue of the government's Fifth Amendment power to exercise eminent domain is what constitutes a "taking" and therefore requires that compensation be paid to the owner. Traditionally there was a division between takings

91 *Kelo v. City of New London, CT* 545 U.S. 469, 482-487.
92 *Kelo* at 488.
93 *Kelo* at 506.
94 *Kelo* at 507.
95 *Kelo* at 510.

under eminent domain and land-use regulations. Land-use regulations fell under the government's police power while "takings" referred to the government's seizure of land under an exercise of eminent domain.[96] Over time as legislators and judges have expanded the scope of the Fifth Amendment, the takings clause has been used in situations that traditionally fell under the government's police power. As the courts have blurred this line, the takings clause has become harder to define and harder to follow, making for a convoluted case law history and broader governmental power.

If land-use regulations and physical takings are not kept separate, the result is an open door for government to appropriate property freely under the guise of dealing with a nuisance. The government may take land from private properties, claiming that it is operating under its police power to protect the health, welfare and safety of the people.

Blackstone has been used as a source for the argument that a land-use regulation should be distinguished from a physical taking under eminent domain. In *John R. Sand & Gravel Company v. United States*, the court's opinion includes a brief overview of Blackstone's perspective on property rights. The court uses Blackstone together with previous Supreme Court cases to make the argument that although property rights must be protected, it has long been recognised that these rights may be limited by "the laws of the land".[97] The government continues to maintain the power to infringe on property rights in situations where the owner is using his land in such a way that is injurious to the community.[98] Property rights, therefore, do not include the right to create a nuisance and the government may prohibit a noxious land use without providing compensation.[99] The government's police power to prohibit a nuisance, however, must be kept distinct from its eminent domain power to take property. The

96 Rubin, 1983:165-166.
97 *John R. Sand & Gravel Company v. United States* 60 Fed.Cl. 230, 237 (Fed.Cl. 2004).
98 See *Loveladies Harbor, Inc. v. United States* 28 F.3d 1171, 1179 (Fed.Cir.1994); *Keystone Bituminous Coal Ass'n v. DeBenedictis* 480 U.S. 470, 491-492 (1987) (quoting *Mugler v. Kansas,* 123 U.S. 623, 665 (1887)).
99 *Mugler v. Kansas* 123 U.S. 623, 668-669 (1887).

Court neglected to do this in *Berman* and *Midkiff,* combining the powers into one general understanding of the extent to which the government has the authority to seize property.[100]

In the landmark property case of *Loretto v. Teleprompter Manhattan CATV Corp.*, the United States Supreme Court acknowledged the importance of maintaining the distinction between physical takings and land-use regulations.[101] The case involved a New York City law that required landlords to allow cable companies to install equipment on their rental properties. The plaintiff in this case, a rental property owner, sued for compensation, claiming that this law constituted a constitutionally compensable taking of her property.[102] The Court agreed, creating a *per se* rule that "a permanent physical occupation of property is a taking".[103] In other words, if the government's interference with a private owner's use of his or her land results in a continual physical presence on the property, then the government must compensate the owner for that interference. In its opinion, the Court cited Blackstone as an early source for the argument that a physical occupation of real property constituted a deprivation of that property.[104]

Unfortunately, the scope of the Court's decision in *Loretto* was incredibly narrow, leaving some remaining confusion over the all-important distinction between land-use regulations and compensable eminent domain takings. Although the Court held that a physical occupation is a taking, it failed to determine whether a land-use regulation could ever be considered a "taking".[105] A decade later in *Lucas v. South Carolina Coastal Council*, the Supreme Court finally articulated a standard balancing test to be used to determine whether a regulatory "taking" has occurred.[106] Such a balancing test, however, places much of the decision in the hands of independent law-

100 See Thomas dissent, *Kelo v. City of New London CT* 545 U.S. 469, 519 (2005).
101 *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982).
102 *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982).
103 *Loretto* at 441.
104 *Loretto* at 430.
105 Rubin, 1983:182.
106 *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992).

makers and judges, leaving private property rights in a precarious position.

5.3.3 Blackstone and eminent domain

So where does William Blackstone fit into the discussion of eminent domain in the American legal system? In addition to being cited in a variety of cases on the topic, Blackstone's view can and should be relevant in future decisions about the reach of eminent domain.

First, as noted previously, Blackstone was an influence on the legal education and understanding of the men who originally penned the Fifth Amendment. By studying his works, judges, legislators and academics can gain a better perspective of the original intent of the "takings clause".

Second, Blackstone's view on the natural law foundation of property rights can be useful when determining the scope of the Fifth Amendment. Blackstone emphasised the importance of the protection of property rights throughout the *Commentaries*. He claimed that the right to private property was "inherent in every Englishman" and one of the three absolute rights that are rooted in nature and reason.[107] Being a natural law, this right to use, enjoy, and dispose of property cannot and should not be infringed upon by human laws, except as the legislature finds necessary. Any interference with property rights should only be made with the greatest caution. Blackstone would likely be appalled by the "renewal projects", like that in *Kelo*, that constitute a public use adequate to permit the government to appropriate private property.

Third, by studying Blackstone's view on property as a whole, the reader will gain a better understanding of the history and purpose of private property rights. As Blackstone explained, private property rights encourage citizens to be productive and, as a result, lead to the betterment of society. Expanding the power of eminent domain and allowing property to be taken based on a group of legislators'

107 Bl. Comm. (1765):1, 1 (134).

definition of a "benefit" to society undercuts these incentives. In a community where private property rights are marginalised and incentives to create are nonexistent, citizens will simply wait to feast on the labours of others.

6. Conclusion

In an era where the original meaning of a law is often touted as justification for a court judgment, studying Blackstone could be one of the best sources available to a legal scholar. Blackstone's *Commentaries* provide an outline of the reasoning behind the creation of those laws that form the backbone of Anglo-American jurisprudence. In addition, his *Commentaries* provide a description of the law that is shed of all its legal jargon and understandable to the common man.

Furthermore, Blackstone's reliance on natural law and reason as a guideline for jurisprudence provides a solid foundation in an age where relativity has shaken the roots of the legal culture.

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