The Principle Approach to the English Common Law: A Guide to Understanding the Commentaries of Sir William Blackstone

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INTRODUCTION

A TRIBUTE TO VERNA HALL AND ROSALIE SLATER

Friends and admirers of Verna Hall and Rosalie Slater marvel at their insight. A half-century ago they rediscovered long-neglected keys to learning which they called the "principle approach." They used the principle approach to teach students who later became teachers. Those teachers taught students who became teachers. The cycle has now repeated itself many times. The outcome has been remarkable. The principle approach cultivates a love for truth and instills a passion for freedom. As a result, they have educated a generation of patriots who love learning, who love the truth, and who love freedom.

America is about freedom and the principles of freedom. It should surprise no one, then, that the American Founders learned by means of a "principle approach" over two centuries ago. Long before anyone had heard of Miss Hall or Miss Slater, law students at Oxford and in the American colonies learned the common law by studying its underlying principles. They absorbed the great lessons of English liberty from such lights as Edward Coke[1] and William Blackstone. Both emphasized principles and precepts as indispensable for a correct understanding of the law. The American Founders for the most part took these principles seriously. Hence, freedom became the stock in trade of the American Founding.

For years I have been a student of the American founding. I am awed by the greatness of its main ideas. I am equally awed by the greatness of its great men and women. I counted it a distinct honor to be asked by Miss Slater, whom I cherish as a national treasure, to write about Sir William Blackstone, whose legacy is such an important part of this nation and its greatness. His writings were important at the time of American Independence in 1776. They continue to be important today.[2] In the history of American law, no one has had a more profound or more lasting impact than William Blackstone.

My purpose here is to provide a guide to understanding the writings of Sir William Blackstone. He was a deep and profound thinker. But his genius lies in the remarkable simplicity of his core ideas. He was

not an innovator. He was a master organizer. He looked at the 500-year history of the English common law, extracted its most important principles and precepts, and explained them in the common language of the English gentry and the American farmer.

The effect was sensational to say the least. In England he was blamed for having caused the American Revolution. In America his writings were used as an indispensable support for the cause of freedom and independence. He was hailed and vilified, either as hero or goat. Blackstone's role in the birth of the American republic, though unintentional, was so significant that he is viewed almost as an "honorary" founding father. For decades after 1776 his *Commentaries* continued to be viewed as a primary and authoritative source on all sorts of legal questions in Britain and America. They were the source quoted more often than any other during the first hundred years of the United States Supreme Court. Forty pages from the introduction of Blackstone's *Commentaries* launched the legal career of Abraham Lincoln, and provided the framework for his views of law and rights from which he never departed.[3] Through Lincoln, then, Blackstone played an important role in preserving the American Republic. To understand Blackstone is to understand the world of the American Founders, why America was born and why it endures. Having a basic grasp of basic Blackstone is crucial for a basic understanding of America.

SIR WILLIAM BLACKSTONE AND THE COMMON LAW

William Blackstone gave his first lectures on the English common law in 1753, two decades before the American Revolution. Those lectures became the basis for his four volume work, the *Commentaries on the Laws of England* (1765–1769).[4] In 1758 he was appointed as professor of common law at Oxford, three years before George III became king. In 1761, Blackstone was made king's counsel for the twenty-two year old monarch. In 1763, Blackstone was appointed solicitor general to Queen Charlotte. These and other appointments put Blackstone in the unenviable position of personally serving a king who believed the opposite of everything that Blackstone held dear. George III, of German descent, was a pure monarchist. He disliked Parliamentary democracy and wanted to rule in the strong man style of German emperors. He had a furious temper and suffered with bouts of mental instability.

In 1765, Blackstone published the first volume of his lectures under the title *Commentaries on the Laws of England*. This was at the same time that the Stamp Act crisis began in the American colonies. As the storms of political strife grew stronger, Blackstone resigned the professorship in 1766. His health declined as his responsibilities grew. In 1768 he returned to Parliament where he was attacked for his views in the *Commentaries*. Despite the turmoil and winds of change, by 1769 he had finished publishing all four volumes of his *Commentaries*.

In 1770 he was offered the job of solicitor-general in the administration of the infamous Lord North. The role would have required him to be thoroughly partisan, and an adversary of the colonists. He chose instead to accept knighthood and retreat to the safer post of Judge of the Court of Common Pleas. He was transferred for a short time to the Court of Kings Bench upon the retirement of Justice Yates, but soon returned to Common Pleas. During this period, the crisis in the Americas worsened. Blackstone again came under scrutiny, this time for being the mentor of mutiny.

Painted by Sir Joshua Reynolds (1723–1792) by courtesy of The National Portrait Gallery, London

Sir William Blackstone

Jurist (1723–1780)

Blackstone had already watered down the content of volumes two through four of his *Commentaries* to avoid the king's wrath and to appease various political factions. Now he found himself in a no win situation anyway. He was attacked vitriolically from all sides. On one hand he was blamed for inspiring the revolution in the colonies. On the other he was castigated for being the king's "toady," that is, for making statements which seemed to favor dictatorial power in the king. His place in British society was in jeopardy because he had unintentionally inspired the American revolution. But the Americans themselves saw him as a spineless compromiser.

The Americans were Whigs, in the tradition of Sir Edward Coke, author of the English Petition of Right (1628). Blackstone was a Tory, unswervingly loyal to the government no matter what. He talked the language of liberty, but excused and defended the power hungry Parliament and the power mad king. Thomas Jefferson, for example, embraced Blackstone's basic principles, but viewed him as a political coward. That is why Jefferson derided Blackstone for his "honeyed Mansfieldism" in politics.[5]

The truth was, however, that Blackstone was not his own free man. He lived in London, not America. To oppose the king or Parliament during the American crisis was political and economic suicide. That is why his *Commentaries* were Janus-faced, speaking the language of liberty and authoritarian government at the same time.[6] They laid out the principles of law and liberty, but hedged on the application of those very principles. That compromise was the price Blackstone had to pay to get his Commentaries published in a day where the King was willing to reduce cities to ashes with naval cannon. We must remember that Blackstone's king, whom he served personally, died a madman. This is the very king before whom Blackstone had taken oaths of fidelity and kissed his ring.

It is easier to criticize Blackstone than to walk in his shoes. His accomplishments are remarkable in light of the fact he had been in chronically poor health since the age of thirty. Blackstone died in London on February 14, 1780, at the age of fifty-seven. The American Revolution had been underway for four years. Blackstone spent those last few years of his life in a type of self-imposed political exile, working for the reform of England's prison system.

THE BASICS OF BLACKSTONE

Understanding Blackstone is easy if we keep a few basic facts in mind. First, out of all four volumes the first 140 pages of Volume One are the most important. In these first 140 pages, Blackstone lays out the basic norms and precepts which had been the foundation for the common law for over five hundred years. Blackstone starts with principles, and he explains these principles simply and clearly, but with great detail in the first 140 pages.

Blackstone titled his work the *Commentaries on the Laws of England*. We must keep in mind that he was writing commentaries on the law as it was. He was not always explaining the law as it ought to be. There were flaws in the British approach to law and government. Blackstone was not writing a four volume reformer's manual. Had he tried to do so, the king would have stopped his books from ever being

published. Instead, Blackstone was writing a four volume reference book which recorded the common practice of the kings, the parliament, and the courts. The first 140 pages are vintage Blackstone where he lays out the bedrock principles of the common law. In volumes two through four we discover many things in the English system which fell short of those principles or failed to implement them properly. This dichotomy does not mean that Blackstone contradicted himself. It meant that England did not always in practice live up to its professed principles of law and justice. Blackstone recorded both.

This leads us to one of the more common mistakes people make in using Blackstone as a reference. Often people will cite language from volumes two through four without asking whether British practice agreed with the principles laid down in the first 140 pages. Until one has mastered the first 140 pages, one is not ready to use or apply the materials found in volumes two through four.

The first 140 pages set forth Blackstone's true thinking on the matter. That is why the Introduction got him in so much trouble. He was able to get away with it because he did not mention the king by name or directly attack the parliament. When challenged he could always point to later sections where he spoke favorably of the king and parliament. By talking first in terms of general principles and basic precepts, he was able to smuggle a manifesto of liberty and freedom into his text without immediately drawing the wrath of the king down on his head. It is instructive to compare Blackstone's Introduction with the Declaration of Independence or with the constitutions of Virginia, Pennsylvania, New Hampshire, and so forth. It is clear that the American founders were consciously implementing every part of Blackstone's Introduction as the foundation of America's new social order. They certainly got the point.

Second, Blackstone's strategy of writing a liberty manifesto as the Introduction tells us something about the political tensions in England. Liberty was still being won. The Introduction was a road map for future victory. Writing such a manifesto carried definite risks in England. Unfortunately for Blackstone, that victory came more quickly in America than in England.

Blackstone was not creating new ideas in the Introduction. He was recounting the highest and the best principles of the British liberty tradition going all the way back to the Magna Carta in 1215. But the British system of powerful kings and a powerful parliament made progress slow. It was ill-suited for making those principles an everyday reality. England's history was too often a story of powerful politicians doing their utmost to gain and use uncontrolled power. They cared little for the principles of the common law. In many ways the common law was a type of subversive force fighting to stay alive despite the tyranny of kings and rulers.

Five hundred years before Blackstone, Henry Bracton, the Father of the Common Law, had said that the "king is under God and the law." [7] For centuries, however, British kings had acted as though they were the law or were above the law. In the world of real politics, power often trumped principle. All too often, the highest principles were proclaimed not by voices from the majority but from the minority. Black-stone's Introduction was another subtle voice of protest. Blackstone was calling England back to its common law roots in the principles of liberty. But Blackstone's was still a minority voice in 1765. He had to exercise extreme care in calling for complete and perfect liberty. Some believe he was much too cautious.

BLACKSTONE'S INTRODUCTION

When we analyze Blackstone's Introduction it breaks down into two basic parts, law and rights. As he viewed the common law, it was composed of two basic theories, a law theory and a rights theory. It was not just one or the other. It was both.

The exciting thing is that both parts occur in the American founding documents. We see them in the structure of the Declaration of Independence. We also see them in the original state constitutions and bills of rights. The American founding documents track perfectly with Blackstone. It is evident that the American founders shared the same understanding of the law theory and rights theory that came from the English common law. When we read Blackstone's first 140 pages, we are reading a detailed explanation of the core beliefs and key ideas behind the Declaration of Independence and those first state constitutions.

It may seem awkward to some to talk about the common law this way. But the "common law" was about more than particular laws and rules. Blackstone realized that the common law had a law theory. It also had a rights theory. When Blackstone looked at the previous five centuries of the common law, an impressive truth emerged. The common law rested on a framework of core principles, core ideas, and core beliefs. To think of the common law only in terms of particular laws or rules is to miss the bigger picture.

Blackstone and the "Law Theory" of the Common Law

In Volume One, Section 2, Blackstone explains his law theory (the law theory of the common law). It can be summarized as follows. God created the universe and mankind. He made physical laws to govern the physical universe and moral laws to govern human conduct.[8] God established these moral laws in the beginning when he created the human race.[9]

These moral laws are eternal and unchangeable moral precepts of right and wrong.[10] They govern every aspect of human conduct. Since God ordained these moral laws at the same time that he created nature and mankind, they are called "laws of nature." These moral precepts, or "laws of nature," are binding all over the world, at all times, and in every situation, circumstance, and condition.[11] Every human being is always subject to these moral laws. No one is ever exempt from them, regardless of situation or circumstance.

Blackstone's starting point is striking. From the outset the "law theory" of the common law begins with an explicitly Judeo-Christian metaphysic. Blackstone's law theory depends entirely on a Christian view of God, the world, and mankind. The key term is the "law of nature." And the "law of nature" is the will of God.[12] Each human being is a totally dependent creature, totally subject to the Creator. Therefore, every human being is totally and unreservedly obligated to obey the original moral law—the law of nature—in every aspect of one's life and conduct.[13]

Second, the human race was originally designed to know God's moral law by instinct. But sin has corrupted mankind's reason and intellect.[14] Sin has so darkened mankind that no one is able to know the law of nature without special help. Therefore, God gave the Bible—the Holy Scriptures—as a special

revelation to fallen mankind.[15] The Bible reveals the laws of nature objectively since mankind is no longer able to know them subjectively or intuitively without error.[16]

Here Blackstone (speaking for the common law) embraces a number of Christian core beliefs held in common by Catholics and Protestants. The most noteworthy is the doctrine of original sin.[17] This is the belief that the original parents of mankind were created sinless. But through free choice they sinned against the Creator. Their relationship with the Creator was such that when they sinned, they passed the corrupting effects of sin down to the whole human race.

Before they fell into sin, they could know the will of God through "natural law," that is, through exercising their own conscience, intellect, and reason.[18] Their instinctive moral knowledge ("natural law") was the same in content as the original moral precepts ("laws of nature") that God imposed in the beginning as a rule of conduct for mankind. Were it not for mankind's fall into sin, natural law and laws of nature would be interchangeable terms. Before their sin, mankind existed in a condition of moral innocence and purity. They did not need an external revelation such as the Bible. They could know the truth subjectively by reason, intuition, and conscience alone. Before sin entered the world, natural law was enough.

When they fell, sin ruined their natural ability to know the truth subjectively or instinctively through natural law.[19] They were no longer spontaneously righteous. "Natural law" in the mind of man was no longer the same as "natural law" in the mind of God.[20] Man's reason became corrupt, and therefore "natural law" in man's mind was corrupted as well. His views of right and wrong became skewed. He was prone to mistake moral principles or to reshape them to fit his own sinful will. Subjective natural law became as defiled and untrustworthy as human reason itself.

This meant that subjective "natural law" was no longer a fit basis for human justice.[21] After their fall into sin, the human race needed an objective revelation outside of themselves, not subject to their subjective whim and caprice. God, in his mercy, provided that objective revelation in the Bible.[22] That is why Blackstone (and the common law) emphasized the importance of an objective "law of nature" over and above subjective "natural law." For Blackstone, the Bible trumps humanism. Stated more precisely, the moral precepts revealed in the Bible are true, regardless of who disagrees.

From Blackstone we learn that man's philosophizing about law cannot be put on an equal plane with the precepts that God has revealed. The "law of nature" (the eternal moral law contained in principles and precepts) was established by God in nature and revealed by God in the Bible. Here is the objective revelation of moral law which binds mankind forever. For Blackstone and the common law, subjective natural law must not be allowed to compete with the objective law of nature.[23] The moral precepts (laws of nature) revealed in the Bible correct the flawed notions of subjective natural law in the minds of men.[24] Furthermore, whenever Blackstone uses the term "natural law" in a favorable light, it is clear that he is speaking of an "objective natural law" rather than "subjective natural law." [25] Blackstone was not a humanist in legal theory. Nor was the common law.

This brings us to two of the most startling assertions made by Blackstone (at least to the modern reader). First, no human law is valid which violates the moral precepts of Scripture.[26] And no human law should

be allowed to contradict those precepts.[27] The reason is simple and compelling. The "law of nature" [ordained when God created the world] and the "law of revelation" [revealed in the Bible] are the two foundations upon which all valid law is built.[28] Subjective natural law is not part of those foundations. Subjective natural law is useful only if it serves to support those foundations and confirm them by demonstration.[29]

Blackstone and the Question "What is Man?"

Above we said that Blackstone starts from an explicitly Judeo-Christian metaphysic. By this we mean that in his view of ultimate reality he presupposed a Christian view of God, the world, and man. This fact is significant since he was summarizing 500 years of the English common law. The common law itself presupposed a Christian view of God, the world, and man.

We have already shown how the common law adopted the Christian concept of original sin. Thus far we have focused on the corruption caused by original sin. We have not yet explained the positive side, where mankind continues to be responsible for knowing and applying the laws of nature despite being corrupted by original sin. It is here that we find Blackstone and the common law adopting the Christian teaching that mankind was originally created in the image of God. To some extent that image still exists in mankind despite their fall into sin. Human beings are creatures who bear the imprint and likeness of their Creator. The human race in general, and each human being in particular, is created in the image of God.

On this point Blackstone stands squarely in the mainstream of both Catholic and Protestant teaching. He assumes throughout that the human race is still created in the image of God, although corrupted by original sin. Sin mars but does not totally eradicate that image. That is why it is not a futile or useless gesture for God to give mankind a special revelation of the laws of nature in the Bible. Although the human intellect is fallen, it is still capable of grasping the importance and scope of basic moral principles or precepts once they are objectively revealed. Armed with this knowledge, each individual person, created in the image of God, is supposed to govern himself in accord with God's precepts. The final goal of the law, then, is self-government based on God's revealed principles: "But laws . . . in which it is our present business to consider them, denote . . . the PRECEPTS by which man, the noblest of all sublunary[30] 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." [31] This is Blackstone's way of saying what Verna Hall and Rosalie Slater have emphasized for years: we must learn God's principles God's way, and use those principles for Christian self-government.

The first key term here is "precepts." These are not specific rules spelled out in detail in the Bible. Rather they are the principles which underlie specific rules. In the Christian use of the Bible for purposes of law, one is to search for moral precepts or principles. We are not to make the mistake of the Pharisees who were experts in particular rules, but who were blind to the principles behind the rules. The Pharisees were interested in the letter of the law. Jesus emphasized precepts. They wanted to kill him for violating

a Sabbath law. He informed them of the principle that the Sabbath was made for man, not man for the Sabbath.[32] In their zeal for specific laws they misused those laws. Meanwhile they were oblivious to the "weightier matters of the law," [33] namely, the core principles and precepts.

According to Blackstone, the common law is concerned with precepts. These "precepts" are revealed in the Bible.[34] They are "moral precepts." [35] They are "first principles." [36] Therefore the eternal moral law of God is the starting point for any correct human understanding of law and government. These are "eternal, immutable laws of good and evil . . . which the Creator . . . has enabled human reason to discover, so far as they are necessary for the conduct of human actions." [37] These moral precepts pertain directly to human nature: "For as God, when he . . . created man, and endued him with FREE-WILL to conduct himself in all parts of life, he laid down certain *immutable laws of human nature*, whereby that free-will is in some degree regulated and restrained, and gave him also the FACULTY of reason to discover the purport of those laws." [38] Sin made it impossible for people to know the laws of nature correctly without special help. God made it possible again by giving mankind a direct revelation of the laws of nature in the Bible.

Despite man's fall into sin, therefore, "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; . . ." [39] Man discovers from the Bible "what is expressly forbidden" by God's moral laws.[40] Then he inductively confirms the discovered principle by using the rules of logic and evidence to demonstrate the evil results that arise from breaking God's laws.[41] One of the first tasks of legal reasoning, then, is to use the rules of logic and evidence to demonstrate whether an action causes good results or destructive results.[42]

The other important terms Blackstone mentions are "endowed," "reason," "free-will," and "faculties." These were all key terms in medieval Catholic and Protestant theology dealing with the Christian teaching of the image of God in mankind. Black-stone's use of these terms alludes to an extensive literature both in theology and in law where such terms are prominent. If we remember that Blackstone spoke Latin as easily as English, and that most of the important legal sources were written in Latin, his choice of words is very enlightening.

For example, the word "faculties" refers to all sorts of inborn abilities. People have the faculty of hearing, the faculty of sight, and the faculty of reason, along with many others. The English word "faculty" came from the Latin *facultas*. In both theological Latin and legal Latin from the twelfth through the seventeenth centuries, the word *facultas* referred to God-endowed abilities in each person which makes them human. In other words, the term *facultas* specifically refers to those attributes that represent the image of God in mankind. When Blackstone used the English term "faculties" when writing about his theory of law, educated readers would immediately grasp the fact that he was using a standard term from Christian theology dealing with the image of God in man.[43]

Such language immediately evokes the memory of Jean Gerson, for example. In 1402, three and a half centuries before Blackstone, Gerson published an extremely important book called *The Spiritual Life of the Soul*.[44] In it Gerson explained that God endowed man with both reason and free-will as a facultas

or inborn trait of the soul. Therefore, liberty (*libertas*) is also a God-given faculty of the soul. Since man cannot change his nature, these traits are inalienable. The upshot of Gerson's writing was that liberty came to been viewed as part of the image of God in man. Like reason and free will, it is inalienable. Gerson's views were well received and almost overnight became part of the English common law. Gerson was not the only Christian writer who spoke this way. He was one of many. That is why such ideas occur in Blackstone's Introduction. They were an ordinary part of the Christian impact on common law legal theory.

The first part of Blackstone's law theory can be summed up as follows. The most basic law of the universe is the law of nature. It consists of the moral precepts that God prescribed to the human race when God created mankind in the beginning. It covers every aspect of human conduct, at least insofar as certain forms of conduct are morally right or morally wrong. In the beginning, the human race knew those precepts instinctively. But sin corrupted the race, and ruined mankind's ability to know those precepts subjectively through natural law. Therefore, God gave an objective revelation of those same precepts in the Holy Scriptures, i.e., the Bible. This objective revelation of the laws of nature is given to correct subjective natural law, which is flawed and untrustworthy. To the extent that natural law continues to be used as a method of legal reasoning, it must be an objective natural law rather than a subjective natural law.

The Difference between Moral Precepts and Faith Precepts

One of the more subtle parts of Blackstone's law theory deals with the difference between moral precepts and faith precepts. As we have seen, the laws of nature are moral precepts that govern a person's outward conduct. They command human beings to do what is morally right. They forbid human beings to do what is morally wrong. The principal value of such a concept is that it tells us how to live uprightly before God and toward our neighbor in society. Certain kinds of conduct are right. Others are wrong. Some actions are good. Some are bad. Some deeds are beneficial. Others are destructive. The law of nature is a rule of moral conduct which teaches people how to behave, and how to have a just and upright social order.

Moral precepts, therefore, tell a man whether he is formally right with God and formally right with his neighbor. However, moral precepts only deal with outward conduct. They cannot reform the heart. And they cannot provide a way of salvation. Since man is corrupted by original sin, he needs a way to be right with God. In Christianity, man is right with God by faith.

Blackstone points out, therefore, that the Bible contains both kinds of precepts. It contains moral precepts to tell mankind how to behave justly toward one's neighbor in society. And it contains faith precepts which instruct man on how to be restored to right standing with God. The Bible contains two types of law which must be carefully distinguished from each other. It contains the moral law which deals with human beings as individuals before God and in society. And it contains the law of faith, which deals with the heart and spiritual salvation.[45]

This part of Blackstone's explanation, though rarely noticed, contains the key to understanding everything else he has to say about law, government, and the relationship of the individual to the state. These two

forms of law in the Bible—the rule of moral conduct and the rule of faith—"regard man as a creature, and point out his duty to God, to himself, and to his neighbor, considered in the light of an individual." [46]

For Blackstone the concept of duty to God is extremely important. The civil government has no authority over duties owed to God. The civil government only has authority with respect to duties owed to one's neighbor in society. This distinction sets the stage for Blackstone's explanation of individual rights, and of the limited jurisdiction of government. According to Blackstone, duties toward God become rights toward other men. This means that inalienable duties toward God become inalienable rights toward men.[47] Also, inalienable duties toward God become immunities toward government, barring government from intruding into one's privacy or personal life. These concepts were to make James Madison famous in America twenty years later when he used them in his *Memorial and Remonstrance on the Religious Right of Man in 1785*.[48] They also influenced Madison's thinking as Father of the U.S. Constitution when he helped draft the First Amendment.

Man has a number of important duties to God under the moral law. For example, man has a private duty to God to stay sober and not get drunk.[49] God further commands people to avoid all types of private, personal sin. However, since these are private duties owed to God, they are not the government's business. Therefore, Blackstone remarked:

> Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them . . . Public sobriety is a relative duty, and therefore enjoined by our laws: *private sobriety is an absolute duty*, which, whether it be or not, *human tribunals can never know; and therefor they can never enforce it by any civil sanction*.[50]

The "State" and "Society" in the Common Law

These types of concepts form the basis of Blackstone's view of law and the state. If a person were to live in a state of nature, where no organized civil government exists, the only law for society would be "the law of nature and the law of God." [51] Blackstone goes on to explain, however, that God created human beings for society. He intends for them to form nations and governments. When they do, the "law of nature and the law of God" continues to be binding on individuals. It also binds society at large, and the governments which they form.[52]

The "law of nature and the law of God" does not become irrelevant simply because a government has been formed. It still binds men and nations. It remains the paramount law of the land. Human laws cannot set it aside. And the creation of civil government does not abolish it or suspend its operation. That is why "no human laws are of any validity if contrary to this; and such of them as are valid derive all

their force and all their authority, mediately [indirectly] or immediately [directly], from this original." [53] After governments are formed, God's law must still be obeyed even by political rulers because: "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." [54]

This means that governments are not free to enact laws that contradict "the law of nature and the law of God." Nor are they free to issue commands directing people to disobey God's moral laws. Furthermore, society at large lacks the authority to pressure the government politically to violate those precepts. Since people have a duty to obey God's moral law, they may have to disobey the laws or commands from the state that contradict its precepts. This is particularly true in a clear case where the moral law absolutely forbids certain conduct such as murder, theft, perjury, etc. Blackstone explains by giving an example from the law of murder:

> To instance in the case of murder: this *is expressly forbidden by the divine*, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime . . . Nay, if any human law should allow or enjoin [command] us to commit it, *we are bound to transgress that human law, or else we must offend both the natural and the divine*.[55]

The government has a duty to take note of those instances where the moral law defines conduct to be evil in and of itself. If "the law of nature and the law of God" declares a particular act to be intrinsically evil, government's law must agree. The government is God's servant and must follow His moral precepts.

> The case is the same as to crimes and misdemeanors that are forbidden by the superior laws, and therefore styled mala in se [evil in itself], such as murder, theft, perjury; . . . for that legislature in all these cases acts only as was before observed, in subordination to the great Lawgiver, transcribing and publishing His precepts.[56]

On the other hand, in some instances the moral law is silent or indifferent. When a range of right choices is available to people, they are at liberty to establish the policy or law best suited for their common welfare.

> There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty, but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; . . .[57]

This divides the moral law into two categories: things that are mandatory, and things that are indifferent. The moral law is indifferent where there is a range of right choices. For example, God does not dictate which specific person one may choose as husband or wife. There can be more than one right choice. But once a person marries, the mandatory rule against adultery applies. Likewise, the moral law is indifferent as to whether you marry or do not marry. But if you choose to marry, there is a mandatory rule that you must marry someone of the opposite sex. Where moral precepts are concerned, then, human laws must pay particular attention to those things that are mandatory: "for with regard to such points as are **not** indifferent, human laws are only declaratory of, and act in subordination to, the former" [i.e., the moral law].[58]

In terms of political theory, therefore, Blackstone insists that governments must comply with "the law of nature and the law of God." Governments are not above God's law, nor are they exempt from following God's law. If the law of nature has said that certain conduct is mandatorily wrong, such as murder, theft, perjury, etc., human laws must follow God's laws.[59] These are acts which are *malum in se* (bad in itself). They generally refer to actions which violate the image of God in other people. Human laws prohibiting such behavior "act in subordination" to God's laws, "transcribing and publishing his precepts." By contrast, there are times when there is more than one right choice on what to do. Here the law of nature is indifferent. It leaves a person at his own liberty as a free agent to choose among numerous benign courses of conduct. The rule of indifference applies where the conduct does not violate the express moral commands of the law of nature, or tend to the injury or harm of other persons.

The Relationship of Moral Law to Civil Law

The last key to Blackstone's law theory is his concept of civil law. By civil law we mean the law of the state. These are laws created by government for establishing justice in society. We might as easily call it public law. Or we could call it political law. The usual term today is civil law since that is the law enacted by civil government.

Blackstone sometimes avoided using the term civil law. Instead he preferred the term municipal law. The reason was to avoid confusion between the English common law and the law of the rest of Europe. On the European continent, the word "civil law" had a technical meaning. It had been used for centuries to denote particular codes written in France, Germany, and elsewhere, modeled on the canon law (church law) of the Roman Catholic Church. European law was code-based law with specific rules applying to everything imaginable. English law by contrast was based on common law principles. In England the principles of law were every bit as important, if not more so, than specific rules about specific things. This made the English common law system very different from the "civil law" system on the mainland. One emphasized particular principles. The other emphasized particular rules instead of principles.

Blackstone uses the term "civil law" as a synonym for "municipal law." The word "municipal" is from the Latin *municipium* meaning city or town.[60] It was the Latin equivalent of the Greek *polis*, meaning city, from which we get the terms politics, political, and police. Municipal or political law, therefore, was simply the law that resulted from the political activity within society. Today we call it civil law. When Blackstone used the term "civil law" he used it in this sense. So for our purposes, this article will use the terms "civil" and "civil law" in the modern sense, rather than to refer to the code-based civil law system of the European mainland.

Blackstone defined municipal or civil law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." [61] First, it was a rule of "conduct." This narrows the scope of government's power significantly. Government cannot regulate the heart and mind. It cannot punish people for conscience or thoughts. The government has no authority over a person's reason or conviction. The government can only deal with outward actions or outward conduct.

Second, civil law is a rule of "civil conduct." This distinguishes "civil conduct" from other forms of conduct. Government can only pass laws that affect "civil conduct." The government has no authority, for example, over private conduct, family conduct, ecclesiastical conduct, or any other conduct which is analytically separate from "civil conduct." To fit into the category of "civil conduct," the actions must have something to do with public justice. "Civil conduct" is conduct which has some "public" element involved in it.

Civil government is instituted to pass laws dealing with public justice. Therefore, civil law can only deal with outward conduct that affects public justice. Conduct becomes "civil conduct" when one's outward actions affect other people in society in their personal rights. This means that the civil government has no authority over conduct which is benign and hurts no one. For conduct to be civil conduct, it must have some outward impact on society and the state because of a person's participation in the social order.

For example, Blackstone believed that government had no authority over private drunkenness, but only over public drunkenness.[62] Private drunkenness is not "civil conduct" but "private conduct." Drunkenness becomes "civil conduct" when a person is drunk in public or when one's drunkenness violates the public peace or poses a threat to the health, safety, welfare, or rights of others.[63]

In like manner, the government generally has no authority over family conduct. In the ordinary scheme of things, "family conduct" is not "civil conduct." But if a husband beats his wife, or batters or starves his children, this is no longer family conduct. It is conduct which affects other persons in their rights, safety, life, health, or welfare. Even in a family setting, if someone violates the mandatory prohibitions of the laws of nature (such as by murder, adultery, desertion, etc.), this is "civil conduct" subject to the rules of "civil law." Likewise, if someone breaches the peace, or violates the rights of person or property of a member of the family, such conduct is no longer family conduct. It is "civil conduct." As such, it is subject to the rules of "civil law."

Third, civil law is a rule of civil conduct "commanding what is right, and prohibiting what is wrong." Government's laws not only prohibit what is wrong. They can also command what is right. This distinguishes Blackstone's approach from some modern ones, such as libertarianism. Libertarians believe that government can pass laws prohibiting what is wrong. But they believe that government cannot command people to do what is right.

Blackstone believed that civil law can do both. We must keep in mind however, that he is talking only about "civil conduct." Government cannot prohibit every wrong. It can only prohibit "civil conduct" that is wrong. It cannot prohibit sin, for example. But it can prohibit crime. Likewise, government cannot command everything that is right. It cannot require you to love your neighbor, for example, or to donate to charity. It can only command one to do right "civil conduct" arising from one's civil duty. So the government can pass laws prohibiting people from conduct which is bad civil conduct. And it may pass laws commanding right civil conduct, namely, requiring people to do their civil duty. In both instances, however, government's authority is limited to civil conduct. This is the kind of conduct which

has something to do with public justice. It is conduct which affects other persons in their rights, safety, life, health, or welfare.

Blackstone thought that it was important to distinguish between civil law and "the law of nature and the law of God." The law of nature—basic moral law—commands what is right and prohibits what is wrong in every area. It has a far broader scope than civil law. But that is because the Creator has unlimited authority and jurisdiction. Civil government has a narrow scope of jurisdiction, limited solely to matters of "civil conduct." If we confuse the scope of the laws of nature with the scope of civil law, we tend to enlarge the power of government far beyond its proper boundaries.

The same is true when we confuse the revealed law with civil law. As we noted earlier, the revealed law (i.e., the Bible) contains two important laws. It restates the laws of nature. And it introduces mankind to the law of faith (how to be right with God). We have already explained how the civil law is narrower in scope than the laws of nature. Civil law only commands what is civilly right and prohibits what is civilly wrong. The laws of nature command every moral right and prohibit every moral wrong.

Likewise, the law of faith deals with religious belief and practice. It commands what is right and prohibits what is wrong in the area of one's relationship with the Almighty. What one believes and how one worships is not civil conduct. It is ecclesiastical conduct or religious conduct. One's religious faith and religious free exercise is none of civil government's business.[64] Civil government has civil authority over civil conduct. It "commands what is right and prohibits what is wrong" in the civil sense. Civil government does not enforce the law of faith. Religious faith and religious practice, as long as they are benign and hurt no one, are beyond the reach of civil government's authority.

These sorts of distinctions point out the key difference between being an individual and being a citizen. The law of nature and the law of faith apply to every person merely as an individual. These laws are from the Creator, and are binding whether government exists or not. They continue to be binding after governments are formed. Government cannot usurp or intrude upon God's jurisdiction. Government must defer to these laws and respect them where individual conduct is concerned. In all other circumstances, government exercises civil authority only, enacts laws that deal with civil conduct only, and regulates only the "civil" conduct of individuals in their capacity as a citizen with civil duties:

> Municipal law is also "a rule of *civil* conduct." This distinguishes municipal law from the natural or revealed; the former [65] of which is the rule of moral conduct, and the latter [66] not only the rule of moral conduct, but also the rule of *faith*. These regard man as a creature, and point out his duty to God, to himself, and to his neighbor, considered in the light of an *individual*. But municipal or civil law regards him also as a *citizen*, bound to other duties than those of mere nature and religion; duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of society.[67]

In this analysis, then, the civil government must take note of the fact that the human being is an individual

with moral and religious duties to God under the "law of nature and the law of God." Government must treat individuals as free agents under both the moral law and the revealed law. However, in addition to the moral law and the law of faith, people are subject to civil law. They can be citizens of a particular political state. And they can be required to perform their public duties as citizens. This includes contributing to the subsistence and peace of society. Therefore, citizens pay their taxes, protect the public peace, and perform military service.

Blackstone's Law Theory and America

In 1765, Blackstone used the term "the law of nature and the law of God" to identify the most basic and fundamental law for society. In the Declaration of Independence eleven years later, Thomas Jefferson stylized this concept with the words "Laws of Nature and of Nature's God." [68] By placing this phrase in the preamble of the Declaration, the American Founders affirmed that America based its legal existence upon the authority of God's original moral law—the "law of nature and the law of God"—as described by Blackstone.

That the Declaration of Independence was signed by all the original thirteen United States is tremendously significant. Blackstone was under scrutiny in his own country. The politically powerful cared little for the principles of the common law which he labored to explain. But in America those core beliefs and basic principles were being used to form the basis of a new nation. The American Founders were rallying to the principles of English law and liberty while the English themselves were turning a deaf ear.

By signing the Declaration of Independence, the American founders publicly proclaimed what kind of nation America was supposed to be. By signing, each state agreed that God's moral law is the foundation for the law of the land. That foundation is what provided legitimacy to the American claim for separate statehood. It also defined and provided legitimacy to America as a new social order. By chartering the new nation on this foundation, they unanimously proclaimed that all future acts of legislation, executive decisions, and judicial decisions must conform to these basic precepts to be legitimate. The Declaration of Independence, therefore, was a public statement of America's original, organic law. The only way to change that law would be to revoke the Declaration itself and declare it null and void. Even then God's law would apply, whether Americans acknowledged it or not. After all, this law still applied in England even when the mother country denied their own common law heritage in dealing with the American colonies.

Blackstone had documented these principles for the sake of all England, not just the colonies. His *Commentaries* were supposed to strengthen the whole British nation, not split it in two. He knew that England was not living up to the highest principles of the common law. He chronicled the principles and ideals to move England forward in the right direction. He could not have foreseen that England would resist its own heritage in such a fashion that it would lose the colonies. The political outcome must have been terribly disappointing for him.

Nevertheless, the impact of all these ideas in terms of political theory is profound. It means that the government's range of choices is strictly limited to that which complies with the "law of nature and the law of God." Anything else is illegitimate and an abuse of power. These common law principles from Blackstone clearly contradict those of Machiavelli, Hobbes, and others who were absolutists in political theory. In Blackstone's law theory, the state is not free to pass whatever law it pleases without regard to basic principles and precepts. There have been many well-known names who approved of authoritarian government, including Plato, Aristotle, Cicero, Suarez, Maxwell, Filmer, the Tew Circle writers, and a host of others. The principle behind their views is summed up in the words of O. W. Holmes, Jr., who said: "The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." [69]

The authoritarian view as summarized by Holmes is the mirror opposite of what we find in Blackstone and the Declaration of Independence. Unfortunately, Holmes's authoritarian view is more widely accepted today in America than either Blackstone's or Jefferson's. Holmes, for example, mocked Blackstone's approach to law, saying that "law is not a brooding omnipresence in the sky." [70] Contrary to Blackstone and the principles of the common law, Holmes believed that the government could pass any law it pleased, regardless of its repugnance to moral law:

> However I am so skeptical as to our knowledge about the goodness or badness of laws that I have no practical criticism except what the crowd wants. Personally I bet that the crowd if it knew more wouldn't want what it does—but that is immaterial.[71] . . . [T]ruth is the majority vote of that nation that could lick all others.[72] . . . Wise or not, the proximate test of a good government is that the dominant power has its way.[73] . . . If the will of the majority is unmistakable, and the majority is strong enough to have a clear power to enforce its will, . . . the courts must yield, as must everybody else.[74] . . . I should be glad if we could get rid of the whole moral phraseology which I think has tended to distort the law. In fact even in the domain of morals I think that it would be a gain, at least for the educated, to get rid of the word and notion Sin.[75] . . . I can imagine a book on the law, getting rid of all talk of duties and rights—beginning with the definition of law in the lawyer's sense as a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts.[76]

Throughout most of the twentieth century, the United States Supreme Court has adopted Holmes's view of law rather than Blackstone's and Jefferson's. The turning point came in 1938 with a case called *Erie Railroad v. Tompkins*. The case itself was rather mundane, turning on the arcane issue of whether or not there is such a thing as federal common law. The results of the case are not important. The rationale is. One year before Hitler invaded Poland, the U.S. Supreme Court spoke the following words:

> The fallacy . . . is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, . . . But there is no such body of law . . . But law in the sense in which courts speak of it today does not exist without

> some definite authority behind it . . . The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." [77]

Twentieth Century Contempt for Blackstone and Jefferson

The examples since 1938 of the Supreme Court's apostasy from America's founding principles are legion. The most recent incarnation is a theory called "law and economics" embraced even by most conservatives on the Court. That theory was developed by Richard Posner, a disciple of Holmes. It is also known as the "Chicago school of economics" since it first became prominent at the University of Chicago law school. It substitutes mammon for morals, so that economic considerations become the final arbiter of all norms in the law. It essentially presents Holmes's approach to law, but dressed respectfully in the language of modern economic theory emptied of moral content.

The common principle behind this and other recent theories is "positivism," the belief that the laws enacted by the state and the decisions of the courts are the only law of the land. For the positivist, there is no law higher than the law of the state. Or, if there is a law higher than the law of the state, the courts can take no notice of such a law. Therefore, whether a person adopts the "evolving constitution" theory of the judicial liberals, or one of the many "strict constructionist," "interpretivist," or "originalist" theories of the judicial conservatives, they all commonly reject the principles of the Declaration of Independence as part of the law of the land. This permits the Court to routinely sidestep the basic principles upon which America was founded. The theory of legal positivism therefore represents a serious threat to freedom and the long-term survival of the American Republic. It unavoidably distorts American law, politics, and constitutionalism.

A disappointing example of how this rejection has misled conservatives appears in the writings of Robert Bork.[78] Judge Bork is viewed among political conservatives as an icon of correct legal and constitutional theory. He is so highly regarded among conservatives that his views are considered by many to be beyond reproach. Yet, in his 1996 best seller, *Slouching toward Gomorrah*, he blames America's modern ills on the fact that Thomas Jefferson wrote the Declaration of Independence.[79] According to Bork, Jefferson made a mistake in writing the Declaration of Independence. Now we are paying for the mistake with too much freedom. The theme of his book is, essentially, that the Founding Fathers were wrong. They believed in individual freedom and rights. Their ideas were dangerous.

BLACKSTONE'S THEORY OF RIGHTS

Rights and the Purpose of Government

To preserve liberty it is crucial that we correctly understand Blackstone's theory of rights and how it was implemented by the American Founders. We said earlier that the common law contained two parts,

a law theory and a rights theory. One is incomplete without the other. What was said above about Blackstone's law theory is only half the picture. Unless we understand the principles and language of rights in Blackstone's writings, we do not really understand Blackstone or his theory of law.

First, Blackstone based his rights theory, like his law theory, on a Judeo-Christian metaphysic. In other words he based his rights theory on a Christian view of God, the world, and man.[80] He rejected the premise from Aristotle that the purpose of government is to impose order. Instead he embraced the premise introduced by medieval Christianity that the purpose of government is to secure individual rights.

> For *the principal aim of society* is to *protect individuals* in the enjoyment of those ABSOLUTE RIGHTS, which were vested in them by the immutable laws of nature, . . . And therefore, the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, . . .[81]

Here Blackstone uses the term "absolute rights." For the reasons explained below, "absolute rights" denoted the exact same concept as the term "unalienable rights" in the Declaration of Independence. They were two ways of saying the same thing. Blackstone insists that the primary purpose of government is to protect such rights. The germ of that principle had existed as early as 1215 in the Magna Carta. Therefore, Blackstone could confidently state that it was a bedrock precept of the English common law. The Declaration of Independence followed the principle by saying "to secure these [inalienable] rights, governments are instituted among men." [82]

Blackstone's Definition of Rights

What were absolute rights according to Blackstone? They were those God-endowed rights which were part of the makeup of human nature as God created it. In other words, rights were part of the faculties or abilities associated with the image of God in man.[83]

> The *absolute rights of man*, considered as a free agent, *endowed* with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This *natural liberty* consists properly in a power of acting as one thinks fit, *without any restraint* or control, *unless by the law of nature*: being a right inherent in us by birth, and one of the *gifts of God to man at his creation*, when he *endued* him with the *faculty of freewill*.[84]

Absolute rights are defined and governed by God's laws of nature, Blackstone says. Therefore, the liberty contained in those rights is not open-ended. It is limited to the authority to make ***any** choice that does not violate God's original moral law*—the laws of nature. You only have a right to do what is right.

"Absolute rights," then, are a special kind of right. They are part and parcel of human nature. They are attached to human nature by God himself. They are part of the definition of what it means to be human.

To be a person is to have those rights. This is so because every person is created in the image of God, and these rights are part of that image. That is why Blackstone also called them rights of personhood.

For Blackstone "absolute rights" and "personhood rights" are interchangeable terms. They are absolute in the same manner that human nature and personhood are absolute. This rationale is based on a Christian view of man. Man is not free to change his nature, because the Creator made him a part of the human species. Man, created in the image of God, cannot change himself into a duck, cat, cow, horse, or monkey. So long as he remains the kind of creature God made him to be, those absolute rights will inhere in him as part of his God-created human nature. Likewise, God made him to be a person in the image of God. Therefore these rights are as absolute as that image, and are indeed rights of personhood itself. They are rights of human nature.

People often wrongly assume that viewing these as "rights of human nature" is humanistic and a departure from Christianity. But human nature is not the source of those rights. Human nature is the place where those rights are lodged. When Blackstone wrote, no one imagined that human nature might someday be changed through advanced genetic tinkering. So to refer to rights this way was to emphasize their permanence and inviolability. The boundary lines around the human species was deemed to be immutable. Since human nature was deemed to be unalterable, at least until the resurrection, Blackstone assumed that personhood rights would remain absolute and immutable as well.

Rights and Personhood

For Blackstone and the common law, therefore, absolute rights were individual personhood rights attached to human nature by God the Creator. They are inalienable because the image of God in man is inalienable.[85] The principal aim of society is to protect people in the enjoyment of these rights. The American Founders agreed. In the Declaration of Independence they said that governments are instituted among men to secure these rights. They also said that whenever any government becomes destructive of the purpose of securing those rights, it can be altered or abolished and new government instituted. That was the fundamental premise of the Declaration of Independence, and the rationale for the birth of the American nation. In the Declaration of Independence, the American Founders were following with exact precision the common law theory of law and rights explained by Blackstone.

Here is how Blackstone explained that absolute rights were also rights of persons or of personhood itself.

> [T]he primary and principal objects of the law are Rights, and Wrongs . . . Rights . . . are annexed to the persons of men, and are then called *jus personarum* or the *rights of persons*; . . . Natural persons are such as the God of nature formed us: . . . The rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other . . . By the absolute rights of individuals we mean those

> which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which *every man is entitled to enjoy* whether out of society or in it.[86]

We can see from this definition that Blackstone is remaining true to the Christian heritage of the common law. His entire discussion is based on the traditional two-fold Christian model of God-given law and God-given rights.[87] Further these rights are part of the image of God in man because they are "annexed" or permanently joined to their very humanity. Such rights are called absolute rights.

However, when people enter into a state of society with others, they begin to associate together in various political relationships which are important. As members of the same social order or as citizens of a state, they now have a new class of rights called "relative rights." Such rights are relative to the existence of a particular government, relative to their particular relations to each other, and are determined by that particular government's laws. These might also be called "citizenship" rights if indeed one ranks as a citizen in that state and society. Sometimes they are called the rights of "subjects."

These relative rights—or citizenship rights—are created by the laws of the state. They come into existence only because a particular state exists. If the state ceases to exist, citizenship rights cease with it. Citizenship rights, being politically created, will vary from country to country. They will also vary from time to time within the same country. This is because all citizenship rights are alienable. They are relative rather than absolute. Relative rights are politically created civil rights rather than God-created absolute rights. They are not permanent like the inalienable rights attached to personhood. That is why citizenship rights, or relative rights, are more correctly termed "privileges" rather than rights. Personhood rights and immunities are inalienable. Citizenship privileges and immunities are alienable. Knowing the difference between absolute rights and relative rights, therefore, is indispensable for a correct understanding of law, politics, and constitutionalism.[88]

Rights and the State

We have already noted that God, not the state, is the creator of inalienable rights. God sets up the boundaries of right and wrong in the laws of nature. He commands everyone to obey the mandatory precepts of that law. And by that law he imposes absolute duties upon every living human being. These absolute duties to God become absolute rights toward other people.

Since human beings are subordinate to God's laws, they cannot suspend or nullify those laws. This means that every person has an inalienable duty to obey God's moral laws and to live one's life for God. Those laws determine what is objectively right. God judges a person by whether one obeys those laws. Therefore one's happiness depends on obedience to God's moral precepts.[89] Since one's destiny and happiness depends upon obeying God's laws, every person has an inalienable right towards others to be free from interference in obeying God's laws. Every person has an inalienable right to fully express the image of God by living in obedience to God's laws.

The Biblical principle "to whom much is given, much is required" [90] applies here. Human beings have been given much by being endowed with faculties of reason, free will, and other traits. They have been endowed or invested with the image of God. Therefore they have an inalienable duty to serve God by expressing that image to its fullest extent and potential. For example, God is the giver of life. Along with the gift of life comes the absolute and inalienable duty to live one's life for God. That duty to God is an inalienable right towards other men. Therefore, life is an inalienable right. A similar analysis applies where liberty and property are concerned. They are inalienable rights toward men because they are inalienable duties to the Creator.

Whether we call them natural rights, natural liberties of mankind, absolute rights, or inalienable rights, we are speaking of the same thing. We are speaking of rights that people carry around with them as a part of their very existence and personhood. These rights are linked to the image of God in mankind, and to the authority which God has given to the human race. Each human being carries about in one's own person certain subjective, God-given abilities and faculties. Each is also invested with the authority to live for God and the duty to obey his laws of nature and of revelation. This means that they have the ability and the objective duty to do what is objectively right. Since the Creator has made these faculties and this authority part of the human soul, they are inseparable from a person's subjective daily life and experience. They are therefore rights of the person. They are absolute and inalienable. And they are subjective rights, belonging personally and existentially to each living human being.

The duty of government, therefore, is to acknowledge these rights and to protect them through laws and just procedures. As Blackstone said, the principal aim of society is to protect individuals in the enjoyment of these rights. And the principal view of human laws is, or ought to be, to explain, protect, and enforce them.[91] Since the government does not create these rights, the rights exist whether the laws acknowledge them or not. Even when the law is careful to recognize them, this does not make those rights any stronger than they already are:

> 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.[92]

It is interesting to note that Blackstone uses the term "invested." This was a technical term from the medieval period meaning to be clothed and endowed with authority. Often this was some form of divine authority. Priests, for example, were deemed to be invested with spiritual authority from God to be ministers of the gospel. Their spiritual authority did not come from government. Here Blackstone says that God has invested every human being with these rights. They are a divine endowment. Similar language appears in the preamble of the Declaration of Independence which says that "all men are endowed by the Creator with certain inalienable rights." The divine endowment concept was not new with Jefferson. It was commonplace. As we see, it had already been stated by Blackstone in 1765 speaking for the English common law.

Since these rights are a divine endowment from God, the civil government must be scrupulously careful not to violate those rights. No civil government has the ability to revoke or abridge such rights without just cause. To lose an inalienable right, a person must himself commit some bad act such that he deserves to be punished by having the right taken away. Speaking of these rights, Blackstone remarks: "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*." [93] Such rights cannot be alienated or sold. But they can be forfeited when a person commits a crime or some other form of wrongdoing which violates the precepts of the laws of nature.

This principle is the basis of the common law concept of due process of law. Since every human being carries about in his person a full complement of inalienable rights, including life, liberty, and property, government cannot abridge those rights unless the person is shown to be a wrongdoer. The principle of inalienable rights bars government from punishing the innocent. Therefore, if the government suspects a person of being a wrongdoer and deserving punishment, guilt or liability must be established by due process of law.

The key word is here is "due" process. Governments often assume that any process will do. But the common law asks "is this the process 'due'?" Is this the kind of process due to a person who is created in the image of God and who is endowed by the Creator and eternal law with inalienable rights that cannot be abridged by government without fault or cause? Having a kangaroo court is not enough. Nor is it enough simply to have efficient procedures. The procedures must be geared to honoring the precepts of the laws of nature. If the procedures are so defective or deficient that they permit the innocent to be treated as if they are guilty, this is not due process because it is not the process due. If they allow the government to deprive a person of life, liberty, or property, subjecting one to fines, forfeitures, or penalties without actual guilt, cause, or fault, this is not due process. Government is not permitted to abridge one's inalienable rights unless it proves the person committed a wrongful act and that the punishment is justly proportional to the nature of the wrong committed.

The Principle of Inalienability

To understand Blackstone's theory of rights, we must understand its basic principles. The first is the principle of inalienability. Some things are alienable. Some things are inalienable. If they are alienable, they can be sold, traded, transferred, conveyed, disposed of, or otherwise given away. If they are inalienable, they cannot be sold, traded, bartered, transferred, conveyed, or otherwise given away, at least not freely or unconditionally.[94]

The principle of inalienability underlies inalienable rights. Some rights are alienable. Some are inalienable. For example, particular goods, particular houses, and particular parcels of land are alienable. They can be sold. The property rights in those goods, houses, and lands are alienable. But the basic right to own property is a different kind of right. It is a trait of personhood placed in human nature by the Creator.[95] That kind of right is inalienable because it is part of personhood itself. Alienable rights,

generally speaking, are rights of exchange. They are rights of trade and transaction. Inalienable rights, as explained previously, are rights of human nature, and are a component part of the image of God in mankind. You can sell particular property rights to particular pieces of property. But you cannot sell your right to be a property owner.

The principle of inalienability came from Christianity. It was introduced by Catholic theologians in the twelfth century A.D. One of the first groups to rely on the concept were the canon lawyers. These were experts in theology and law who wrote the first systematic code of church law for the Roman Catholic Church just after the Gregorian Reform.[96] According to Richard Tuck of Oxford, "It was the canon lawyers who developed and applied such important maxims as the principle that 'personal iura' [i.e., rights of the person] . . . cannot be transferred to others nor be the subject of contracts." [97] Since England was a Catholic country, these developments in church law were immediately transplanted into the English common law.

The principle, then, is that rights to "things" can be traded, transferred, and sold. But rights that are a part of human nature itself cannot be. Rights to particular pieces of property are alienable. But the right of property which is part and parcel of the human personality is inalienable.

It is easy to mistake the words "absolute" and "inalienable" to mean unlimited or unrestricted. To do so is to misunderstand Blackstone and the American founders. Inalienable rights may be absolute, but they are not unlimited. There are limits and bounds to inalienable rights. The enjoyment of the right might be forfeited by the act of wrongdoing.[98] Likewise, divine duties and civil duties help divine the boundaries of inalienable rights. That is why one is permitted in some circumstances to sacrifice one's rights for the sake of others. That is also why the civil government can pass laws "commanding what is right." When civil government requires one to performs one's civil duties that conform to the precepts of the laws of nature, government does not necessarily violate one's inalienable right.[99] These are some of the reasons why Blackstone and the American founders did not use the terms "absolute" or "inalienable" to mean unlimited or boundless.

The Principle of Inalienability and Particular Rights

As soon as the principle of inalienability emerged it began being framed in terms of particular rights. The first right to be identified by the medieval Christian writers as inalienable was the right to life. This occurred as early as the twelfth century, notably among the Franciscans. Thereafter the right to life was a staple of Christian law and the English common law until the time of Blackstone. We find Blackstone stating precisely the same principle in the following words:

> This natural life being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.[100]

In other words, since the Creator reserves to himself the power of life and death over his creatures, they do not have the right to take their own lives, nor may others abridge one's right to life. The right to life cannot be bought or sold. Nor can it be thoughtlessly discarded. The right to life is inalienable because each human being has an absolute duty to live one's life for God.

The second area in which Christian teaching applied the principle of inalienability was in the right of property. Above we saw how the principle of inalienability applied to property, making property an inalienable right.[101] Blackstone confirmed the importance of this right in the common law saying:

> The original of private property is probably founded in nature, . . . So great moreover is the regard of the law for private property, that it [the law] will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, *the public good is in nothing more essentially interested, than in the protection of every individual's private rights,* . . . Nor is this the only instance in which the law of the land has postponed even public necessity to the *sacred and inviolable rights* of private property.[102]

The third area where the principle of inalienability developed was that of liberty. As stated earlier, important work was done in this area by Jean Gerson in 1402.[103] We noted his use of the important word *facultas* or faculty. A *facultas* is a God-given component of human personality. For Gerson liberty was a *facultas* given by God, making it a God-given trait of human personality. Gerson applied the same rationale to liberty that had been applied earlier to life and property. Each was seen as a facultas of the human soul. Therefore, by the time of Gerson, the foundation was laid in Christian jurisprudence for liberty to be an inalienable right. This completed the trilogy of inalienable rights in the common law—life, property, and liberty.

Speaking for the common law, Blackstone explained the inalienable right of liberty in the following terms:

> Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals . . . Of great importance . . . is the preservation of this personal liberty: for if once it were left in the power of any . . . to imprison arbitrarily . . . there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly

> hurrying him to gaol [jail], where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.[104]

For Blackstone, liberty was not just a civil right. It was a right attached to human nature. Liberty is a right of the person and a trait of human personhood. It is therefore absolute and inalienable. Blackstone notes:

> And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman.[105]

Applying the principle of inalienability leads to an impressive list of individual rights. In the common law, some of these included the "right of personal security" and "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." [106] It also included "the same natural right to security from the corporal [physical] insults or menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member." [107] In addition there was the right to "The preservation of a man's health from such practices as may prejudice or annoy it," and "The security of his reputation or good name from the arts of detraction and slander." [108]

Besides these sorts of rights, Blackstone also provides a catalog of liberty rights too extensive to mention here.[109] His brief review of various property rights covers three pages.[110] In Blackstone the "pursuit of happiness" also ranks as an inalienable right.[111] (Happiness was a technical term in the common law with its roots in medieval theology. It was based on the Christian belief that a person's true happiness exists only in obedience to God and his laws.)[112] It is clear from these sorts of examples that the common law was as much about rights as it was about law. Blackstone viewed both the principle of inalienability and inalienable rights as supremely important. One does not understand Blackstone without understanding both. Nor does one understand the common law without understanding Blackstone's theory of rights.

Inalienable Rights and Citizenship

Blackstone's law theory and rights theory culminates in a link between inalienable rights and citizenship. Although inalienable rights are given by God, Blackstone insists that they are also to be written into the law and protected by the arm of the state. This means that the government must fully grasp the meaning of inalienable rights and citizenship rights, and studiously avoid abridging a person's rights.

This idea is very important to Blackstone. It represents the dividing line between good government and tyranny. All rights of personhood can be summed up, he says, into one of three broad categories: personal security (life), personal liberty, and private property. There is no other way for government to abuse its power and mistreat its subjects than to abridge one or the other of these kinds of rights.[113] Therefore inalienable rights must become part of civil law and be enforced as "civil immunities," areas in which the individual person is immune from government's reach or misconduct: [114]

> And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed.[115]

To secure these rights, government must also recognize certain political rights or citizenship rights in its people, particularly where such rights are logically necessary for making inalienable rights an everyday reality. To protect inalienable rights, an additional layer of constitutional rights must be created. This type of rationale, so foreign to modern thinking, is both startling and profound. Here Blackstone presents one of the most innovative and far reaching political concepts of all time. People not only have God-given natural rights, they have a God-given natural right to enjoy certain civil rights.

> But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.[116]

This additional set of necessary rights includes: (1) the right to a constitution which sets limits on the power of the legislature, (2) limits on the discretion of the chief executive and the executive branch, (3) the right of access to the courts, the guarantee of due process of law in those courts, the right to be free from the arbitrary will of the judge, and the right to be free from bureaucratic agencies which mix legislative, executive, and judicial functions, (4) the right to petition the government, particularly the executive branch, for redress of grievances, and (5) the right of having arms for defense sufficient for the natural right of resistance and self-preservation, among other rights.[117] The purpose of constitutional rights, then, is to serve as a method and a means for protecting and securing inalienable rights. These constitutional rights are "civil rights." Blackstone's principle is that each person has a God-given natural right to the enjoy these necessary "civil rights." This amazing concept, so little known today, provides one of the links between inalienable rights and civil rights.

It is a matter of regret that there was no opportunity for Thomas Jefferson to write this principle into the Declaration of Independence when others were included. Had it been otherwise, the idea would not seem so foreign that people have a natural right to equal civil rights. But we do find Thomas Jefferson making this point in his Bill for Religious Liberty.[118] Jefferson wrote the bill when he was governor in 1779. It did not become law in Virginia until January 1786.[119] In it Jefferson argues that religious liberty is an inalienable right. In the course of that argument, Jefferson also insists that people have a God-given natural right to receive and enjoy equal civil rights.[120] Two centuries later that principle became the cornerstone principle proclaimed by Rev. Martin Luther King, Jr., in the Civil Rights movement. The idea was not original with Dr. King, nor with Thomas Jefferson. It was a principle from the common law as stated in 1765 by William Blackstone.

Blackstone finishes his explanation of the interplay between his law theory and rights theory, and of inalienable rights and civil rights, with the following words:

> In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman . . . In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: *liberties more generally talked of, than thoroughly understood, and yet highly necessary to be perfectly known and considered by every man of rank or property*, lest his ignorance of the points whereon it is founded should hurry him into faction and licentiousness on the one hand, or a *pusillanimous indifference and criminal submission* on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution . . . be supported in it's full vigor; and limits certainly known, and . . . set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defense. *And all these rights and liberties it is out birthright to enjoy entire*; unless where the laws of our country have laid them under necessary restraints. *Restraints in themselves so gentle and moderate, as will appear upon farther enquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow citizens.*[121]

Here then is the sum and substance of Blackstone's argument. The law exists to prohibit that which is bad. It does not exist to prohibit that which is good. The law cannot punish good conduct or innocent people. It may only punish wrongful conduct which violates the mandatory terms of God's laws of nature, or harms others in their persons or their equal rights. When it does punish, punishments must be proportional to the wrong that was done. Government has no authority to contradict or contravene God's eternal moral precepts. Government is bound by those precepts, known variously as "the law of nature and the law of God" or the "law of nature and of revelation" (in the American context in the Declaration of Independence—"the Laws of Nature and of Nature's God"). The purpose of government and of the law is to protect the individual in the exercise of God-given inalienable rights. Government may not abridge those rights without fault or cause. These are rights to do what "a good man would do" and to be restrained only from what is "pernicious either to ourselves or our fellow citizens." Where the law places restraints on rights, those restraints must be gentle and moderate, otherwise they tend to tyranny. Constitutional rights exist for the purpose of securing and implementing God-given inalienable rights.

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THE ROLE OF THE COMMON LAW JUDGE

In Blackstone's theory of law and rights, the judge at common law plays an important role. The common law has to do with custom. It deals principally with the customs of a particular nation or people. The common law judge is supposed to be expert in those customs. Because of his unique role, the judge in many ways is a mouthpiece or oracle of the customs of the law.

Beyond this, however, there is a singularly important principle dealing with custom and the role of the judge. Since the basic law of the land is none other than God's moral precepts—those eternal and immutable principles of right and wrong found in the laws of nature and of revelation—the custom of the law should always be to assume those principles as a starting point for all legal and judicial thinking. The judge is supposed to assume this basic moral framework of right and wrong to be the final rationale behind all law. Otherwise, justice is simply whatever the government says it is, or what the politically powerful say it is, or whatever the state decrees. If the first and principal custom of the law is to assume God's moral precepts as the starting point, the common law judge can never be merely a rubber stamp for the decrees of tyrants and dictators. Some have viewed the judge as the mere agent of the chief executive and legislature regardless of how unjust or absurd their dictates. Not so the common law judge. He is not free to act as if the law is whatever the state says it is.

The alternatives are obvious. If justice is whatever the state decrees, everything Blackstone said in his introduction would be pointless. Likewise, the entire argument of the Declaration of Independence would have been rhetorical gibberish—an artfully crafted political fabrication or fable. King George III would have been right simply because he was king. The American Revolution would have been illegitimate. And the Declaration of Independence would be reduced to mere propaganda and farce. If Blackstone's view of the link between first principles and the nature of justice is invalid, his theory of law and rights collapses. The framework of the American founding crashes down along with it, since the American founders adopted the same principles.

In Blackstone's view, there must be more to the law and to justice than the simple decree of the state. There must be some starting point from which a nation's justice proceeds in terms of norms, principles, and precepts. It will either be the laws of nature and the law of God as in English and American common law. Or it will be some other construct, whether materialism, communism, socialism, aryanism, liberalism, conservatism, libertarianism, or other set of ideas. If the day ever comes that the Declaration of Independence is formally revoked by the American people, then these principles from the common law might no longer apply. But until then America's starting point is, formally at least, the same as Blackstone's: the Laws of Nature and of Nature's God, unalienable rights endowed by the Creator, and the belief that the purpose of government is to secure those rights vested in mankind by that law.

In Blackstone's approach, then, there is an overarching custom behind all law. The custom, simply put, is for the judge always to assume that this basic moral framework is binding and valid where the nation's basic law is concerned. It is true that the common law judge must be an expert at the country's basic customs and common law. But the judge also functions in the context of a much deeper custom, one

involving the way we think. Behind particular customs and common law, is the custom of assuming a framework of basic right and wrong as the starting point for legal thought. The judge himself or herself is bound by that law. It will even affect how the judge reads, understands, and applies constitutions, laws, and statutes.

This means, of course, that a due regard for these precepts and principles is the starting point for all correct judicial thought. The common law judge assumes these precepts and principles to be interwoven into the entire fabric of every law and every judicial opinion. This is true even when the judge is examining particular rules or statutes, and when judges are interpreting the meaning of constitutions and written legislation. Behind the express language of every constitution, law, and ordinance is a foundation of basic principles of right and wrong. They form the essence of the nation's fundamental values—legally, politically, and constitutionally.

This concept has far reaching implications for whether particular judicial opinions are valid or invalid in terms of law. Common law judges are sworn to uphold the laws of the land. Where earlier judicial opinions embody that law, judges are bound by the earlier decisions as precedents. They are not free to change the rule based on their own private choice, policy preferences, natural law speculation, or whim. They must follow the law as explained in those earlier opinions. Yet, there is an exception, Blackstone says. It rests on two considerations. If the earlier decision violates the rules of logic by being evidently contrary to reason, or if it violates God's basic moral law, the precedent is not binding on later judges: "Yet this rule admits of exception, where the former determination is most evidently *contrary to reason*; much more, if it be ***clearly*** *contrary to divine law*." [122]

Blackstone goes further to explain that the erroneous opinion was not bad law, it was *not law* at all. He again insists that whether or not a judicial opinion has the force of law depends on whether it conforms to the rules of logic and the precepts of morality. To be a valid precedent, a judicial opinion must meet two essential criteria. First, it must not be "absurd," violating the rules of reason and logic. Second, it must not be "unjust," violating the laws of nature or of revelation.

> For if it be found that the former decision is *manifestly absurd* or *unjust*, it is declared not that such a sentence was *bad law*, but that it was *not law*; . . . [I]t is sufficient that there be nothing in the rule *flatly contradictory to reason*, and then the law will presume it to be well founded . . . The doctrine of the law, then, is this: that precedents and rules must be followed, unless *flatly absurd* or *unjust*; . . . So that the law and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Upon the whole, however, we may take it as a general rule, "that the decision of the courts of justice are the evidence of what is common law." [123]

For Blackstone the judge's opinion is not infallibly the same thing as "law." Instead the judge's opinion is "evidence" of the law. Sometimes previous judicial opinions are so erroneous that they are not "bad law," rather they are "not law." They are invalid where they are contrary to reason by being manifestly

absurd, and they are invalid where contrary to divine law by being unjust. The judge, then, must take notice of the law of nature and the law of God in all aspects of law and legal reasoning. This is the first and principal custom ahead of all other customs in the common law. It is this aspect of the role of the judge that was lost in twentieth century jurisprudence. The idea is virtually unknown in the modern law school setting. It has literally disappeared from the judicial way of thinking, particularly in America.

CONCLUSION

In this article we have provided a guide to understanding Sir William Blackstone's approach to the principles of the English common law. We have seen how his common law theory was composed of two vital parts—a law theory, and a rights theory. We learned that the key technical phrase associated with his law theory was "the law of nature and the law of God." He also used synonymous terms for the same concept including the "law of nature and the law of revelation." The key technical terms associated with his rights theory are "absolute rights," "natural liberties of mankind," and "rights of persons." We learned that he believed the principal aim of society is to protect individuals in the enjoyment of these absolute rights which were vested in mankind by the immutable laws of nature.

We also learned that there is a close association of the key terms and concepts in America's Declaration of Independence with those used earlier by Blackstone. First, the American union was launched on the basis of the "Laws of Nature and of Nature's God," a term equivalent to Blackstone's. Second, its rights theory was that of "unalienable rights endowed by the Creator." "Unalienable rights" in the Declaration of Independence is an exact synonym of Blackstone's term "absolute rights." Third, the Declaration asserts that the purpose of government is "to secure those rights." Here too the American founders were using language embodying precisely the same concepts as William Blackstone and the English common law.

Blackstone, speaking for the common law, set forth in clear and precise ways a number of very sophisticated ideas dealing with the nature of law and rights. Each was represented by some unique and important technical term. For example, he defined "the law of nature" as the will of God. God first ordained that law in the beginning when he created the first man and woman. The law of nature was the original constitution of the universe. It prescribed moral precepts, principles, norms, and laws of human nature intended to bind mankind forever in every circumstance, situation, condition, and location. This law of nature is an eternal and immutable rule of right, a rule of moral conduct. It is fixed and permanent. It binds the human race for as long as the race exists. Originally man was able to perceive the just requirements of this law by means of natural law in his intellect.

But man fell into sin and was corrupted and ruined in his ability to discern what is just by natural law. Therefore God gave mankind a special revelation of two things—the original precepts of the moral law, and the law of faith or how to be right with God. These two revelations are found in the Bible, the Holy Scriptures, which is also known as revealed law or divine law. The Bible restates God's original law of nature which God ordained in the beginning when he created mankind and nature. It does so for the

express purpose of providing mankind with an objective revelation of God's will. The Creator intends for mankind to use the objective law of nature as the primary rule of moral conduct rather than to rely on subjective natural law which, due to the perversity of man's intellect, is corrupted and fallen.

The "law of nature and the law of revelation," then, become the two foundations for all human laws and justice. No human laws should be permitted to contradict these. And no human laws are valid unless conforming to that original law. These are objective revelations rather than subjective speculations. Therefore, speculative natural law as propounded by philosophers, ethicists, and even judges is not a fit foundation for law. Speculative and subjective natural law as imagined in the metaphysical disquisitions of philosophers and ethicists "can never be put in competition" with the objective revelation of moral law found in the Holy Scriptures. Blackstone based his law theory on an objective law of nature, rather than on subjective natural law.

Governments are bound by the precepts and principles of this "law of nature and of revelation." Where God's law has decreed that certain forms of conduct are intrinsically evil and mandatorily prohibited, such as murder, the civil law must follow suit "transcribing and publishing his precepts." The civil law is not free to contradict or contravene the mandatory precepts of the moral law. Kings, legislatures, and judges are bound by this law. No act of any kind by government can suspend, annul, disallow, overturn, or invalidate the moral law. The moral law is implied and presupposed in every executive act, piece of legislation, and judicial decision of every nation on earth. Whenever government contradicts or overrides the moral law, such acts by government are invalid and void of authority. They do not bind the conscience nor command obedience.

There is no king so high, or legislator so mighty, or judge so powerful that he can desert the precepts of the moral law to rule by his own whim or caprice, or by raw power and force. Government's power is limited by the moral law, and it is further limited to the area of civil conduct. Civil laws must command what is right and prohibit what is wrong, but only in the area of civil conduct. The government may punish those acts that violate the mandatory precepts of the moral law when such acts have a public element and pertain to public justice. The government may also restrict or punish bad civil conduct which degrades the image of God in others, abridges their personal rights, or threatens their life, health, safety, reputation, or civil welfare. The government is not free to punish good conduct. It has no authority to punish conduct which is benign and hurts no one. The government has no jurisdiction over private conduct, family conduct, ecclesiastical conduct, or other personal forms of conduct that are benign and hurt no one, and which comport with the precepts of the laws of nature.

Where rights are concerned, every person is endued with the faculties of reason and freewill, and is invested with absolute rights, or rights of personhood. These rights cannot be abridged unless the person himself commits some bad act that amounts to a forfeiture, such that it is just to deprive him of the enjoyment of the right. To impose a penalty or punishment on such a person, the government must first demonstrate his guilt or liability with proofs and safeguards that insure the innocent will not be punished. No penalty or punishment may be greater than what is proportional to the nature of the wrong done.

These principles are the essence of due process of law. For government to abridge or destroy one's rights without such safeguards is a species of compulsive tyranny. It is oppression and a manifest breach of liberty. Government is not permitted to violate the image of God in man by abridging the rights of one who does good, where there is no wrongful act amounting to a forfeiture. To condemn or oppress the guiltless is an act of tyranny.

Every person has a natural, God-given right to do what a good man would do and be restrained from nothing but that which would be pernicious to himself or to other persons in society. Every person has a right to do that which is objectively right. There is no right to do wrong. The absolute rights of mankind—rights annexed to personhood—are those which one is entitled to enjoy as in a state of nature where no government exists. These rights are one of the gifts of God to man at his creation when he endued him with the faculty of freewill. They can be generally classified in three large categories—the right of personal security (including life), the right of personal liberty, and the right of private property. Absolute rights are the same as inalienable rights. All inalienable rights fit within one of these three categories. The principal aim of society is to protect individuals in the enjoyment of these rights. And the principal view of human law is to explain, protect, and enforce them. These rights do not include conduct which violates the laws of nature or revelation. One only has a right to do those deeds that conform to the laws of nature.

Civil rights are an extra category of rights separate from inalienable rights. Civil rights are relative to one's relation to a particular nation or state. They are rights of citizenship, not personhood. They are politically created rather than God-given. Civil rights are generally classified as citizenship rights but are also known by the technical term "privileges and immunities." Since civil rights are politically created, they are subject to being changed by public law and are therefore alienable. Personhood rights cannot be changed by public law and are inalienable. Government is supposed to enforce and secure both categories of rights. It protects inalienable rights linked to personhood. It also protects alienable rights such as privileges of and immunities of citizenship. Even if a person is not a citizen of a particular state and is not entitled to enjoy its citizenship privileges and immunities, one is still entitled to protection by government for all inalienable, personhood rights.

Furthermore, since it is the duty of government to foster and protect inalienable rights, government must establish certain fundamental, constitutional rights as an intermediate or secondary means of securing inalienable rights. Since inalienable rights cannot be fully secured without this secondary category of constitutional rights, every person has a natural right to receive those civil rights. This establishes the principle that each person has a God-given inalienable right to the equal enjoyment, in common with one's fellow citizens, of such civil rights as are essential to the full and complete enjoyment of one's inalienable, personhood rights.

The common law judge has a very important role in this framework according to Blackstone. The purpose of the judge is to protect the rights of individuals under the laws of nature, and the laws of the state. The judge is required to know and apply both kinds of law and both kinds of rights. The judge

secures inalienable rights through the interplay of the laws of nature and the civil law. He secures citizenship privileges and immunities as they appear in the civil law. A government which provides no protection for inalienable rights is tyrannical in the highest degree. A government which fails to provide such constitutional and civil rights as are necessary as an intermediate or secondary means of securing inalienable rights is likewise tyrannical.

These sorts of principles from Blackstone and the common law belonged also to the American founders while the colonies were still British. Such principles as these formed the framework and scaffolding of the entire American founding experience. The most important of these principles were written into the preamble of the Declaration of Independence, America's original charter of liberty and nationhood. There we find the Founders taking their stand on the Laws of Nature and of Nature's God, and on such self-evident truths as unalienable rights endowed by the Creator and that the government's purpose is "to secure these rights."

These assertions marked a clear break with the Aristotelian world view. They were a departure from Aristotle's theories of distributive justice and his belief that the purpose of the state is to impose order, not to protect rights. This is important because Aristotle was only one of many to hold such views about the power of the state and the relationship of the individual to the state. Far too often in western history, political philosophers venerated the ideas of Aristotle rather than siding with the Christian principles of law and rights found in the English common law.

Even today it has become intellectually unfashionable to take the principles of the Declaration of Independence seriously. To believe in a God-given law of nature, self-evident truths, or in God-endowed inalienable rights is considered unsophisticated and philosophically naive. The modern world has evolved beyond the simplistic dogmas of Blackstone and Jefferson, we are told. Supposedly, no one takes them seriously anymore, at least not among the intellectually sophisticated.

Beginning with O. W. Holmes, Jr., a century ago it became intellectually fashionable to ridicule Blackstone's views as "theology" and not law. Critics mock the idea of a higher moral law to which even nations are accountable. Support for the idea of the sacredness of human life has evaporated along with the idea of the inalienable right to life. And the bottom has dropped out of rights theory in general, such that the term has been emptied of identifiable content. Aristotle's unitary view of the state, where the purpose of government is to impose law and order, has won the day particularly among political conservatives. Liberals make much of rights, but not the rights theory of Blackstone or Jefferson.

All these things are consistent with the thinking of O. W. Holmes, Jr., who led an intellectual revolution among lawyers against the core ideas of the American Revolution and the American founders. Holmes wrote, for example, "I should be glad if we could get rid of the whole *moral phraseology* which I think has tended to distort the law. In fact even in the domain of morals I think that it would be a gain, at least for the educated, to get rid of the word and notion Sin." [124] He also wrote: "I think that the *sacredness of human life* is a purely municipal ideal of *no validity* outside the jurisdiction. I believe that force . . is the *ultima ratio*, . . ." [125] He believed that the word "rights" was a meaningless term. It is simply an "empty

substratum" whereby we "pretend to account for the fact that the courts will act in a certain way." There is no substance to the concept of "rights," it is an artificial, hypothetical term representing little more than a guess or a prediction.[126] He wished, frankly, to get rid of all talk of rights.[127]

Instead, Holmes wished to revive an Aristotelian view of law. Holmes defined law as "a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts." [128] He called this view "law in the lawyer's sense" as if Blackstone and Jefferson were theologians rather than lawyers. In the twentieth century, Holmes's view became indigenous to law school training. For decades it has been part of the mental furniture used by federal and state judges. In this view there is no moral law from God binding the state, there are no self-evident truths, and there are no inalienable rights which government is duty-bound to protect in private individuals. Law is the simple decree of the state, no more and no less. Holmes insisted: "The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." [129]

These quotes from Holmes sound extreme, but they undergird the way law is taught and practiced today in America. Holmes's approach has been adopted to one degree or another by both liberals and conservatives. For example, in the 1973 *Roe v. Wade* case, the Supreme Court legalized abortion on the demand. Justice Blackmun, writing as a judicial liberal, cited Holmes as his starting point for his decision.[130] Like Holmes, he said in essence that morality has no place in the law (it is not law in the lawyer's sense). The only relevant consideration was the law of the state, in this instance the U.S. Constitution. The end product was abortion on demand with practically no consideration of the principle of the inalienable right to life.

In subsequent cases, conservatives have consistently failed to challenge the *Roe* rationale. The reason is simple. Conservatives are also disciples of Holmes. Justice Antonin Scalia, for example, has noted on numerous occasions that his mentors in the law are Roger Taney and O. W. Holmes, Jr. Taney rejected the principles of the Declaration of Independence when he wrote the *Dred Scott* opinion about slavery in 1857.[131] Holmes rejected them as shown above. Scalia believes, therefore, that the principles of the Declaration of Independence are "aspirations" and not law.

Consequently, he wrote in *Akron II*, a 1990 abortion case, that when life begins is not a justiciable question.[132] It is not the kind of question that judges may consider.[133]

Scalia takes this position despite the fact that the Fourteenth Amendment specifically addresses "the right to life" and prohibits the states from abridging it without due process. Scalia does not adopt the common law principle of due process, however. Therefore he has no effective way to counter the liberal approach of Justice Blackmun. He suggests returning the abortion question to the legislatures of the states, despite the fact that the history and language of the 13th and 14th amendments do not permit that option. Thus for thirty years there has been no significant progress one way or the other in the matter of abortion. This is owing to the fact that both liberal and conservative judges derive their theories ultimately from Holmes. Both reject America's founding principles in the Declaration in the judicial sense. That is why neither

liberalism or conservatism is the answer for America. They are two different strains of the same disease.

Robert Bork tried to diagnose America's malady in *Slouching toward Gomorrah*. The intention was a good one, but the diagnosis was flawed. America's social sickness does not trace to the Declaration of Independence as Bork suggests. Rather, it traces to a misunderstanding of the Declaration and the rejection of its core principles. Dr. Bork, as a quasi-Aristotelian judicial conservative, has prescribed the wrong medicine. He would exchange Jefferson for Aristotle. This is hardly the right cure to one who values being free. That is why Bork's book could more aptly be titled *Retreating to Athens*. Personally, I prefer Philadelphia and 1776.

The American founders, educated in the principle approach of the common law, established a framework of fundamental principles for America. These can be found in the Declaration of Independence, the original constitutions of the early states, in the state bills of rights, and in the federal constitution and bill of rights. They selected the highest and best principles from the English heritage when establishing that framework. There is a remarkable cohesion between what we find in Blackstone regarding those principles, and what we find in the American founding documents. We learn much therefore from Blackstone about the path of law and justice in America when we read his *Commentaries*.

The greatness of America's past is rooted in those principles. The greatness of America's future rests most assuredly on those same principles. That is why America needs an intellectual revolution whereby we return to our roots and founding principles. Only then will we be emancipated from the sterile dichotomy of liberal and conservative politics. Only then will the courts fulfill their destiny as halls of justice. Only then will our self-identity as Americans truly rise to the level envisioned by the founders. Only then will the blessings of liberty be truly secure for ourselves and our posterity. What is at stake here is the meaning of America. All that America means, and all that it holds for the future, depends on faithful adherence to these remarkable principles. It is small wonder, then, that Blackstone is viewed almost as an honorary founding father. He did not create the principles. But his writings gave indispensable aid to freedom's cause.

1 Edward Coke was born February 1, 1552 and died September 3, 1634. He lived during the reigns of Edward VI, Mary Tudor, Elizabeth I, James I, and nearly half the reign of Charles I. Coke was admitted to the bar on April 20, 1578. He gained renown one year later as one of the six lawyers defending Henry Shelley in the now famous "Shelley's Case." The "Rule in Shelley's Case" is still discussed in law schools for being a long-standing legal principle involving the inheritance of land.

Coke began his public career by being elected to Parliament in 1589. In 1592 he was appointed Solicitor General, Reader of the Inner Temple, and Recorder of London. He became speaker of the House in 1593. About this time, Queen Elizabeth I appointed him Attorney General. In that role Coke gained a reputation for being a tenacious and terrifying prosecutor. For example, he prosecuted the Earl of Essex, the Earl of Southhampton, Sir Walter Raleigh, and the conspirators of the "gunpowder plot," an assassination attempt against the King and Parliament when meeting in joint session.

In his role as prosecutor, Coke came to be viewed as an unwavering defender of the monarchy. When James I became king in 1603, he wrongly assumed that Coke would become the king's willing puppet. James appointed him Chief Justice of the Court of Common Pleas in 1606, and Chief Justice of the King's Bench—known as the "Lord Chief Justice of England"—in 1613. These appointments were supposed to give the king unrestricted control over the courts. Coke consistently opposed the king's dictatorial designs, however. He was eventually removed by the king in 1616. In 1620 Coke became a member of Parliament again. There Coke spent the next sixteen years leading the opposition against the totalitarian leanings of the royal family.

2 As recently as the 1970s, Blackstone remained an important figure in the law. In that decade, Dr. McCarthy DeMere chaired the Law and Medicine Committee of the American Bar Association. The task of his committee, which included the work of 200 attorneys, was to draft a legal definition of "death." After two years and much wrangling, they finally settled on a definition. Dr. DeMere and the committee frequently consulted the writings and explanations provided by William Blackstone two centuries earlier. See, *The Human Life Bill: Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate*, Ninety-Seventh Congress, First Session on S. 158, A Bill to Provide that Human Life Shall Be Deemed to Exist from Conception, April 23, 24; May 20, 21; June 1, 10, 12, and 18. Serial No. J-97-16 (Washington, D.C.: GPO, 1982). Testimony of Dr. McCarthy DeMere.

3 Abraham Lincoln had intended to become a blacksmith. He thought that his meager education doomed any success as a lawyer. In 1834 this opinion changed. While running for state representative, Lincoln met an attorney named John Stuart who himself was a candidate. Stuart loaned Lincoln some of his law books, including Blackstone's *Commentaries*. While walking home, Lincoln read about forty pages from the introduction dealing with the nature of law. This reading revolutionized Lincoln's life and thinking. He next mastered the section on the rights of persons. These two sections, and Lincoln's staunch fidelity to the Declaration of Independence (which uses Blackstone's paradigm of law and rights), remained the fulcrum of Lincoln's legal and political thinking for the remainder of his life and career.

4 William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765). Reprinted 1966, The Layston Press, Buntingford (England) for Oceana Publications, New York. [Hereafter, Blackstone, *Commentaries*.]

5 Near the end of his life, Thomas Jefferson, in a letter to James Madison, recalled the importance of Edward Coke to the American Founding, and why Jefferson was critical of Blackstone.

"You will recollect that before the Revolution, Coke Littleton was the universal elementary book of law students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties. You remember also that our lawyers were then all Whigs. But when his black-letter text, and uncouth but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the students' hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all of the young brood of lawyers now are of that hue. They suppose themselves, indeed, to be Whigs, because they no longer know what Whigism or republicanism means."

Letter of Thomas Jefferson to James Madison, February 17, 1826, in Adrienne Koch and William. Peden, eds., *The Life and Selected Writings of Thomas Jefferson* (New York: Modern Library, 1944), 726. It is important to note that Jefferson believed the new generation of American leaders were already losing touch with America's original founding principles by adopting Blackstone's style of politics for the American system.

6 In Roman mythology, Janus was the god of gates and doorways. In sculpture, architecture, and on coins, Janus was depicted as a head with two faces pointing in opposite directions.

7 The Latin text reads: "Ipse autem rex non debet esse sub homine *sed sub deo et sub lege*, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem. Non est enim rex ubi dominatur voluntas et non lex. Et quod sub lege esse debeat, cum sit dei vicarius, evidenter apparet ad similitudinem Ihesu Christi, cuius vices gerit in terris. Quia verax dei misericordia, cum ad recuperandum humanum genus ineffabiliter ei multa suppeterent, hanc potissimam elegit viam, qua ad destruendum opus diaboli non virtute uteretur potentiæ sed iustitiæ ratione. Et sic esse voluit sub lege, ut eos qui sub lege erant redimeret. Noluit enim uti viribus, sed iudicio." The English rendering is as follows: "The king ought not to be under man but under God and under the law, because law makes the king. Therefore let him confer on the law what the law confers on him, namely, rule and authority. For there is no king [rex] where will rules rather than law [lex]. And that he must be under the law . . . clearly appears in the analogy of Jesus Christ, whose vice-gerent he is on earth. For when there were many ways available to Him to provide his ineffable redemption for the human race, the true mercy of God chose this most powerful way to destroy the work of the devil, not to use the power of force but the reason of justice. Thus he chose to be under the law that he might redeem those who live under it, not wishing to use force but judgment." Henry de Bracton (c. 1210–1268), *De Legibus Et Consuetudinibus Angliae* (On the Laws and Customs of England). Latin text of George Woodbine (1876–1953). Translated by Gary Amos. Emphasis added. [Hereafter, italics in the text and endnotes added for emphasis.]

[8] "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 that matter into motion, he established certain laws of motion, to which all movable bodies must conform . . . But *laws*, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but *of human action or conduct*; that is, 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 . . . These are the *eternal, immutable laws of good and evil*, to which the Creator himself in all his dispensations conforms; . . ." Blackstone, *Commentaries*, Volume 1, Section 2, "Of the Nature of Laws in General," 38–40.

[9] "For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, *when he created man*, and endued him with free-will to conduct himself in all parts of life, *he laid down certain immutable laws* of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. . . ." *Ibid*., 39–40.

[10] See note 8, *supra*, at 40.

[11] "This law of nature being co-eval [existing as long as] 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*: no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original." *Ibid*., 41.

[12] *Ibid*., 39. For an extensive treatment of the history and meaning of the legal term "law of nature" see, Chapter 2, "The Laws of Nature and of Nature's God," in Gary Amos, *Defending the Declaration: How the Bible and Christianity Influenced the Writing of the Declaration of Independence* (Charlottesville, VA: Providence Foundation, 1994), 35–74.

[13] "*Man, considered as a creature*, must necessarily be subject to the laws of his Creator, for he *is entirely a dependent being*. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct; not, indeed, in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And, consequently, *as man depends absolutely upon his Maker for every thing, it is necessary that he should in all points conform to his Maker's will*.

This will of his Maker is called the law of Nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, . . ." *Ibid*., 39–40.

[14] "And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But *every man* now finds the contrary in his own experience; that *his reason is corrupt, and his understanding full of ignorance and error*." *Ibid*., 41.

[15] "This has given manifold occasion for the benign interposition of Divine Providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by *an immediate and direct revelation*. The doctrines thus delivered we call the revealed or divine law, and they are to be *found only in the Holy Scriptures*." *Ibid*., 41–42.

[16] "These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But *we are not from thence to conclude that the knowledge of these 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." *Ibid*., 42.

[17] Among the many Christian features of Blackstone's explanation, his inclusion of the doctrine of original sin proves indisputably that he was not writing from a Deistic perspective, but a Christian one. Nor could he. After all, he was summarizing a five-hundred-year history of the English common law that was based on Catholic and Protestant Christianity, not Deism.

[18] "This will of his Maker is called the law of Nature. For as God . . . *when he created man*, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and *gave him also the faculty of reason to discover the purport of those laws* . . . 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*, . . . And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error." *Ibid*., 39–41.

[19] *Ibid*.

[20] "But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be attained than by *a chain of metaphysical disquisitions*, . . . the greater part of the world would have rested content in mental indolence, and ignorance, its inseparable companion. . . .[T]he Creator . . . has not perplexed the law of nature with a multitude of *abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised*; . . ." *Ibid*., 40–41.

[21] "The doctrines thus delivered . . . are to be found only in the Holy Scriptures. These *precepts*, when revealed, are found upon comparison to be really a part of the original *law of nature*, . . . But we are not from thence to conclude that the knowledge of these 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. 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 [natural law] as we are of the former [the law of nature], both would have an equal authority; but, till then, *they can never be put in any competition together*." *Ibid*., 42.

[22] "This has given manifold occasion for the *benign interposition of Divine Providence*; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover [i.e., reveal] and enforce its laws *by an immediate and direct revelation*. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures." *Ibid*., 41–42.

[23] 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 [natural law] as we are of the former [the law of nature], both would have an equal authority; but, till then, *they can never be put in any competition together*. Compare note 21, *supra*.

[24] This belief that the moral principles in the Bible were given to correct fallen natural law in man's intellect was not new with Blackstone. Nor was it merely a Protestant departure from Catholicism. Five hundred years earlier, the great Roman Catholic theologian, Thomas Aquinas, had made the same point in his *Summa Theologica*. According to Aquinas, sin had so disabled man's intellect that its capacity for spontaneous moral rectitude was destroyed. Therefore God gave the written Scriptures to correct man's fallen notions about natural law.

"The written law [i.e., Scripture] is . . . *given for the correction of the natural law*, either because it supplies what was lacking in the natural law, or because the natural law was perverted in the hearts of different men, as to different matters, so that they thought those things good which are naturally evil, which perversion stood in need of correction." [*Summa Theologica*, Part 1 of 2, Question 94, Article 5, Reply to Objection 1].

"[I]t was necessary for the directing of human conduct to have a Divine law . . . because, on account of the uncertainty of human judgment, *especially on contingent and particular matters*, different people form different judgments on human acts; and from this also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err." [*Summa Theologica*, Part 1 of 2, Question 91, Article 4, answer].

[25] "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. There are, it is true, a great number of indifferent points, in which both the divine law and the *natural* leave a man at his own liberty, but which are found necessary for the benefit of society to be restrained within certain limits . . . Municipal law is also 'a rule of civil conduct.' This distinguishes municipal law from the *natural* or revealed; the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith . . ." *Ibid*., 41 and 45.

[26] "This 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: *no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original*." *Ibid*., 41.

[27] "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." *Ibid*., 42.

[28] *Ibid*.

[29] "This 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." *Ibid*., 41.

[30] I.e., "under the moon." This was a turn of the phrase which pointed out that human beings are not angels, unseen spirits, or celestial beings. They are earthly, terrestrial creatures, i.e., mortal men. Nonetheless, the human race is the highest of such mortal creatures.

[31] *Ibid*., 39. Emphasis added. See note 7, *supra*.

[32] See, Matthew 12:1–13, Mark 2:23, and Numbers 15:32–36.

[33] Matthew 23:23.

[34] "These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, . . ." *Ibid*., 42.

[35] "As then the moral precepts of this law are indeed of the same original with those of the law of nature, . . ." *Ibid*., 42.

[36] "But if the discovery of these *first principles of the law of nature* depended only upon the due exertion of right reason, . . ." *Ibid*., 40.

[37] *Ibid*., 40.

[38] *Ibid*., 39–40.

[39] *Ibid*., 41.

[40] *Ibid*., 42.

[41] "To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime." *Ibid*., 42.

[42] "This 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." *Ibid*., 41. For discussion of Blackstone's use of "pursuit of happiness" in the Christian rather than hedonist sense,

see, Chapter Four, "Unalienable Rights Endowed by the Creator," in Gary Amos, *Defending the Declaration*, *supra* note 12, at 119–121, and 207. Blackstone's argument about the appropriateness and role of using "demonstrations" traces at least to the writings of Rufinus who wrote at about a.d. 1160. For an excellent summary of the influence of Rufinus see, Brian Tierney, *The Idea of Natural Rights* (Atlanta, GA: Scholars Press, 1997), at 62–66, and 138. [Hereafter, Tierney, *The Idea of Natural Rights*.] Blackstone's explanation of the pursuit of happiness—a common law concept—traces at least as far back as William of Ock-ham in the fourteenth century. (Ockham died in 1347.) As Brian Tierney points out, "He [Ockham] also believed that God had endowed humans with a faculty of reason through which they could discern that good . . . But Ockham did see such a natural end for humans—to live and to live well—and he maintained that reason could discern this end and the means to attain it . . . Reason showed, for instance, that humans required certain rights if they were to live and live well; . . ." Tierney, *The Idea of Natural Rights*, at 200.

[43] For a helpful survey of the use of the Latin term *facultas* see, Brian Tierney, *The Idea of Natural Rights*, at 50–53, 68, 210–212, 220, 229, 242–248, 261–262, and 325–326. See also, Richard Tuck, *Natural Rights Theories: Their Origin and Development* (London: Cambridge University Press, 1979), at 25–28, 55, 72–75, and 90.

[44] *De Vita Spirituali Animae*. Tuck notes that Gerson linked *facultas* to man's God-given *dominium*, and "To this *dominium* the *dominium* of liberty can also be assimilated, which is an unrestrained facultas given by God . . ." *Ibid*., 27.

[45] "This distinguishes municipal law [i.e., civil law] from the natural [i.e., laws of nature] or revealed [i.e., the Bible]; the former of which [i.e., law of nature] is the rule of moral conduct, and the latter [i.e., the Bible] not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbor, considered in the light of an individual." 1 Blackstone, *Commentaries*, Volume 1, at 45.

[46] *Ibid.*

[47] The word "inalienable" is taken from the English common law of property. To sell, convey, divest, or otherwise dispose of a piece of property was to "alienate" it. If something was "inalienable," it could not be freely transferred, sold, conveyed, or given away. An "inalienable right" is one that a person may not unconditionally sell, trade, barter, or transfer without denying the image of God in himself. God the Creator endows men and women with these rights, annexing them to the human person. To deny these rights in a man or woman is to deny that the person is a human being. See, Chapter Four, "Inalienable Rights Endowed by the Creator," in Gary Amos, *Defending the Declaration: How the Bible and Christianity Influenced the Writing of the Declaration of Independence* (Charlottesville, VA: Providence Foundation, 1994), 104. In the text of the Declaration of Independence, the spelling "unalienable" is used rather than "inalienable." Either spelling was grammatically correct in that era. There was no substantive difference or conceptual difference between them. There is no merit to the arguments of those who suggest that the two spellings represent different concepts. They were simply minor variations in spelling, a phenomenon which was not uncommon in the colonial era.

[48] Speaking of the free exercise of religion as an inalienable right, Madison explained: "That right is, in its nature, an unalienable right. It is unalienable . . . because *what is here a right towards men, is a duty towards the creator*. It is the duty of every man to render the creator such homage, and such only, as he believes to be acceptable to him; this duty is precedent, both in order of time and degree of obligation, to the claims of civil society." *A Memorial and Remonstrance on the Religious Rights of Man*, James Madison [circa June 20, 1785]. "To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance." In, Gary Amos, *Biblical Principles of Law and the Common Law*, 2 Vols. (Draft Classroom Edition, Privately Published, 2000), Volume Two: *Documentary Sources for Understanding Western Legal Principles*, Section 62 at 498.

[49] "Be not drunk with wine, which is dissipation, . . ." Ephesians 5:18 (New Testament).

[50] 1 Blackstone, *Commentaries*, Book One, Chapter One, at 120.

[51] "If man were to live in a state of nature, 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 possibly 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 superior but Him who is the author of our being." *Ibid*., 43.

[52] "But man was formed for society; and . . . is neither capable of living alone, nor, indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse, called 'the law of nations'; which, as none of these states will acknowledge a superiority in the other, can not be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agree-ments 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, . . .*" *Ibid*., 43.

[53] *Ibid*., 41.

[54] *Ibid*., 42.

[55] *Ibid*., 42–43.

[56] *Ibid*., 54.

[57] *Ibid*., 42.

[58] *Ibid*.

[59] It is for this reason that a civil government lacks the authority to pass laws that condone or approve homosexual marriage. Civil government lacks the authority to create a right out of an act which is mandatorily wrong under the objectively revealed moral precepts of "the law of nature and the law of God."

[60] "I call it municipal law, in compliance with common speech; for though, strictly, that expression denotes the particular customs of one single *municipium*, or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same

laws and customs." 1 Blackstone, *Commentaries*, at 44.

[61] *Ibid*.

[62] See note 49 *supra*.

[63] *Ibid*.

[64] Blackstone alluded to this principle but did not state it directly since in England the king was the head of the church. Compare page 125, *supra*.

[65] I.e., the law of nature.

[66] I.e., the revealed law, contained in the Bible, the Holy Scriptures.

[67] 1 Blackstone, *Commentaries*, at 45.

[68] For a further discussion of this point see, Chapter 2, "The Laws of Nature and of Nature's God," in Gary Amos, *Defending the Declaration: How the Bible and Christianity Influenced the Writing of the Declaration of Independence* (Charlottesville, VA: Providence Foundation, 1994), 35–74.

[69] In, *Erie Railroad v. Tompkins*, 304 U.S. 64, 79 (1938).

[70] The exact quote is as follows: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917). (Holmes dissenting.) Holmes used the phrase "brooding omnipresence" in other contexts as well, such as to deny the existence of an original moral law or "the law of nature and the law of God."

[71] Letter of O. W. Holmes, Jr., to Frederick Pollock (April 13, 1910).

[72] Cited in, Irving Bernstein, "Patrician Conservatism: Mr. Justice Holmes," in *Intellectual History in America: From Darwin to Niebuhr*, Cushing Strout, ed. (New York: Harper & Row, 1968), at 90.

[73] *Ibid*., 92.

[74] *Ibid*.

[75] Letter of O. W. Holmes, Jr., to Frederick Pollock (May 30, 1927).

[76] Letter of O. W. Holmes, Jr., to Frederick Pollock (April 21, 1932).

[77] *Erie Railroad v. Tompkins*, 304 U.S. 64, 79 (1938). The Court was quoting Holmes's dissenting opinion in *Black & White Taxi v. Brown & Yellow Taxi*, 276 U.S. 518, 533 (1928).

[78] Robert Bork was Acting Attorney General of the United States, 1973–1974 (at the height of the Wa-tergate Scandal, when he fired Archibald Cox during the so-called "Saturday Night Massacre"); Solicitor General, U.S. Department of Justice, 1972–1977; Professor, Yale Law School, 1962–1975 and 1977–1981; nominated to the U.S. Supreme Court, 1987; and Circuit Judge of U.S. Court of Appeals for the D.C. Circuit, 1982–1988.

[79] Robert H. Bork, *Slouching toward Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996, paperback ed. 1997). In chapters 3 and 4, Bork launches a blistering critique of the Declaration of Independence. Bork sees the Declaration of Independence merely as a collection of "ringing phrases," "rhetorical flourishes," and the "rhetoric" of "confident liberalism." Jefferson said in the Declaration that the purpose of government is to secure our God-given inalienable rights. Bork says that such ideas are "hardly useful," and "indeed may be pernicious, if taken, as they commonly are, as a guide to action, governmental or private." Bork says that Jefferson "made a serious mistake" about the nature of man in the Declaration of Independence which left "an emptiness at the heart of American ideology." And "although the American Founders shared those sentiments," their mistake "has brought us to this—an increasing number of alienated, restless individuals, individuals without strong ties to others, except in the pursuit of ever more degraded distractions and sensations." Thus the fault is in freedom and in the mistake of the Founding Fathers for giving us liberty and freedom (in the terms advocated by Blackstone).

According to Bork, if it had not been for Jefferson's "profoundly unfortunate" "proposition that all men are created equal," which, Bork says, is "a matter for regret," America would not be in the sad shape it is today. The "Declaration's pronouncement of equality" was "ambiguous." That "ambiguity was dangerous" and in the twentieth century has become "a serious threat to freedom."

On page 98 (paperback edition) he concludes: "The unqualified language of the Bill of Rights and the Declaration of Independence" . . . "feed our national obsession about 'rights'" . . . and "impoverishes cultural, political, and judicial discourse." But on this point Judge Bork has it entirely the wrong way around. It is our ignorance of the language and principles of the Declaration of Independence which allows America to go astray in various forms of legal positivism, both liberal and conservative. It is that ignorance that "impoverishes cultural, political, and judicial discourse."

[80] Two books that are indispensable for understanding the history of rights theory and Christianity's role in it are Richard Tuck, *Natural Rights Theories: Their Origin and Development* (London: Cambridge University Press, 1979); and, Brian Tierney, *The Idea of Natural Rights* (Atlanta, GA: Scholars Press, 1997). Tierney, in particular, demolishes once and for all the notion that western rights theories such as Blackstone's were the product of classical humanism or Enlightenment humanism. He also demonstrates the absurdity of believing that the common law notion of personal, individual rights was somehow contrary to Christian teaching. Near the end of his masterful book on rights, after hundreds of pages of documentation and explanation, Tierney concludes that such ideas where rooted in the Christian jurisprudence and philosophy of the Middle Ages.

The idea of natural rights grew up—perhaps could only have grown up in the first place—in a religious culture that supplemented rational argumentation about human nature with a faith in which humans were seen as children of a caring God . . . Perhaps it would be more satisfying if the idea of natural rights had entered Western political thought with a clatter of drums and trumpets in some resounding pronouncement like the American Declaration of Independence . . . In fact, though, this central concept of Western political theory first grew into existence almost imperceptibly in the obscure glosses of the medieval jurists . . . Characteristics of language that were first acquired in the twelfth-century persisted. The language of the Decretists was a part of the context for Ockham, Ockham's language for Gerson, Gerson's for Suarez, the language of Suarez for Grotius . . . The one necessary basis for a theory of humans rights is a belief in the value and dignity of human life. The first rights theorists derived such a belief from the Christian tradition, . . . [Tierney, at 343–347.]

[81] 1 Blackstone, *Commentaries*, Book One, Chapter One, "Of the Absolute Rights of Individuals," at 120.

[82] The key language of the Declaration of Independence reads as follows: "We hold these truths to be self-evident, that all men are created equal, that *they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty, and the pursuit of Happiness. *That to secure these rights, Governments are instituted among Men*, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." (Emphasis added.) Note the original use of capitalization for particular emphasis of technical terms.

[83] In this way, Blackstone was agreeing with such persons as Gerson from the early fifteenth century, and Grotius from the seventeenth.

[84] 1 Blackstone, *Commentaries*, 121.

[85] For the definition of inalienable see note 47 *supra*.

[86] *Ibid.*, 117–119.

[87] What Tierney has written of Grotius likewise applies here to Blackstone, namely, that in Blackstone's work "as in that of his scholastic predecessors, we find natural rights and natural law existing side by side, both associated with traits of human nature that were taken to be implanted by God." See, Tierney, *Natural Rights Theories*, at 319. It must be remembered, however, that Blackstone insisted on an objective rather than subjective natural law. That is why he preferred the term "law of nature."

[88] Two important examples of the difference between personhood rights and citizenship privileges and immunities are found in the U.S. Constitution. The first is in Article 1, Section 2 which deals only with "privileges and immunities of citizens" rather than inalienable personhood rights. Article 1, Section 2 addresses relative rights, not absolute rights. The second is in the Fourteenth Amendment. That amendment deals with both inalienable personhood rights and also with citizenship privileges and immunities. For a person who is also a citizen of the United States, the amendment secures both kinds of rights—personhood rights and citizenship rights. Not all persons are citizens, however. Some persons on American soil do not enjoy the privileges and immunities belonging to citizens. Nevertheless if they are present on American soil they are still persons, and therefore they deserve protection under the law. For persons who are not citizens, the Fourteenth Amendment declares "nor shall any state deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws."

[89] "[T]he Creator . . . has so intimately connected, so inseparably interwoven, the laws of eternal justice with the happiness of each individual, that the latter can not be attained but by observing the former; and, if the former be punctually obeyed, it can not but induce the latter." 1 Blackstone, *Commentaries*, at 40.

[90] The principle is from Luke 12:48 which says in part: "For unto whomsoever much is given, of him shall be much required: . . ." (kjv).

[91] See note 80 *supra*.

[92] 1 Blackstone, *Commentaries*, at 54.

[93] *Ibid*.

[94] See note 47 *supra*.

[95] For a discussion of the historical development of the right of property see Richard Tuck, *Natural Rights Theories: Their Origin and Development* (London: Cambridge University Press, 1979), at 17–24. The Latin Bible used the verb *dominari*, from the nouns *dominus* (master) and *dominium* (dominion), or property. Throughout the 1200s and the early 1300s, Christian theologians debated whether God had given man dominion or property in the original scheme of creation law. In 1329, Pope John XXII settled the debate in a pronouncement called *Quia Vir Reprobus*. Since that time, mainstream Catholics and (subsequently) mainstream Protestants have agreed that property is natural and moral to man, and is confirmed by the teachings of Scripture. Tuck summarizes the pope's argument saying that "God's *dominium* over the earth was conceptually the same as man's *dominium* over his possessions, and that Adam 'in the state of innocence, before Eve was created, had by himself *dominium* over temporal things,' even when he had no one to exchange commodities with. A history could be told of the transition of such *dominium* after the fall down to the present day: property was thus natural to man, sustained by divine law, and could not be avoided . . . Property had begun an expansion towards all the corners of man's moral world . . . The end result of this debate was that the conservative theorists had been led to say that men . . . had a control over their lives which could correctly be described as *dominium* or property. *It was not a phenomenon of social intercourse, still less of civil law: it was a basic fact about human beings, on which their social and political relationships had to be posited.*" *Ibid.*, 22–24.

[96] The Gregory Reform was begun by Pope Gregory vii at about 1075 a.d. Harold J. Berman's groundbreaking work in this area is found in his 1983 masterpiece *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983). Berman's book is an in depth study of the roots of modern Western legal institutions and concepts. It won the 1984 Scribes Book Award from the American Bar Association.

[97] Tuck, *Natural Rights Theories*, at 15.

[98] "Yet nevertheless it [life] may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; . . ." 1 Blackstone, *Commentaries*, at 129.

[99] For example, one has an inalienable right to life and liberty. But in a state of society, one who is able-bodied and of age may also have a citizenship duty to "contribute to the subsistence and peace of society." Having this duty means that one can be required by law to pay one's just taxes, and to cooperate in common defense, as for example in a just war. Serving in the militia or the active military in such a circumstance reduces one's liberty and may end one's life. Nevertheless, such service, if it proceeds from the same principles of duty which define the principle of inalienability in the first place, does not contradict the principle of inalienability.

[100] 1 Blackstone, *Commentaries*, 129.

[101] See note 94 *supra*.

[102] 1 Blackstone, *Commentaries*, 134–135.

[103] See note 44 *supra*. It should be noted where liberty is concerned, however, as Tierney has pointed out, this concept was already at work in Christian jurisprudence as early as the twelfth century.

[104] 1 Blackstone, *Commentaries*, 130–132.

[105] *Ibid*., 123. This is the reading from Blackstone's first edition. The wording was altered in later editions.

[106] *Ibid*., 125.

[107] *Ibid*., 130.

[108] *Ibid*.

[109] *Ibid*., 130–134.

[110] *Ibid*., 134–136.

[111] *Ibid*., 40. See also notes 42 and 88 *supra*.

[112] The common law use of the term happiness was based on Christian theology tracing to Augustine's *De Trinitate* (xiii, 4) in the fourth century a.d. The term was particularly important in Christian theology and law after the thirteenth century. Blackstone's use of the term merely restates the common law understanding that traced at least to Aquinas's *Summa* in the mid-1200s. Aquinas dealt extensively with the subject of happiness (as did theologians and Christian law scholars for centuries thereafter). God has created man to desire happiness (Part 1, Question 82, Article 1, contra), happiness is man's last end (Part 1, Question 82, Article 1, answer), true happiness consists in adhering to God and obeying his moral law (Part 1, Question 82, Article 2, contra), happiness is man's perfect good (Part 1 of 2, Question 2, Article 2, contra), it is a reward of virtue (Part 1 of 2, Question 2, Article 2, Reply Obj. 1), it is incompatible with any evil (Part 1 of 2, Question 2, Article 4, answer), "since happiness is the perfect good, no evil can accrue to anyone therefrom" (Part 1 of 2, Question 2, Article 4, answer), "man is ordained to happiness through principles that are in him; since he is ordained thereto naturally" (Part 1 of 2, Question 2, Article 4, answer), it requires man to become like God in his goodness (Part 1 of 2, Question 2, Article 4, Reply Obj. 1), it does not consist in pleasure (Part 1 of 2, Question 2, Article 6, answer), man attains to happiness through his soul (Part 1 of 2, Question 2, Article 7, answer), happiness is a perfection of the soul and is an inherent good of the soul (Part 1 of 2, Question 2, Article 7, Reply Obj. 3), it does not consist in any created good, because as "Augustine says (De Civ. Dei xix, 26): 'As the soul is the life of the body, so God is man's life of happiness: of Whom it is written: "Happy is that people whose God is the Lord" (Ps. 143:15)'" (Part 1 of 2, Question 2, Article 8, contra). The literature on the common law concept of "happiness" is so extensive that it is inconceivable how modern writers trace Blackstone's concept of pursuit of happiness (used by Jefferson in the Declaration of Independence) to hedonism. The pursuit of happiness was the pursuit of a life of earthly blessedness as a reward for obeying God's moral laws and for living well towards one's neighbor.

[113] "And these [rights] may be reduced to three principal or primary articles; the right of *personal security*, the right of *personal liberty*; and the right of *private property*: because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, *inviolate*, may justly be said to include the preservation of our *civil immunities* in their largest and most extensive sense." 1 Blackstone, *Commentaries*, at 125.

[114] *Ibid*.

[115] *Ibid*., 140.

[116] *Ibid*., 136. See also note 111 *supra*.

[117] *Ibid*., 136–140.

[118] We also find it in the records of debates over the constitutions and bills of rights for the several states and of the federal government.

[119] Virginia Act for Religious Freedom, January 16, 1786, Code of Virginia, Title 57, Religious and Charitable Matters, Section 57–1.

[120] In the Act for Religious Freedom, Jefferson explains "That our civil rights . . . [include the right of] being called to offices of trust and emolument," . . . are "privileges and advantages" [i.e., civil rights] "to which, in common with his fellow citizens, he has a natural right; . . ." A person has these "civil rights" or civil "privileges" in common with fellow "citizens." Although these are, strictly speaking, civil rights rather than inalienable rights, each person has a God-given "natural right" to share equally in those civil rights.

[121] 1 Blackstone, *Commentaries*, at 136–140.

[122] *Ibid*., 69–70.

[123] *Ibid*., 70–71. For brevity's sake we have not treated Blackstone's view of the common law judge in the context of rights theory. We have limited our discussion to law. It is sufficient for purposes of this article simply to state that Blackstone also required the common law judge to pay equally close attention to the principles of right as to the principles of law. Where the common law judge fails to provide proper consideration of the rights of the persons before the Court, the judge fails in his duty. The purpose of the Court is to protect and preserve the rights of individuals under the laws of nature and the laws of the land.

[124] See note 74 *supra*.

[125] See note 71, *supra*, at 88.

[126] Letter of O. W. Holmes, Jr., to Frederick Pollock, January 19, 1928.

[127] See note 75, *supra*.

[128] *Ibid*.

[129] See note 68, *supra*.

[130] See, *Roe v. Wade*, 410 US 113 (1973), citing Holmes's dictum in *Lochner v. New York*.

[131] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), at page 407.

[132] See, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990). In his concurring opinion, Justice Scalia noted that for the Court could not resolve the abortion issue without "volunteering a judicial answer to the nonjusticiable question of when human life begins." [At 497 U.S. 520.] He approached the abortion issue in the same way that Roger Taney approached slavery in *Dred Scott*. It is a political issue only, rather than a moral and legal one dealing with fundamental rights. Scalia concluded: "Leaving this matter to the political process is not only legally correct, it is pragmatically so." Whatever the outcome, so long as it rests on political compromise, the result is legitimate. [*Ibid*.] This sounds incredibly like Holmes. The majority utters the last word. The Fourteenth Amendment was written to protect us from such majorities. Apparently we have learned little from the majorities who gave us black slavery, or the Nazi holocaust. Scalia's Holmesian approach makes the Court a rubber stamp of that political majority.

[133] This is the very point made by Blackmun in 1973 in *Roe*. Here Blackmun, a liberal, and Scalia, a conservative, are in full agreement.