

A Mistake of Natural Law: Sir William Blackstone and the Anglican Way

CRAIG A. STERN †

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ABSTRACT: It is said that no book on the common law surpasses the importance of Sir William Blackstone's *Commentaries on the Laws of England*. But it is also said that the *Commentaries* is of questionable merit, with aspects of it downright incoherent. The most fundamental element of the *Commentaries* to attract this disparaging characterization is its discussion and use of what it usually calls "the law of nature" — and what we these days usually call "natural law." Does the *Commentaries* perpetrate a mistake — actually many mistakes — of natural law? This article answers that it is not the *Commentaries*, but rather its critics that perpetrate mistakes of natural law. The mistakes arise from the expectation that Blackstone's natural law would take after Thomas Aquinas's (or even Christopher St. German's) natural law. But readers of the *Commentaries* who allow Blackstone his own way with natural law will find it a valuable treatment that animates the whole. Blackstone's natural law owes much to two influences, Roman law and the Anglican Church. The second influence is the more distinctive and guides Blackstone's response to the first. Both led Blackstone to view the natural law as an order immanent in human law, an order especially prominent within the common law. Seen in this light, natural law provides the foundation for the *Commentaries* and a foundation for understanding law in our own day.

KEYWORDS: *Blackstone; Natural Law; Roman Law; Anglicanism; Law and Religion*

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1. INTRODUCTION

“[P]erhaps the most important single book . . . in the history of the common law” is Sir William Blackstone’s *Commentaries on the Laws of England* (hereinafter *Commentaries*).¹ No other book but the Bible had a greater role in generating American institutions² and the nineteenth century alone saw about one hundred American versions.³ It is said that the *Commentaries* led early American courts to decide from principles, not precedents.⁴ But it is said also that the *Commentaries* is of questionable merit,⁵ with aspects of it downright incoherent.⁶

The most fundamental element of the *Commentaries* to attract this disparaging characterization is its discussion and use of what it usually calls “the law of nature.”⁷ “Natural law” is the term more frequently used these days for a transcendent legal order to which human law necessarily bears some relationship. Because Blackstone’s concept of the “law of nature” is similar to that of contemporary “natural law,” this article

[†] Professor, Regent University School of Law (US). B.A. Yale University, J.D. University of Virginia. The author thanks Mark Cartledge, Doug Cook, Alyson Crisbie, Lou Hensler, Mike Hernandez, Timothy and Meredith Pettman, Paul Shakeshaft, the good people of the Regent University Law Library, and his wife Kelly for their help.

¹ DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW*, at vii (Peter Smith 1973) (1941); see also Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996). The *Commentaries* was hugely popular in the eighteenth and nineteenth centuries. See WILFRID PREST, *WILLIAM BLACKSTONE* 307 (2008).

² See BOORSTIN, *supra* note 1, at iii; see also Alschuler, *supra* note 1, at 5-9; Joseph W. McKnight, *Blackstone: Quasi-Jurisprudent*, 13 Sw L.J. 399, 411 (1959). The present article happens to highlight elements of the *Commentaries* that commended it to Americans of the Founding: “Even those who rejected Blackstone’s anti-republican emphasis on parliamentary omnipotence . . . had no difficulty in accepting the validity of Blackstone’s exposition of English common law as founded on custom, divine law, and the law of nature, hence providing an entirely appropriate legal foundation for the incipient USA.” Wilfrid Prest, *General Editor’s Introduction* to 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, at vii, xiv (Wilfrid Prest ed., Oxford Univ. Press 2016) (1765) (footnote omitted).

³ See Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 YALE J.L. & HUMAN. 103, 107-08 (2003).

⁴ McKnight, *supra* note 2, at 401.

⁵ See Emily Kadens, *Justice Blackstone’s Common Law Orthodoxy*, 103 Nw. U. L. REV. 1553, 1566 (2009).

⁶ See *infra* notes 45-54 and accompanying text.

⁷ Sometimes the *Commentaries* seems to use “natural law” or some similar term for the law of nature. See *infra* text accompanying notes 41-42. This seeming lack of uniformity and rigor in terminology certainly does not foster coherence in the *Commentaries*. On the other hand, Aquinas seems to do likewise. See *infra* note 33.

often will use the latter term instead. In this parlance, the concern becomes the charge of incoherence in Blackstone's discussion and use of natural law. Does the *Commentaries* perpetrate a mistake — actually many mistakes — of natural law?

This article proposes that it is not the *Commentaries*, but rather its critics that perpetrate mistakes of natural law. The mistakes arise from the expectation that Blackstone's natural law would take after Thomas Aquinas's⁸ (or even Christopher St. German's)⁹ natural law. As Blackstone disappoints these expectations, he has met with criticisms that his treatment of natural law is a sloppy pro forma performance that even he himself does not take seriously. But readers of the *Commentaries* who allow Blackstone his own way with natural law will find it a valuable treatment that animates the whole of the *Commentaries*.

Blackstone's natural law owes much to two influences. The first is Roman law, especially as captured in the *Corpus Juris Civilis*.¹⁰ The second is the Anglican church,¹¹ which is the more distinctive and guides Blackstone's response to the first. Both led Blackstone to view the natural law as an order immanent in human law, an order especially prominent within the common law. Seen in this light, natural law provides the foundation for the *Commentaries*. While doing so, it also provides a foundation for understanding law even today, a foundation actually in use far more than some might think.

⁸ See *infra* notes 34-44 and accompanying text.

⁹ In the early sixteenth century, St. German wrote *Doctor and Student*, "the first major law book published in English," "also the first purely analytical English law book," a work of "analytical theology and philosophy." DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 187-88* (2d ed. 2004). He drew in part upon Aquinas. CHRISTOPHER SAINT GERMAN, *ST. GERMAN'S DOCTOR AND STUDENT*, at xxiii-iv, li, lvi (T. F. T. Plucknett & J. L. Barton eds., 1975).

¹⁰ See *infra* notes 55-96 and accompanying text.

¹¹ See *infra* notes 97-329 and accompanying text.

2. THE *COMMENTARIES* AND THE COMMENTATORS

After unproductive struggles to develop a successful practice at the bar, Blackstone's professional life began to flourish with his Oxford lectures on the common law.¹² The *Commentaries* is not these lectures merely recast, delivered as they were to an audience of mere teenagers.¹³ Nevertheless, the *Commentaries* is designed to teach and Blackstone wanted his readers to learn.¹⁴ The readers for whom he wrote were "young nobility and gentry,"¹⁵ the leading laymen of the realm.¹⁶ Chief among these were those who were or would become legislators, and Blackstone was determined to instruct them not to harm by statute the liberties of Englishmen.¹⁷

Blackstone's aim to instruct lay readers shaped the *Commentaries*. This aim trained the focus of the *Commentaries* upon substantive rules of law, lending the *Commentaries* both its pathbreaking distinctive and also the daunting obstacle to its creation.¹⁸ Blackstone's object was to teach laymen the laws of property, crimes, torts, and such — not how to draft legal instruments or plead at bar.¹⁹ Beyond teaching the substance of the law to laymen, this substantive-law focus gave "lawyers a new vision of the law."²⁰ The *Commentaries* imposed order and a clarifying system on the

¹² See Douglas H. Cook, *Sir William Blackstone: A Life and Legacy Set Apart for God's Work*, 13 REGENT U. L. REV. 169, 172-173 (2000-01).

¹³ See McKnight, *supra* note 2, at 400.

¹⁴ See John H. Langbein, *Blackstone on Judging*, in BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY 65, 77 (Wilfrid Prest ed., 2009).

¹⁵ DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 65 (1989).

¹⁶ See Robert C. Berring, *The Ultimate Oldie But Goodie: William Blackstone's Commentaries on the Law of England*, 4 J.L. 189, 190 (2014). This is not to say that Blackstone disregarded the education of lawyers by means of his *Commentaries*. See David Lemmings, *Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth-Century England*, 16 LAW HIST. REV. 211, 215, 251-52 (1998); Prest, *supra* note 2, at ix.

¹⁷ See LIEBERMAN, *supra* note 15, at 56, 66.

¹⁸ See S. F. C. Milsom, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUD. 1, 4, 6 (1981).

¹⁹ See *id.* at 2, 5, 12.

²⁰ *Id.* at 10, 12; see also Lemmings, *supra* note 16, at 243, 252.

jumble that was English law.²¹ This arrangement was a key to its success.²² It is Blackstone's use of natural law that undergirds this arrangement.²³

Near the beginning of the *Commentaries* is Blackstone's introductory discussion of law.²⁴ Law is "a rule of action dictated by some superior being," and laws considered as rules for human conduct are "the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior."²⁵ The obligation to obey law derives from dependence upon the lawgiver, "[a]nd 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."²⁶ In its scope, Blackstone's law of nature reminds one of Aquinas's natural law.²⁷

²¹ See Jessie Allen, *Law and Artifice in Blackstone's Commentaries*, 4 J.L. 195, 195 (2014).

²² See LIEBERMAN, *supra* note 15, at 33-36.

²³ See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 37 (The Legal Classics Library 1983) (1765-70) (quoting with approval John Fortescue's endorsement that lay students "trace[] up the principles and grounds of the law, even to their original elements"). Blackstone's use of natural law in the *Commentaries* may also reflect his own introduction to the law. It was St. German's *Doctor and Student*, a work integrating theological and legal thought, that drew Blackstone to the law. Cook, *supra* note 12, at 170. Perhaps for similar reasons, the *Commentaries* turned students from theology to law. McKnight, *supra* note 2, at 401.

Note that the pagination of the various editions of the *Commentaries* has become more or less standardized. This move is not without its problems, however. See Alschuler, *supra* note 1, at 3 n.4; cf. Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 195, 200 (2015)) (selecting for use the first edition, as does the present article); Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 801 (1988) (same).

²⁴ See 1 BLACKSTONE, *supra* note 23, at 38-62. Blackstone's approach reflects Christian and classical roots. Conklin, *supra* note 23, at 246. It owes a debt to Burlamaqui, HENRY SUMNER MAINE, *ANCIENT LAW* 94 (Oxford Univ. Press 1931) (1861); McKnight, *supra* note 2, at 406-07, but not in its definition of law, J. M. Finnis, *Blackstone's Theoretical Intentions*, 12 NAT. L.F. 163, 171 (1967). Blackstone's definition of municipal law follows his organization of the *Commentaries*. See *id.* at 167-69.

²⁵ 1 BLACKSTONE, *supra* note 23, at 39.

²⁶ *Id.*

²⁷ See THOMAS AQUINAS, *THE SUMMA THEOLOGICA* 209 (Daniel J. Sullivan ed., Fathers of the English Dominican Province trans., Encyclopaedia Britannica 1952) (1265-73). (I-II, 91, 2, observing, "Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Therefore it has a share of the Eternal Reason, by which it has a natural inclination to its due act and end; and this participation of the eternal law in the rational creature is called the natural law . . . [T]he natural law is nothing else than the rational creature's participation of the eternal law").

The voluntaristic stamp of Blackstone's law of nature — it is the *will* of God — diminishes somewhat in the next words of the *Commentaries*. God's wisdom leads him to prescribe only what corresponds to the nature of things and in this he conforms to “the eternal, immutable laws of good and evil.”²⁸ Human reason is able to discover these laws, and God's goodness leads him to link our happiness with obedience to the law of nature. “For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be obtained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter.”²⁹ This link between the law of nature and human happiness “is the foundation of what we call ethics, or natural law.”³⁰ Natural law comprises articles that “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.”³¹

Blackstone then renders explicit the supreme authority of the law of nature:

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.³²

Again, Blackstone's law of nature brings to mind Aquinas's natural law.³³

But Blackstone's approach to what he calls natural law differs profoundly from that of Aquinas. We already have noted that the

²⁸ 1 BLACKSTONE, *supra* note 23, at 40.

²⁹ *Id.*

³⁰ *Id.* at 41.

³¹ *Id.*

³² *Id.*

³³ See 2 AQUINAS, *supra* note 27, at 227–28 (I–II, 95, 2, observing, in an article on the relation of “human law” to “natural law,” that “every human law has just so much of the character of law as it is derived from the law of nature. But if in any point it differs from the law of nature, it is no longer a law but a corruption of law.”).

Commentaries describes natural law as a set of demonstrations that certain human conduct leads to human happiness and consequently comports with the law of nature.³⁴ This description is nothing like Aquinas's description of natural law as the participation of human beings in the eternal law, or perhaps vice versa.³⁵ This difference between Blackstone and Aquinas becomes yet clearer in the former's comparison of divine law with natural law.

Although human reason before the Fall sufficed to discover the precepts of the law of nature, human reason after the Fall "is corrupt, and [human] understanding full of ignorance and error."³⁶ Therefore, God of his compassion has informed us of the law of nature "by . . . immediate and direct revelation."³⁷ "The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures."³⁸ So the natural law and the divine law both bespeak the law of nature.

Yet undoubtedly the revealed law is (humanly speaking) of infinite more authority than what we generally call 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

³⁴ See *supra* text accompanying note 31.

³⁵ See *supra* note 27.

³⁶ 1 BLACKSTONE, *supra* note 23, at 41. For discussions of Aquinas's approach to the impact of the Fall upon the operation of the natural law, see also CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 159-63 (1993) and Russell Hittinger, *Natural Law and Catholic Moral Philosophy*, in *A PRESERVING GRACE* 1, 7-8 (Michael Cromartie ed., 1997). Hittinger finds that Aquinas, "[i]n his last recorded remarks on the subject of natural law," said:

Now although God in creating man gave him this law of nature, the devil oversowed another law in man, namely, the law of concupiscence. . . . Since then the law of nature was destroyed by concupiscence, man needed to be brought back to works of virtue, and to be drawn away from vice: for which purpose he needed the written law.

Id. at 7 (citing Thomas Aquinas, *Collations in Decem Praeceptis* (1273)).

³⁷ 1 BLACKSTONE, *supra* note 23, at 42.

³⁸ *Id.* In tension with his formulation here, elsewhere in the *Commentaries* Blackstone will write of "divine law, either natural or revealed," 2 *id.* at 420, and "divine law both natural and revealed," *id.* at 455. In these two instances, it appears that he uses "divine" to denote the divine origin of the law of nature rather than to denote divine law proper. So, in yet a third place, he writes of "those laws which the creator has given us; the divine laws, I mean, of either nature or revelation." 4 *id.* at 177.

certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.³⁹

Natural law is “only what . . . we imagine to be” the law of nature.⁴⁰

The *Commentaries* continues with further observations on the relationship between these laws and human law:

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 is, 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; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former.⁴¹

Two elements of this excerpt warrant special notice. First is Blackstone’s usage of the “law of nature” and the “natural law.” As mentioned above,⁴² his usage sometimes seems to depart from distinguishing the two, with natural law as a merely human construct thought to resemble the actual law of nature. On one reading, such a departure appears in this passage. The second element is the connection between matters indifferent — matters for which the law of nature does not prescribe a specific rule — and human law. While there is a firm link between the laws of nature and human law, it appears that human law largely

³⁹ 1 *id.* at 42.

⁴⁰ *Id.*

⁴¹ *Id.* Examples of Blackstone’s references to the divine law include his discussion of the law of nuisance as enforcing “that excellent rule of gospel-morality, of ‘doing to others as we would they should do unto ourselves,’” 3 *id.* at 218, and of the criminal law, 4 *id.* at 11, 30, 42, 43, 60, including laws against homicide, *id.* at 177, dueling, *id.* at 199, and sodomy, *id.* at 216. John Finnis has noted that Blackstone’s endorsement of the role divine law is to play in the formulation of human law does not lead him to confuse crime with sin. See Finnis, *supra* note 24, at 177.

⁴² See *supra* note 7.

concerns itself with matters indifferent. Whereas Aquinas casts human law essentially in the position of providing determinations that apply rules of the natural law in particular contexts,⁴³ Blackstone sees human law having greatest play where the law of nature appears mute. This significant role in his analysis for things indifferent owes a major debt to Blackstone's Anglican point of view.⁴⁴

Blackstone's introductory remarks on law and their relation to the rest of the *Commentaries* (and, for that matter, Blackstone's entire project) have drawn sharp criticism. It is reported that no less an authority than Dr. Johnson remarked that Blackstone "thought clearly, but he thought faintly."⁴⁵ The *Commentaries* "is widely believed to rest on silly, ponderous, formal, conceptual, outdated, deductive, mechanistic, naive and hopelessly unrealistic jurisprudence,"⁴⁶ to be lacking in rigor,⁴⁷ and apparently riven by inconsistencies.⁴⁸ Especially for his effort to satisfy the customary requirement of supplying his treatise with a general introduction on the law,⁴⁹ Blackstone has received much criticism.⁵⁰ Beyond this, Blackstone seems largely to ignore the introductory doctrine

⁴³ See 2 AQUINAS, *supra* note 27, at 209-10 (I-II, 91, 3, observing that, "it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws . . ."). The *Commentaries* is not wholly lacking this approach. For example: "And sometimes, where the thing itself has it's [sic] rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct." 1 BLACKSTONE, *supra* note 23, at 55.

⁴⁴ The significant role in the *Commentaries* for human law to supply rules for matters indifferent does not preclude a role for the law of nature (or natural law) in supplying specific rules for human law. See, e.g., 1 BLACKSTONE, *supra* note 23, at 435-36, 441 (discussing parents and children); 2 *Id.* at 390, 392-93 (discussing property in animals); 4 *Id.* at 11 (discussing capital punishment), 29 (discussing wife's defense of duress), 30 (discussing self-defense), 42 (discussing guilt from crime), 67, 117 (discussing international law).

⁴⁵ Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 570 (1976) (quoting C. HERBERT STUART FIFOOT, LORD MANSFIELD 26 (1936)). The early classic effort to debunk the *Commentaries* is JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (London, Thomas Payne et al. 1776), but Bentham's target is as much the notion of natural law as the *Commentaries* itself. Posner's article explains that Bentham's is a "fundamentally misconceived attack on the *Commentaries*." *Id.* at 569.

⁴⁶ Alschuler, *supra* note 1, at 2.

⁴⁷ See BOORSTIN, *supra* note 1, at 189.

⁴⁸ See Posner, *supra* note 45, at 571.

⁴⁹ See McKnight, *supra* note 2, at 402.

⁵⁰ See Michael Lobban, *Blackstone and the Science of Law*, 30 HIST. J. 311, 311 (1987); McKnight, *supra* note 2, at 402, 404. Lobban's criticisms are answered in Harold J. Berman & Charles

he supplies once his introduction is behind him.⁵¹ H.L.A. Hart has argued that Blackstone does not use the law of nature to support English law, and that his natural law test of the validity of positive law is vacuous in any event.⁵² Although these arguments have not gone unanswered,⁵³ they actually point not to defects but rather to the very natural law technique Blackstone uses in his discussion of English law in the *Commentaries*, the technique based upon his Anglican understanding.⁵⁴

The *Commentaries* has suffered at the hands of some commentators. The introductory explanation of the law of nature and natural law has been a popular target of criticism. So has Blackstone's use — or rather non-use — of these elements when he develops his commentaries on the laws of England proper. Nevertheless, a more liberal appreciation of his work will notice a highly developed and broadly used natural law approach in those commentaries. This appreciation, however, must be attuned to discerning

J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 490 n.107 (1996).

⁵¹ See *supra* notes 41 and 44 for instances where the *Commentaries* explicitly draws upon specific rules of the law of nature, natural law, or divine law.

⁵² H. L. A. Hart, *Blackstone's Use of the Law of Nature*, 1956 BUTTERWORTHS S. AFR. L. REV. 169, 169-71.

⁵³ See Finnis, *supra* note 24, at 171-74.

⁵⁴ McKnight concurs in Hart's view of Blackstone's treatment of the law of nature and sees it as making way for Blackstone's focus on indifferent matters. See McKnight, *supra* note 2, at 405. McKnight's understanding also supports, if ironically, the argument that Blackstone thereby paves the way for his own brand of natural law analysis. See *infra* notes 309-12 and accompanying text.

Two other criticisms of the *Commentaries* deserve scant mention here. First, the radical critique of Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979), that finds Blackstone "supremely unconvincing." *Id.* at 211. Kennedy's critique itself has been found supremely unconvincing. See, e.g., Alschuler, *supra* note 1, at 45-46; Berman & Reid, *supra* note 50, at 492 n.108; John W. Cairns, *Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318, 350-52 (1984); Watson, *supra* note 23, at 795, 802. Second, some commentators criticize Blackstone on his discussion of absolute rights, as if his use of "absolute" means incapable of diminishment or compromise. See, e.g., Lobban, *supra* note 50, at 329-30; McKnight, *supra* note 2, at 401 n.16. This criticism falls aside upon paying more careful attention to Blackstone's usage:

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.

1 BLACKSTONE, *supra* note 23, at 119. "Absolute" means apart from social context, not sacrosanct. See Watson, *supra* note 23, at 803.

a use of the natural law that Blackstone's own introduction may not have foretold for his readers today.

3. BLACKSTONE AND JUSTINIAN

Before seeing Blackstone as an Anglican it helps to see him as a civilian — a master of the *Corpus Juris Civilis*, the body of Roman law assembled under the Byzantine Emperor Justinian in the early sixth century.⁵⁵ Blackstone's own studies at Oxford made him well acquainted with Roman law.⁵⁶ This acquaintance primed him for cultivating his Anglican approach to the natural law, an approach that ends up looking very much like that of Justinian.

As noted already, the *Commentaries* presents the laws of England primarily as a body of substantive law.⁵⁷ This approach enabled Blackstone to present the laws as a system, arranging them conceptually by categories.⁵⁸ In this, the *Commentaries* resembles the Roman law treatises of the ancient jurisconsult Gaius and of Justinian, whose *Institutes* is a component of the *Corpus Juris Civilis*.⁵⁹ The *Commentaries* has been likened to Justinian's work in both content and effect.⁶⁰

⁵⁵ For an introduction to Justinian and his work, see Craig A. Stern, *Justinian: Lieutenant of Christ, Legislator for Christendom*, 11 REGENT U. L. REV. 1 (1998). Helmholz has remarked that Blackstone was perhaps one-fifth a civilian, R.H. Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 AVE MARIA L. REV. 1, 5 (2005), not so small a fraction considering how imbued Blackstone was with the common law.

⁵⁶ See Cook, *supra* note 12, at 170-72.

⁵⁷ See *supra* text accompanying note 18.

⁵⁸ See Berring, *supra* note 16, at 191; Watson, *supra* note 23, at 810. It may be that Blackstone came to this method owing to his "academic persona." Wilfrid Prest, *The Religion of a Lawyer?: William Blackstone's Anglicanism*, 21 PARERGON 153, 158 (2004).

⁵⁹ See Milsom, *supra* note 18, at 10-11; Watson, *supra* note 23, at 810 (finding the *Commentaries* to be a "direct descendant of Justinian's *Institutes*"); see also Cairns, *supra* note 54, at 320, 340, 350, 359 (finding the *Commentaries* to be largely an "Institutional" work).

⁶⁰ See BOORSTIN, *supra* note 1, at 3. Others have written that Blackstone's work is fundamentally unlike Justinian's, Berman & Reid, *supra* note 50, at 492-96, or failed fundamentally by forcing the content of the common law into an unwelcoming structure from Roman law. Lobban, *supra* note 50, at 312, 321-23.

Like the *Commentaries*, the *Corpus Juris Civilis* presents abstract introductory discussions of natural law⁶¹ and manifests its actual use of natural law in the body of the work, the treatment of the law of Rome. Drawing on the universal and supreme authority of natural law, Justinian used it to support and explain Roman law. Intent on promulgating law for the entire Roman world, Justinian hoped to justify Roman law as universal by demonstrating that it reflected universal principles of law. Of course, the Emperor looked to support his own legal regime, not to supply arguments to criticize or attack it. The dignity and universal authority of the natural law lay ready to lend dignity and universal authority to Roman law.⁶²

Beyond lending this support, the natural law helped explain the rules of Roman law. Natural and Roman law were viewed as intertwined, so much so that natural law was best seen through existing Roman law, the celebrated simplicity and harmony of which derived from this relationship.⁶³ As in classical Greek thought on natural law, natural law was understood to be from the “aboriginal design of nature,” but Roman thinking also understood actual, positive Roman law to approximate the ideal natural law, gradually conforming to it more fully.⁶⁴ Far from a revolutionary doctrine, the Roman natural law approach encouraged Roman lawyers to find the natural law in positive law.⁶⁵

In actual operation, Roman natural law concerned itself with conforming legal rules to the nature of things.⁶⁶ It sought the intrinsic character of legal subjects, applying natural reason to the facts of the

⁶¹ See ALEXANDER PASSERIN D'ENTRÈVES, *NATURAL LAW* 24-25, 27-33 (Transaction Publishers 1994) (1951).

⁶² See *id.* at 23-24, 31-32.

⁶³ See MAINE, *supra* note 24, at 60, 63-64.

⁶⁴ *Id.* at 44-45, 60-63.

⁶⁵ See *id.* at 63, 73.

⁶⁶ See BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 57 (1962).

matter at hand.⁶⁷ A master of both natural law theory and Roman law likens this work to developing rules for preparing flaky piecrust.⁶⁸

The *Commentaries* makes use of natural law in much the same way.⁶⁹ Far from using natural law to trump the law of England,⁷⁰ and only rarely using natural law to criticize English law,⁷¹ Blackstone follows the Roman natural law tradition in explaining why English law is as it is.⁷² This use is in keeping with Blackstone's practical rather than theoretical bent.⁷³ Like the natural law of the Roman lawyer,⁷⁴ Blackstone's natural law unites *is* with *ought*, seeking norms from the nature of things,⁷⁵ but with more warrant.⁷⁶

A good example of this technique is offered by Blackstone's explanation of the law of property. As Professor Graham has explained, the *Commentaries* does not present irrational support of old ways but rather a studied focus on the physical nature of things.⁷⁷ From nature and the natural order in physical context, for example, Blackstone evolves a "natural history" of property to rationalize English property law.⁷⁸ Natural law inheres in the nature of things, and the law of England, like

⁶⁷ See *id.*

⁶⁸ See D'ENTRÈVES, *supra* note 61, at 148; see also McKnight, *supra* note 2, at 406 n.67 (agreeing with Maine on the somewhat utilitarian cast of Roman natural law).

⁶⁹ Although it may be that Blackstone never explicitly asserted that one could discover the law of nature from English law, or vice versa. McKnight, *supra* note 2, at 403 n.33. At least one commentator has written that the common-law tradition reflects the notion that innate reason has led the positive law to hold within itself the natural law. Lobban, *supra* note 50, at 314. Similar to this link is the one Blackstone approvingly found to be advanced by Aristotle: learning positive law is a good way to learn ethics. See Conklin, *supra* note 23, at 205.

⁷⁰ See LIEBERMAN, *supra* note 15, at 49-55.

⁷¹ See *id.* at 46.

⁷² See Langbein, *supra* note 14, at 77.

⁷³ See PREST, *supra* note 1, at 310; see also Posner, *supra* note 45, at 576 (pronouncing Blackstone "better at particulars than at generalization").

⁷⁴ See D'ENTRÈVES, *supra* note 61, at 151.

⁷⁵ See BOORSTIN, *supra* note 1, at 60. One commentator has tagged Blackstone a "natural law maverick" for constructing a "pastiche" of natural law and his own views. McKnight, *supra* note 2, at 407. Perhaps the link of *is* with *ought* in his romanesque approach invites such criticism.

⁷⁶ See *infra* notes 290-97 and accompanying text.

⁷⁷ Nicole Graham, *Restoring the "Real" to Real Property Law: A Return to Blackstone?*, in BLACKSTONE AND HIS COMMENTARIES, *supra* note 14, at 151.

⁷⁸ See *id.* at 154-55, 160.

Roman law, developed in light of this natural law.⁷⁹

The *Commentaries* holds many instances where Blackstone explicitly explains that English law is true to the nature of things — sometimes presented as fulfilling the obligation of the law to reflect “necessity.” This, after he notes that the law of nature inheres in the nature of things,⁸⁰ and that sound Roman laws took “the nature of things for their guide.”⁸¹ Some examples: Blackstone establishes the obligation of allegiance to civil government upon the nature of civil government.⁸² The legal relationship between husband and wife is founded in nature.⁸³ Necessity has given rise to the law of property,⁸⁴ and laws on personal property take into account their transitory nature.⁸⁵ The laws of civil wrongs derive in several respects from the nature of things, often human nature,⁸⁶ and criminal laws likewise derive from the nature of things or reflect the nature of things.⁸⁷ In these instances, Blackstone seems to hark back to the Roman law, rooted as it was in the nature of things.

Roman law makes its appearance in the *Commentaries* in at least two other general ways that support Blackstone’s Anglican approach to the law. First is its concept of the *jus gentium*, the law of nations. If the natural law truly is universal, one would expect it — or projections from it — to be found in the laws of all nations. The law of nations, understood as the body of laws to be found widespread among the nations of the earth, therefore becomes a window on natural law, as the Romans believed.⁸⁸

⁷⁹ The *Commentaries* suggests that natural law inheres in the nature of things in such language as, “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.” 1 BLACKSTONE, *supra* note 23, at 38. If Blackstone tags the law of property as governing things indifferent, *see infra* note 152 and accompanying text, he does not thereby hold that property law is wholly without natural law principles. *See infra* notes 309-12 and accompanying text.

⁸⁰ *See* 1 BLACKSTONE, *supra* note 23, at 40.

⁸¹ *See id.* at 58.

⁸² *Id.* at 354, 358.

⁸³ *See id.* at 410.

⁸⁴ *See 2 id.* at 4, 7.

⁸⁵ *See 3 id.* at 146.

⁸⁶ *See id.* at 4, 22, 116, 379, 434.

⁸⁷ *See 4 id.* at 20-21, 27, 74, 186, 216.

⁸⁸ *See* D’ENTRÈVES, *supra* note 61, at 32-33; MAINE, *supra* note 24, at 46; NICHOLAS, *supra* note 66, at 55.

This value of the *jus gentium* is evident in Blackstone's use of comparative law. He looks to law outside England not so much to disparage non-English law as to find points of commonality. Those points support English law by suggesting that it rests upon natural law foundations.⁸⁹ A similar cast in Anglican theology could therefore offer a link and support to Blackstone's approach to the law.

Beyond its content, another aspect of Roman law that influenced the *Commentaries* and would harmonize well with an Anglican understanding of the law is the process of the development of Roman law. Roman law developed over hundreds of years, largely case by case.⁹⁰ In this respect, its development paralleled that of English common law. While Roman law came to repose nearly exclusively in the *Corpus Juris Civilis*,⁹¹ English law rejected such codification in favor of its commitment to the method by which Roman law developed.⁹² Some have noted that Blackstone took the view of a practicing lawyer and judge in the *Commentaries*,⁹³ and though it was famously said that, "In England less attention is paid to natural law than anywhere else in the world,"⁹⁴ Blackstone used natural law arguments successfully at the bar.⁹⁵ The common law — the law of cases — required barristers and judges to consider cases with an eye to their context. This technique largely provided the materials Blackstone assembled in the *Commentaries*. It is a technique that befits the Anglican way, a technique that developed law that itself befits the Anglican way. It also was the way of Roman lawyers.

⁸⁹ See *infra* notes 279-89 and accompanying text.

⁹⁰ See NICHOLAS, *supra* note 66, at 28-32.

⁹¹ See 2 EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 80 (Encyclopaedia Britannica Inc. 1952) (1788).

⁹² See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 585 (Liberty Fund, Inc. 2010) (1898). So the English were "more Roman than the Romanists," those who received as authority the *Corpus Juris Civilis* rather than adhering to the method by which Roman law developed. *Id.* at 705.

⁹³ See Berman & Reid, *supra* note 50, at 503. *But see infra* note 235.

⁹⁴ Helmholz, *supra* note 55, at 20; see also D'ENTRÈVES, *supra* note 61, at 119 n.1.

⁹⁵ McKnight, *supra* note 2, at 407-09.

If common law judges in deciding cases were making law up, they were making it up to fit.⁹⁶

Blackstone, student of Roman law, reflected a Roman law approach to the natural law in the *Commentaries*. Beginning, like the *Digest* and *Institutes* of the *Corpus Juris Civilis*, with an abstract exposition of natural law and related formulations, the body of the *Commentaries* puts natural law most to use in explaining and justifying particular rules of law. Seeking the dictates of reason and the guide of reasonableness, Blackstone rests rules of law upon the nature of the matter at hand — a typically Roman technique. In this and other respects, Blackstone's use of natural law fits well with the Anglican stance on natural law that he adopts in the *Commentaries*.

4. BLACKSTONE AND THE CHURCH OF ENGLAND

No surprise that Sir William Blackstone, Oxford don, justice of both the King's Bench and Common Pleas, was an Anglican. What may surprise is how serious an Anglican Blackstone was, and how deeply his Anglicanism influenced the jurisprudence of his *Commentaries*.

Blackstone's deep and pervasive Christian faith was manifest.⁹⁷ As a young man he took a serious interest in religion,⁹⁸ and made a careful investigation of Anglicanism⁹⁹ before committing himself wholeheartedly to orthodox Anglicanism.¹⁰⁰ He celebrated his commitment in a poem, a vision of diverse faiths in which he praised the Church of England for its moderation, liberty, support of science,

⁹⁶ See Milsom, *supra* note 18, at 11-12. Milsom here speaks of fit according to patterns of legal rules, but the notion of judges in a sense creating rules that at the same time are seen as compelled by antecedent norms is apropos.

⁹⁷ See Cook, *supra* note 12, at 169.

⁹⁸ See Prest, *supra* note 58, at 163.

⁹⁹ See Cook, *supra* note 12, at 174.

¹⁰⁰ See PREST, *supra* note 1, at 309; Prest, *supra* note 3, at 123; Prest, *supra* note 58, at 161.

reforming influence, and virtue.¹⁰¹ Although a committed Anglican, Blackstone was not so committed that he could brook no Dissenters,¹⁰² going so far as to alter the *Commentaries* in light of Dissenter reaction to an earlier edition of the work.¹⁰³ The general Anglican understanding of providential development from primitive sources¹⁰⁴ and the important role reason plays in perceiving truth¹⁰⁵ would support Blackstone's construction of the *Commentaries*.

The substantial alignments between Anglican theology and the *Commentaries* are the focus of the next pages of this article.

4.1. RICHARD HOOKER

Key to the Church of England is the work of the Elizabethan divine, Richard Hooker.¹⁰⁶ Beyond helping to shape the contours of Anglicanism as a whole, Hooker's influence on legal theory was especially pronounced.¹⁰⁷ Blackstone's Anglican understanding of the law necessarily reflects Hooker's understanding.

Hooker held law in high esteem:

[O]f Law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and in earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power: both Angels and men and creatures of what condition soever, though

¹⁰¹ See WILLIAM BLACKSTONE, *THE PANTHEON* 27-32 (photo. reprint, Gale Ecco Print Editions 2010) (1747). Prest has called Blackstone a "comparative theologian." Prest, *supra* note 3, at 110.

¹⁰² See Prest, *supra* note 58, at 153, 165-66.

¹⁰³ See *id.* at 155-56.

¹⁰⁴ See BOORSTIN, *supra* note 1, at 74-75.

¹⁰⁵ See Raymond D. Tumbleson, "Reason and Religion": *The Science of Anglicanism*, 57 *J. HIST. IDEAS* 131, 133, 151 (1996).

¹⁰⁶ See NIGEL ATKINSON, *RICHARD HOOKER AND THE AUTHORITY OF SCRIPTURE, TRADITION AND REASON*, at ix (1997). Though such, his work earned surprising approval from the leader of the Roman Catholic Church. See RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 246 (1974).

¹⁰⁷ Harold Berman highlights Hooker's influence as to political authority and consent, the importance of history, and the large role played by matters indifferent—those not determined by transcendent sources of law. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1665-66 (1994).

each in different sort and manner, yet all with uniform consent,
admiring her as the mother of their peace and joy.¹⁰⁸

Law for Hooker is fundamental.¹⁰⁹ Furthermore, his treatment of law is no incidental matter but derives from his theology.¹¹⁰ Law, as one might gather from the excerpt just quoted, reigns over politics. In this, Hooker departs from an Aristotelian view,¹¹¹ and follows, as elsewhere, the magisterial reformers rather than Augustine or Aquinas.¹¹²

Hooker goes so far as to hold that God himself works according to law,¹¹³ and for at least one commentator, Hooker holds that God is law.¹¹⁴ A famous apothegm of Hooker states that “the being of God is a kind of law to his working.”¹¹⁵

In some respects, Hooker’s general discussion of the fundamental types of law adumbrates that of Blackstone. Hooker explains that, in his usage, both the law of nature and divine law reveal eternal law to humankind.¹¹⁶ At the same time, however, Hooker holds divine law to be positive law, a creature of God’s reason and will both, whereas for Blackstone it is simply a revelation of the law of nature.¹¹⁷ Likewise, Hooker sees some human law as an adaptation of natural law, and other human law as an ordinance “merely human,” reasonable and convenient

¹⁰⁸ 1 RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* 232 (J.M. Dent & Sons, Ltd. 1907) (1594, 1597).

¹⁰⁹ See W.J. TORRANCE KIRBY, *RICHARD HOOKER, REFORMER AND PLATONIST* 48 (2005). “Perhaps the most influential Anglican thinker to make explicit use of natural law is the Elizabethan divine, Richard Hooker” Will Adam, *Natural Law in the Anglican Tradition, in CHRISTIANITY AND NATURAL LAW* 58, 63 (Norman Doe ed., 2017).

¹¹⁰ See *id.* at 55.

¹¹¹ See ROBERT K. FAULKNER, *RICHARD HOOKER AND THE POLITICS OF A CHRISTIAN ENGLAND* 114-16 (1981).

¹¹² See KIRBY, *supra* note 109, at 52, 58-78.

¹¹³ See W.J. Torrance Kirby, *Reason and Law, in A COMPANION TO RICHARD HOOKER* 251, 253, 255 (Torrance Kirby ed., 2008).

¹¹⁴ See KIRBY, *supra* note 109, at 51; Kirby, *supra* note 113, at 251.

¹¹⁵ 1 HOOKER, *supra* note 108, at 150.

¹¹⁶ See Kirby, *supra* note 113, at 265. Elsewhere, Kirby notes that the question of Hooker’s doctrine of natural law is controversial. See KIRBY, *supra* note 109, at 57.

¹¹⁷ See L.S. THORNTON, *RICHARD HOOKER* 32, 107 (1924). In this context Hooker calls law “positive” if express revelation is necessary to know it. 1 HOOKER, *supra* note 108, at 220 n.1. Also, apparently unlike Blackstone, Hooker observes that the evidence of the senses is clear and strong while that of revelation is complicated and complex. THORNTON, *supra*, at 16. At the same time, however, the object held out in the Scriptures is more certain than that in the senses. *Id.* at 18.

for the time and place.¹¹⁸ A similar formulation of human law will find its way into the *Commentaries*.¹¹⁹

The line from Hooker to Blackstone is more clearly traced along particular elements to be found in the works of both. One is the role of human reason in the development of law.¹²⁰ Like other Reformation theologians, Hooker asserts that Scripture and reason both convey to humans the knowledge of God and of his eternal law.¹²¹ “It was part of God’s nature to work in an orderly and reasonable way”¹²² Consequently, “God’s own creation also worked in an orderly and reasonable way,”¹²³ a way ruled by law. God acts to accomplish his “rational purpose.”¹²⁴ So for Hooker, the appeal to reason becomes key.¹²⁵ The law of reason is for all humans,¹²⁶ endowed as they are with “a natural practical wisdom.”¹²⁷ Humans find themselves ruled by the law of reason, divine law, and human law¹²⁸ — the last resting upon rational human nature¹²⁹ and either resolving “probable matters” or “clarify[ing]

¹¹⁸ NIGEL VOAK, RICHARD HOOKER AND REFORMED THEOLOGY 117 (2003); see also FAULKNER, *supra* note 111, at 114 (reading Hooker to state that human law is discovered naturally, but that the authority to do so is from God); Rowan Williams, *Foreword: Of the Lawes of Ecclesiastical Politie Revisited*, in A COMPANION TO RICHARD HOOKER, *supra* note 113, at xv, xviii–xix (distinguishing in Hooker laws for humanity from laws for particular societies, with both legitimate and binding).

¹¹⁹ See *infra* notes 305–12 and accompanying text. Also finding its way into the *Commentaries* is Hooker’s usage of the term *lex gentium* to mean international law rather than something like the Roman usage of *jus gentium* discussed above at notes 88 to 89. Finnis, *supra* note 24, at 177.

¹²⁰ Of course, some role for human reason is found in standard views on the making of law, with perhaps the classic being that of Aquinas. See, e.g., *supra* note 43. Nevertheless, the uses to which Hooker and Blackstone put reason bear a special affinity, as discussed below. See *infra* notes 305–12 and accompanying text.

¹²¹ See KIRBY, *supra* note 109, at 74; see also KIRK, *supra* note 106, at 243.

¹²² ATKINSON, *supra* note 106, at 13.

¹²³ *Id.*

¹²⁴ KIRBY, *supra* note 109, at 51.

¹²⁵ See THORNTON, *supra* note 117, at 13; see also Adam, *supra* note 109, at 63 (Hooker “often uses the term ‘law of reason’ as synonymous with ‘natural law’”), 73 (Hooker took “the explicit doctrine of natural law of the Thomistic tradition and repackaged it as the law of reason”), 76 (“The concept of natural law, and its derivative—the law of reason, played a central role in the thought of Richard Hooker . . .”).

¹²⁶ See FAULKNER, *supra* note 11, at 63, 72.

¹²⁷ KIRBY, *supra* note 109, at 55. And reason shows the good, THORNTON, *supra* note 117, at 37, presumably the key to the happiness all humans seek. See KIRBY, *supra* note 109, at 75; THORNTON, *supra* note 117, at 38. This idea too finds its way into Blackstone. See *supra* notes 28–31 and accompanying text.

¹²⁸ See ATKINSON, *supra* note 106, at 14.

¹²⁹ See THORNTON, *supra* note 117, at 36–37.

and enforc[ing] the necessary precepts of reason.”¹³⁰ The authority Hooker grants to human reason, a touchstone of Anglicanism, holds sway in the *Commentaries*, as shall appear.¹³¹

A second major influence of Hooker upon Blackstone is his endorsement of the authority of custom. Against the Puritan threat of “singularity,” lack of consensus,¹³² Hooker counterpoised consent,¹³³ a distant consent presumed to continue.¹³⁴ Custom, modified appropriately by customarily legitimate written law, is authoritative and likely to induce obedience.¹³⁵ This appreciation for custom fits well with Hooker’s view that God teaches through human experience.¹³⁶ It also supports Blackstone’s hailing custom as the common law, a move that enabled him to capture the advantages of both primitive sources and traditional developments.¹³⁷

Third is the related matter of Hooker’s use of history. For Hooker, Scripture supports the value of experience.¹³⁸ Joined with his notion that God delivers law providentially,¹³⁹ these views support Hooker’s position that attaining truth is a gradual affair played out in history.¹⁴⁰ Humans may make laws, but in a sense those laws are God’s as he works his providential will.¹⁴¹ History as the unfolding of gradual development¹⁴² is normative for Hooker.¹⁴³ Consequently, Harold Berman has found in Hooker a key to English historical jurisprudence and its continuing influence¹⁴⁴ as well as

¹³⁰ FAULKNER, *supra* note 111, at 115.

¹³¹ See *infra* notes 305-12 and accompanying text.

¹³² ATKINSON, *supra* note 106, at 50.

¹³³ See FAULKNER, *supra* note 111, at 103, 111.

¹³⁴ See *id.* at 112.

¹³⁵ See 1 HOOKER, *supra* note 108, at 422; see also ATKINSON, *supra* note 106, at 55; KIRK, *supra* note 106, at 244.

¹³⁶ See KIRK, *supra* note 106, at 244-45; Williams, *supra* note 118, at xix.

¹³⁷ See BOORSTIN, *supra* note 1, at 73.

¹³⁸ See THORNTON, *supra* note 117, at 17.

¹³⁹ See FAULKNER, *supra* note 111, at 114.

¹⁴⁰ See THORNTON, *supra* note 117, at 45-46.

¹⁴¹ See *id.* at 37. Such a commitment to historical development, adapted to local conditions, lies at the core of Hooker’s chief aim—to explain and defend the ecclesiastical polity of the Church of England. See ATKINSON, *supra* note 106, at 58.

¹⁴² See ATKINSON, *supra* note 106, at 47.

¹⁴³ See *id.* at 54.

¹⁴⁴ Berman, *supra* note 107, at 1664-66.

an emphasis on historical continuity.¹⁴⁵ For Blackstone, history is the key to understanding English law.¹⁴⁶

The last marked influence of Hooker on Blackstone is the importance of the concept of things indifferent, matters not conclusively ordained by transcendent law but rather left more to human determination.¹⁴⁷ Positive laws may resolve matters that God leaves to human liberty.¹⁴⁸ So, while some human laws are based upon natural law,¹⁴⁹ its necessary tenets are few, leaving most matters to public authority.¹⁵⁰ Blackstone takes a similar tack¹⁵¹: Daniel Boorstin has discussed the remarkable degree to which Blackstone holds that private property itself is a creature of civil law.¹⁵² Crimes not *mala in se* but rather those “with regard to things in themselves indifferent . . . become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper.”¹⁵³ “Lands are not naturally descendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in one as well

¹⁴⁵ See *id.* at 1666.

¹⁴⁶ See BOORSTIN, *supra* note 1, at 36; LIEBERMAN, *supra* note 15, at 42; Conklin, *supra* note 23, at 218. Lobban finds in Blackstone a commitment to authority and history over deductive reasoning, see Lobban, *supra* note 50, at 328, and views the *Commentaries* as intertwining theory with history. *Id.* at 330. And Boorstin finds a telling example of Blackstone’s commitment to history in his treatment of the Revolution of 1688. BOORSTIN, *supra* note 1, at 26.

¹⁴⁷ See ATKINSON, *supra* note 106, at 59–60.

¹⁴⁸ See 2 HOOKER, *supra* note 108, at 363.

¹⁴⁹ THORNTON, *supra* note 117, at 32.

¹⁵⁰ See FAULKNER, *supra* note 111, at 113; see also *id.* at 100 (observing that, after the law of reason, human law holds prominence for Hooker), 112 (observing that, once natural necessity calls for a rule, nearly any rule will do).

¹⁵¹ While for Blackstone “indifferent” can mean diverse things, Finnis, *supra* note 24, at 172–73, Blackstone imitates Hooker on biblical law, for example, acceding to its authority but finding its still-obligatory moral law pertinent to very few issues. See D. SEABORN DAVIES, *THE BIBLE IN ENGLISH LAW* 20 (1954). As to one such instance, it is both intriguing and relevant to note that Blackstone observes that blood guilt—a concept harking back to biblical standards—would adhere to Parliament were it to over-extend capital punishment. 4 BLACKSTONE, *supra* note 23, at 11. The Bible also speaks specifically of blood guilt for over-extension of capital punishment. See DEUTERONOMY 19:4–10. See generally Craig A. Stern, *Torah and Murder: The Cities of Refuge and Anglo-American Law*, 35 VAL. U. L. REV. 461 (2001) (demonstrating the influence of the biblical law of homicide upon the Anglo-American law of homicide).

¹⁵² BOORSTIN, *supra* note 1, at 170–74, 179–80. See 1 BLACKSTONE, *supra* note 23, at 185; 2 *Id.* at 2, 210–11, 491 for pertinent passages from the *Commentaries*.

¹⁵³ 1 BLACKSTONE, *supra* note 23, at 55.

as the other.”¹⁵⁴ Regarding the jurisdiction of courts, “[e]very nation must and will abide by it’s [sic] own municipal laws; which various accidents conspire to render different in almost every country in Europe.”¹⁵⁵ Apart from these specific observations regarding indifferent matters, Blackstone’s chief use of natural law paradoxically guides the resolution of matters that, in a sense, are indifferent.¹⁵⁶ More on this use later.¹⁵⁷

The teaching of Hooker was not lost on the English legal theorists that followed. Edward Coke viewed the law as reason in history — reason in the sense of reasonable, not rationalistic — and understood that natural law was incorporated into human law.¹⁵⁸ Even more than Coke, Matthew Hale especially influenced Blackstone in the *Commentaries*.¹⁵⁹ Like Hooker, Hale saw natural law and divine law as authoritative but also as speaking only to a limited set of questions.¹⁶⁰ Likewise, Hale understood history as providence,¹⁶¹ with positive law accordingly developed through time.¹⁶² This historical focus finds its way from Hale into the *Commentaries*.¹⁶³ Also, both Hale’s locating reason within a particular object (in addition to its being a human faculty) and his debt to natural science and empiricism¹⁶⁴ seem reflected in the *Commentaries*.¹⁶⁵

The Anglicanism of Hooker, Coke, and Hale, and their emphasis on reason and history alongside the authority of natural law and Holy Writ, are to be seen in Blackstone’s *Commentaries*. An even clearer influence on

¹⁵⁴ *Id.* at 185.

¹⁵⁵ 3 *id.* at 87.

¹⁵⁶ So, as for Hooker, such human law is “grounded upon the Word,” 1 HOOKER, *supra* note 108, at 309, but not dictated by it.

¹⁵⁷ See *infra* notes 305-12 and accompanying text.

¹⁵⁸ See Berman, *supra* note 107, at 1690-93.

¹⁵⁹ See Berman & Reid, *supra* note 50, at 443, 489-94; Cairns, *supra* note 54, at 340, 352; Finnis, *supra* note 24, at 164-65; Watson, *supra* note 23, at 810-12.

¹⁶⁰ See Berman, *supra* note 107, at 1709.

¹⁶¹ See *id.* at 1722.

¹⁶² See *id.* at 1708, 1711-14.

¹⁶³ See *id.* at 1733.

¹⁶⁴ See *id.* at 1715, 1729.

¹⁶⁵ See *infra* notes 241-46, 291-93 and accompanying text.

Blackstone, however, is Anglican thought closer to his own time. It is to that thought that we now turn.

4.2. THE LATITUDINARIANS

The Anglican Church faced the Age of Reason and Deism with Latitudinarianism.¹⁶⁶ Though standing in opposition to those two developments, the Latitudinarians, as their name implies, embraced tolerance as their major theme.¹⁶⁷ This theme in no way compromised their commitment to God and the Christian faith. The Latitudinarians believed that God holds an absolute claim on humanity and that all our powers depend upon his will.¹⁶⁸ Christianity is to govern all of life.¹⁶⁹ Education for moral and spiritual reformation is especially important.¹⁷⁰ With these tenets Latitudinarianism was a major force in seventeenth century Anglicanism.

It also was in important respects a movement in continuity with the work of Hooker, a continuity that would support the work of Blackstone. The Latitudinarians in their tolerance relied upon Hooker's emphasis on things indifferent.¹⁷¹ They also shared Hooker's endorsement of strong laws.¹⁷²

Beyond these particulars, the most important influence of Latitudinarianism to be seen in the *Commentaries*, and well within the trajectory Hooker set for the Anglican Church, was its appreciation for reason as a guide in human affairs. Latitudinarian thought was well

¹⁶⁶ See W. M. SPELLMAN, *THE LATITUDINARIANS AND THE CHURCH OF ENGLAND 1600-1700* 10-83 (1993).

¹⁶⁷ See ERNEST CAMPBELL MOSSNER, *BISHOP BUTLER AND THE AGE OF REASON: A STUDY IN THE HISTORY OF THOUGHT* (1936).

¹⁶⁸ See SPELLMAN, *supra* note 166, at 120.

¹⁶⁹ See *id.* at 7.

¹⁷⁰ See *id.* at 4, 61, 128.

¹⁷¹ See *id.* at 157.

¹⁷² See *id.* at 70. Other Latitudinarian notions to find their way into the *Commentaries* are the endorsement of strong civil government, *id.* at 122, and self-interest as sound motivation, *see id.* at 118-19, 122.

suites to the development of science¹⁷³: it is no accident that Isaac Newton was an Anglican.¹⁷⁴ The Latitudinarians understood that human reason did not survive the Fall unimpaired.¹⁷⁵ At the same time, however, some power of human reason persists.¹⁷⁶ Human reason *under* God is able to understand nature, itself existing under the Sovereign God.¹⁷⁷ This human reason is not the reason of rationalism, but instead more like common sense.¹⁷⁸ And just as reason is an aid to understanding the Bible,¹⁷⁹ so is the Bible a necessary aid to the use of reason.¹⁸⁰ Latitudinarians favored reason and the philosophical explanation of reality,¹⁸¹ but more important to Blackstone's jurisprudence was their view that reason was useful especially for discerning natural law.¹⁸²

One who could be viewed as the leading exponent of Latitudinarianism in the next century, the century of Blackstone, is Bishop Joseph Butler.¹⁸³ Butler published his most important work, *The Analogy of Religion Natural and Revealed*, in 1736 and it became hugely influential in the middle of the century during the height of Blackstone's career and the writing of the *Commentaries*.¹⁸⁴ Relying on the same principles that served Hooker,¹⁸⁵ Butler aimed to refute the deists on the grounds of natural theology.¹⁸⁶ As Blackstone would argue,¹⁸⁷ the

¹⁷³ See James R. Jacob & Margaret C. Jacob, *The Anglican Origins of Modern Science: The Metaphysical Foundations of the Whig Constitution*, 71 *ISIS* 251, 258 (1980); SPELLMAN, *supra* note 166, at 6–7.

¹⁷⁴ See Jacob & Jacob, *supra* note 173, at 254, 262, 265. The Anglican mix of authority from the Bible, reason, and the senses—a mix hospitable to science—is one of its distinctives. See *id.* at 256; Tumbleson, *supra* note 105, at 134–35, 139, 148, 151–53, 156.

¹⁷⁵ SPELLMAN, *supra* note 166, at 111.

¹⁷⁶ See *id.* at 74–77.

¹⁷⁷ See *id.* at 87–88, 160.

¹⁷⁸ See *id.* at 4.

¹⁷⁹ See *id.* at 156.

¹⁸⁰ See *id.* at 83–86.

¹⁸¹ See *id.* at 106–07.

¹⁸² See *id.* at 8, 66, 76–77, 81–82. The association of reason with natural law is typically English. Helmholz, *supra* note 55, at 12, 21.

¹⁸³ See Conklin, *supra* note 23, at 213.

¹⁸⁴ See MOSSNER, *supra* note 167, at 178–87.

¹⁸⁵ See THORNTON, *supra* note 117, at 103.

¹⁸⁶ See BOORSTIN, *supra* note 1, at 15. The project of natural theology itself received impetus from Hooker. See Kirby, *supra* note 113, at 270–71. Butler also aligned himself with the empiricism of Locke and Newton. MOSSNER, *supra* note 167, at 82.

¹⁸⁷ See *supra* notes 24–27 and accompanying text.

creature owes a duty to the creator, and design proves a designer.¹⁸⁸ Likewise, general laws govern nature,¹⁸⁹ with the nature of things giving rise to right and wrong, thus determining God's will.¹⁹⁰ Humans are able to discover their duties through reason — more the reasonable dictate of God's will than the deliverances of logic.¹⁹¹ Blackstone would also endorse Butler's view of civil government as an agency of God's government concerned with social consequences.¹⁹²

Two major aspects of Butler's theology to lodge in the *Commentaries* command attention here. The first is emphasis on experience. We have noted Butler's emphasis on reason, that is on reasonableness more than cold logic.¹⁹³ Nevertheless, humankind cannot by speculation judge what leads to human perfection or happiness.¹⁹⁴ Hooker had held that the degree of certainty we attain is relative to the nature of things.¹⁹⁵ Like him, Butler held that we should not expect to plumb the depths of all knowledge and understanding, but rather follow the light we do have.¹⁹⁶

That light largely is the product of experience. The laws by which God governs are known to us by reason along with experience.¹⁹⁷ As science and medicine developed by progressive advances,¹⁹⁸ so ethics depends upon empirical evidence and common sense, and morality itself

¹⁸⁸ See JOSEPH BUTLER, *THE ANALOGY OF RELIGION NATURAL AND REVEALED* 245 (J.M. Dent & Co. 1906) (1736).

¹⁸⁹ See *id.* at 105.

¹⁹⁰ See *id.* at 243. So, for those designed for society God's laws prescribe justice and charity. *Id.* at 245.

¹⁹¹ See MOSSNER, *supra* note 167, at 14. Butler did not suppose that all elements of moral government are clear to humans. *Id.* at 90. Mossner also discerns some sleight of hand in Butler's treatment of the matter of law and will. *Id.* at 102.

¹⁹² Compare 1 BLACKSTONE, *supra* note 23, at 45, 54, with BUTLER, *supra* note 188, at 37-38, 41, 98.

¹⁹³ See *supra* text accompanying note 191. Again, this emphasis reminds one of Hooker, ATKINSON, *supra* note 106, at 13, as does Butler's division of the precepts of religion into moral and positive according as the reasons for the precept are seen or not seen, MOSSNER, *supra* note 167, at 92, and the acknowledgement that reason needs support from God's inspiration, *id.* at 123-24.

¹⁹⁴ See BUTLER, *supra* note 188, at xxx.

¹⁹⁵ See ATKINSON, *supra* note 106, at 91-92, 98.

¹⁹⁶ JOSEPH BUTLER, *FIFTEEN SERMONS PREACHED AT THE ROLLS CHAPEL AND A DISSERTATION UPON THE NATURE OF VIRTUE* 237-38 (G. Bell Sons 1914) (1726).

¹⁹⁷ See BUTLER, *supra* note 188, at 143.

¹⁹⁸ See *id.* at 152-53.

is a science of human action with attention paid to the facts of results.¹⁹⁹ God uses our experience to teach us duties.²⁰⁰ As with physics, so with human laws, experiment, inductive method, and judgment based upon the generality of observations are sound guides.²⁰¹ Experience, resting upon God's governance by punishment and reward,²⁰² is a surer guide than abstract reason.²⁰³

Blackstone suited the *Commentaries* to his readers, enlightened eighteenth-century Anglicans.²⁰⁴ He himself was committed to English enlightenment principles²⁰⁵ and Butler's welcome to progress, knowledge, and experience²⁰⁶ suited Blackstone well. Like Edmund Burke,²⁰⁷ Blackstone embraced Latitudinarianism and the work of Joseph Butler.²⁰⁸ He subscribed to the test of probability rather than certainty,²⁰⁹

¹⁹⁹ See MOSSNER, *supra* note 167, at 105, 117.

²⁰⁰ See *id.* at 96.

²⁰¹ See BUTLER, *supra* note 188, at xviii, xxx, 79.

²⁰² See *id.* at 25, 180.

²⁰³ See *id.* at 104, 143-44, 148. As Blackstone would remark regarding the changing of human laws, see *infra* notes 272-78 and accompanying text, Butler observed that we hazard unknown effects by changing the regime God has instituted for his rule. See BUTLER, *supra* note 188, at 101, 106, 108-09. With the results yet to be experienced, we cannot assess the outcome of such a move.

²⁰⁴ See Crane Brinton, Book Review, 55 HARV. L. REV. 703, 703 (1942) (reviewing *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1941)).

²⁰⁵ See PREST, *supra* note 1, at 308; Graham, *supra* note 77, at 152; Tim Stretton, *Coverture and Unity of Person in Blackstone's Commentaries*, in BLACKSTONE AND HIS COMMENTARIES, *supra* note 14, at 111, 125.

²⁰⁶ See BUTLER, *supra* note 188, at 162.

²⁰⁷ See MOSSNER, *supra* note 167, at 189.

²⁰⁸ See Conklin, *supra* note 23, at 213-15. Conklin points out especially the affinity in epistemology and the role of happiness.

²⁰⁹ See Blackstone's probabilism here, for example: "But this [move of the Restoration Parliament] was for the necessity of the thing, which supersedes all law; for if they had not so met, it was *morally impossible* that the kingdom should have been settled in peace." 1 BLACKSTONE, *supra* note 23, at 147 (emphasis added). And here: "So that it is *morally impossible* to trace out, with any degree of accuracy, *when* the several mutations of the common law were made . . ." 4 *id.* at 402 (first emphasis added). The probabilism in this use of "morally impossible" finds an explanation from Blackstone's contemporary, Samuel Johnson:

He thus defined the difference between physical and moral truth: "Physical truth is, when you tell a thing as it actually is. Moral truth is, when you tell a thing sincerely and precisely as it appears to you. I say such a one walked across the street; if he really did so, I told a physical truth. If I thought so, though I should have been mistaken, I told a moral truth."

JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 510-11 (C.P. Chadsey ed., Doubleday 1946) (1791).

reasonableness as a touchstone of truth,²¹⁰ and common sense coupled with experience.²¹¹ The large role in the *Commentaries* played by history may be ascribed, at least in part, to this regard for experience.²¹²

A second aspect of Butler's theology that helped shape the *Commentaries* is the importance and function of human happiness.²¹³ God governs mankind by reward, by the consequences of human actions.²¹⁴ Therefore, true happiness directs us towards doing God's will.²¹⁵ This happiness (supplemented by conscience²¹⁶) defies certain demonstration, but does make itself known with "practical proof."²¹⁷ To pursue virtue is to pursue happiness, and to pursue happiness is to pursue virtue.²¹⁸

Again, Blackstone concurs with Butler in his argument that God has ordered human affairs so that we need only pursue our own happiness to find ourselves pursuing the law of nature that God has established for the right ordering of our affairs.²¹⁹ For both Butler and Blackstone, reasonable self-love motivates us to adhere to God's rule.²²⁰ So here too, Blackstone shows himself in the *Commentaries* aligning with the work of Butler as he aligns with other elements of the Anglican tradition.

Blackstone had every reason to write the *Commentaries* from an Anglican point of view. It was good rhetoric for reaching his intended

²¹⁰ See BOORSTIN, *supra* note 1, at 23.

²¹¹ See *id.* 55, 117-19. In these last commitments, Blackstone owed a debt also to Locke, *id.* at 31, and the Common Sense school of philosophy, Conklin, *supra* note 23, at 216-17.

²¹² See BOORSTIN, *supra* note 1, at 31-40, 55.

²¹³ Blackstone's crucial use of happiness has been noted already in these pages. See *supra* notes 29-31 and accompanying text.

²¹⁴ See BUTLER, *supra* note 188, at 93, 238.

²¹⁵ See *id.* at 26, 236, 271.

²¹⁶ See BUTLER, *supra* note 196, at 68.

²¹⁷ MOSSNER, *supra* note 167, at 100. So probabilism is the method for pursuing happiness. See BUTLER, *supra* note 188, at xxv-xxvii.

²¹⁸ See Butler, *supra* note 188, at xxx, 36, 56, 61, 72, 93, 112, 268-70; BUTLER, *supra* note 196, at 240. At the same time, God has given us some power over the happiness of others. BUTLER, *supra* note 188, at 42.

²¹⁹ See *supra* notes 29-31 and accompanying text; see also BOORSTIN, *supra* note 1, at 92; Alschuler, *supra* note 1, at 52.

²²⁰ Compare BUTLER, *supra* note 196, at 68 (for Butler) with BOORSTIN, *supra* note 1, at 53 (for Blackstone). Conklin also finds that the pursuit of happiness is a linchpin for Blackstone, Conklin, *supra* note 23, at 224, 260, but she places his approach also within the Common Sense school, *id.* at 215-17. She attributes the phrase "the pursuit of happiness" in the *Declaration of Independence* to Blackstone. *Id.* at 200-02. But see Craig A. Stern & Gregory M. Jones, *The Coherence of Natural Inalienable Rights*, 76 UMKC L. REV. 939, 973-74 (2008).

audience. It was true to his own convictions. We have seen thus far particular elements of the *Commentaries* signaling Blackstone's Anglican approach. The main topic of this article, however, is his use of natural law—the concept and body of transcendent law—and the degree to which Blackstone's Anglican understanding shapes this use.

5. THE ANGLICAN BLACKSTONE AND THE NATURAL LAW

As we have seen, Blackstone's *Commentaries* bears the impress of its author's Anglican faith. This impress shapes the appearance of natural law in the *Commentaries*, but by no means minimizes the role of natural law. To be sure, if using natural law means using it as Aquinas used it, Blackstone does not use natural law.²²¹ In fact, Anglican Blackstone lodges criticism at the scholastic tradition.²²² But the use of natural law, a transcendent norm that guides human law, may transcend Aquinas's use. In fact, the *Commentaries* more than anything takes the common law back to natural law, to first principles,²²³ portraying the common law as blended with the natural law into one body.²²⁴ Its use of natural law is not

²²¹ While Blackstone does subscribe to the notion that natural law bounds the validity of human law, *see supra* text accompanying notes 32, 41; Posner, *supra* note 45, at 605, his use of natural law embraces far more, Finnis, *supra* note 24, at 183.

²²² *See* BOORSTIN, *supra* note 1, at 78; *see also* 2 BLACKSTONE, *supra* note 23, at 58 (describing the “ingenuity” of the middle ages as one “which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon”); 4 *id.* at 410–11 (bemoaning the scholastic intricacies of Norman jurisprudence). Blackstone's approach avoided the complexities of the scholastics. *See* Conklin, *supra* note 23, at 224. At the same time, while some note Blackstone's modern emphasis on individual rights rather than on the classic common good, Finnis, *supra* note 24, at 181, and on peace as the end of civil society, BOORSTIN, *supra* note 1, at 179, and his “social” rather than philosophical consistency, Brinton, *supra* note 204, at 704, Blackstone does hold that society has a “moral purpose,” BOORSTIN, *supra* note 1, at 190, and shares also with Aquinas, *see, e.g.*, 2 AQUINAS, *supra* note 27, at 213–14 (I–II, 92, 1), 232–33 (I–II, 96, 3), the belief that law has moral content, teaches right and wrong, and improves human beings. *See* 1 BLACKSTONE, *supra* note 23, at 27, 45; 2 *id.* at 8; 3 *id.* at 162.

²²³ *See* Conklin, *supra* note 23, at 211.

²²⁴ *Cf.* Helmholz, *supra* note 55, at 21–22 (noting that English lawyers traditionally assumed that the common law and natural law “complemented each other”). *But see* Allen, *supra* note 21, at 196–98 (questioning the impact of natural law upon the *Commentaries*).

muddled or unnecessary.²²⁵ After its conventional introductory treatment of natural law²²⁶ it frequently adverts to natural law principles when discussing the common law itself.²²⁷ Blackstone held that the natural law was the only sure guide to English law.²²⁸ Desiring not just to understand but also to admire,²²⁹ he sought beauty in the law, a beauty lent to English law by God's design in natural law.²³⁰ The *Commentaries* continuously pursues this project and shapes its discussion from principles,²³¹ being structured to align positive law with natural law²³² and organized to demonstrate order in the English law from divine simplicity.²³³ While it melded law and equity together into one overall, integral system,²³⁴ it treated not the whole of the common law, but rather only what was susceptible of rational appreciation.²³⁵

The integral connection in the *Commentaries* between English law and natural law constituted English law a handbook on natural law. As the spirit of law is a product of natural law,²³⁶ so natural law can be seen from the laws of England.²³⁷ At the same time, English common law contained a strong cultural component,²³⁸ adapted as it was “to the genius of the

²²⁵ See LIEBERMAN, *supra* note 15, at 38-55.

²²⁶ See Lobban, *supra* note 50, at 323.

²²⁷ See LIEBERMAN, *supra* note 15, at 37; Finnis, *supra* note 24, at 175-76 (listing scores of references in note 94).

²²⁸ See BOORSTIN, *supra* note 1, at 142.

²²⁹ See *id.* at 30.

²³⁰ See BOORSTIN, *supra* note 1, at 85. In like manner, Maine has remarked the importance of simplicity, harmony, and elegance as guides to Roman juriconsults. MAINE, *supra* note 24, at 65.

²³¹ See BOORSTIN, *supra* note 1, at 28.

²³² See Finnis, *supra* note 24, at 176.

²³³ See BOORSTIN, *supra* note 1, at 92.

²³⁴ See *id.* at 98.

²³⁵ See Lobban, *supra* note 50, at 332-33. Emily Kadens has emphasized that Blackstone's approach to the law differed in its systemization and generalization from that of the practitioner. Kadens, *supra* note 5, at 1559; see also *id.* 1563 (stating that the *Commentaries* was said to depart from the common law as practiced), 1575 (stating that even in practice Blackstone acted as if legal questions held one correct answer without doubt), 1605 (stating that Blackstone even as judge knew the law, but not the “legal mind”).

²³⁶ See BOORSTIN, *supra* note 1, at 58.

²³⁷ See *id.* at 53, 60. Following Hale, Blackstone in the *Commentaries* treats the general phenomenon of law under the guise of the law of England as an example historically considered. *Id.* at 35-36. The experience of generations of wise men had rendered the common law the nearest human approach to the natural law. KIRK, *supra* note 106, at 371.

²³⁸ See Watson, *supra* note 23, at 795.

English nation.”²³⁹ Taking liberty as the signal English virtue led, as we shall see, only to emphasizing all the more the importance of natural law to the laws of England.²⁴⁰

The Anglican context lent Blackstone’s natural law an empirical cast akin to Sir Isaac Newton’s physics.²⁴¹ His approach was descriptive, not deductive.²⁴² Blackstone was not unaware of the dangers of arguing from particular to general,²⁴³ but he nonetheless endorsed the scientific approach.²⁴⁴ The *Commentaries* is a quest for reasonableness, for the rational principles — the natural law — undergirding the positive particulars of English common law.²⁴⁵ Because law is a rational science, natural law suffuses the text.²⁴⁶ In this commitment to empirical science for fleshing out the natural law embedded in English law, Blackstone treats law much as Butler treated theology.

Hooker more than Butler animates Blackstone’s emphasis on history, but that emphasis likewise demonstrates an Anglican approach to natural law.²⁴⁷ It is in progressive human experience that Providence gradually works the natural law into human law.²⁴⁸ As with Burke’s view, natural law makes itself known in history.²⁴⁹ But history is no sure

²³⁹ 1 BLACKSTONE, *supra* note 23, at 17; *cf.* 4 *Id.* at 256 (rooting a legal principle in “the genius and spirit of the law of England”).

²⁴⁰ See *infra* notes 306–08 and accompanying text. Blackstone emphasized English civil freedom, LIEBERMAN, *supra* note 15, at 39–40, and liberty, BOORSTIN, *supra* note 1, at 154, giving rights a central position in his analysis, *id.* at 162; see also Allen, *supra* note 21, at 196–97.

²⁴¹ See *supra* notes 173–74 and accompanying text; Berman & Reid, *supra* note 50, at 498–500, 511.

²⁴² See Lobban, *supra* note 50, at 333.

²⁴³ See 1 BLACKSTONE, *supra* note 23, at 59.

²⁴⁴ See *id.* at 34; 2 *id.* at 2.

²⁴⁵ See BOORSTIN, *supra* note 1, at 11–12, 20–23.

²⁴⁶ See LIEBERMAN, *supra* note 15, at 37. Blackstone’s dedication to the scientific approach to the common law did not rule out what Boorstin calls “mystery” when needed to supplement science, much as Edmund Burke called upon mystery in aid of his arguments. BOORSTIN, *supra* note 1, at 25. Similarly, the *Commentaries* has been tagged as “formalistic, in the sense of describing the nominal power relationships, while failing to acknowledge what he and other lawyers of his day knew to be the actual division of power and influence.” Langbein, *supra* note 14, at 70.

²⁴⁷ Hooker’s use of history is treated above at notes 138 to 145.

²⁴⁸ See BOORSTIN, *supra* note 1, at 62–64, 78.

²⁴⁹ See *id.* at 72–73; RICHARD TUCK, *NATURAL RIGHTS THEORIES* 84 (1979). One is reminded also of Maine’s characterization of the Roman law as aspiring to an “indefinite approximation” to perfect law. See MAINE, *supra* note 24, at 63. Here again, Blackstone’s roots in Roman law complement his Anglicanism.

guarantee that the human law has taken on its shape from natural law. Blackstone held that awkward complexity too comes from history,²⁵⁰ and history must bow to reason if found to contradict it.²⁵¹ Nevertheless, Blackstone held history both descriptive of the law and prescriptive,²⁵² obviating the need to distinguish “historical explanation” from “moral justification.”²⁵³ The providential, historical development of the law enabled Blackstone to portray law as possessing both the appropriate degree of fixity and the appropriate degree of change. On the one hand, common law and justice itself are fixed and uniform.²⁵⁴ On the other hand, natural law leads to growth and change in the law,²⁵⁵ and it is susceptible of diverse interpretations.²⁵⁶ Far from his being an uncompromising apologist for the status quo,²⁵⁷ Blackstone’s very commitment to history also committed him to progress.²⁵⁸ Correction and improvement — in continuity with historical development — are welcome.²⁵⁹ Accordingly, the *Commentaries* ends with this charge:

We have taken occasion to admire at every turn the noble monuments of antient simplicity, and the more curious refinements of modern art. Nor have it’s [sic; i.e., that of the body of English law] faults been concealed from view; for faults

²⁵⁰ See BOORSTIN, *supra* note 1, at 104.

²⁵¹ See LIEBERMAN, *supra* note 15, at 45. Boorstin writes that Blackstone employs a fiction that English law expresses both “the perfection of reason” and “the fullness of experience,” BOORSTIN, *supra* note 1, at 135, but Blackstone asserts that legal customs, while often rooted in natural law, are not always reasonable and so may stand in need of correction. Compare, e.g., 1 BLACKSTONE, *supra* note 23, at 251 (suggesting that a custom “seems dictated by nature herself”) with *id.* at 280 (observing how an ancient rule of common law “was consonant neither to reason nor humanity” and so endorsing its later alteration).

²⁵² See BOORSTIN, *supra* note 1, at 63.

²⁵³ LIEBERMAN, *supra* note 15, at 49. This approach was typical of English eighteenth-century treatment of the law. Berman & Reid, *supra* note 50, at 438.

²⁵⁴ See 1 BLACKSTONE, *supra* note 23, at 137 (asserting that the law of England “is permanent, fixed, and unchangeable, unless by authority of parliament”); 3 *id.* at 429 (observing that “truth and justice are always uniform”). Langbein suggests that Blackstone himself viewed the fixed and settled character of the law as a myth. Langbein, *supra* note 14, at 68.

²⁵⁵ See BOORSTIN, *supra* note 1, at 57.

²⁵⁶ See 1 BLACKSTONE, *supra* note 23, at 226 (opining that the terms of the theoretical social contract are “only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ”).

²⁵⁷ See PREST, *supra* note 1, at 307–08. Elsewhere Prest notes Blackstone’s Tory opposition to the Whig establishment. Prest, *supra* note 58, at 154.

²⁵⁸ See Alschuler, *supra* note 1, at 37–38.

²⁵⁹ See BOORSTIN, *supra* note 1, at 81; LIEBERMAN, *supra* note 15, at 43–44.

it has, lest we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskilful [sic] improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.²⁶⁰

As the common law embodies and expresses the natural law, it is to be reformed when lapses from that transcendent standard appear. Blackstone calls English law of “human structure.” Though eighteenth-century English lawyers may have called their law “the perfection of reason,”²⁶¹ Blackstone acknowledges it to be a somewhat faulty human application of natural law,²⁶² sometimes more honored in the breach.²⁶³

One means of developing the law with both Anglican continuity and an eye to the principles of natural law is by legal fiction.²⁶⁴ Blackstone held that legal fictions permit the law to do justice in changed circumstances,²⁶⁵ as in bypassing Norman errors.²⁶⁶ In the *Commentaries*, fictions, along with history, ground the law.²⁶⁷ Legal

²⁶⁰ 4 BLACKSTONE, *supra* note 23, at 436. Other passages urging modification of English law include *id.* at 3-5, 88-89, 165-66, 175, 239, 278-79, 349, 353, 381-82, and 409.

²⁶¹ MAINE, *supra* note 24, at 64.

²⁶² See BOORSTIN, *supra* note 1, at 111, 145.

²⁶³ See *id.* at 146-50.

²⁶⁴ The classic discussion is to be found in MAINE, *supra* note 24, at 17-36.

²⁶⁵ See LIEBERMAN, *supra* note 15, at 47.

²⁶⁶ See BOORSTIN, *supra* note 1, at 69.

²⁶⁷ Allen, *supra* note 21, at 202-05. Allen would have this use of fictions establish that the *Commentaries* sees the law as a fabrication that does not reflect the way things really are. *Id.* at 205. Fabrication the law may be, see *supra* text accompanying note 260, but the point of fictions is to shape this fabric more accurately to reflect the way things really are notwithstanding formulations of the positive law that otherwise would depart from the way things really are. After all, that is the driving force behind fictions. See MAINE, *supra* note 24, at 17-36.

fictions enable the common law to embody the principles of the natural law.²⁶⁸

Of course, statutes also might help the law embody the principles of natural law.²⁶⁹ To some degree, the *Commentaries* portrays statutes as declaring the natural law,²⁷⁰ lending necessary correction to the common law while simultaneously rooted in the common law.²⁷¹ But statutes present a danger:

THE mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy of the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's [sic] symmetry has been destroyed, it's [sic] proportions distorted, and it's [sic] majestic simplicity exchanged for specious embellishments and fantastic novelties.²⁷²

Architecture was important to Blackstone.²⁷³ As a “rule-bound art,” it attracted his keen interest.²⁷⁴ He used architectural metaphors in the *Commentaries*,²⁷⁵ and elsewhere portrayed the old common law as a well-designed building.²⁷⁶ Damning accusation it was, then, for

²⁶⁸ See, e.g., Stretton, *supra* note 205, at 119–20, 122, 126–27 (casting Blackstone's (?) “one person” theory of marriage as a legal fiction to serve his “scientific organizing principle” though, according to Stretton, not directly dictated by natural law).

²⁶⁹ Again, the classic discussion is to be found in MAINE, *supra* note 24, at 17–36.

²⁷⁰ See Lobban, *supra* note 50, at 325.

²⁷¹ See 1 BLACKSTONE, *supra* note 23, at 86, 353; 3 *Id.* at 328, 410; 4 *Id.* at 431–33. Blackstone presupposed and endorsed ameliorative legislation in his charge quoted above at note 260.

²⁷² 1 BLACKSTONE, *supra* note 23, at 10.

²⁷³ See Conklin, *supra* note 23, at 220–24.

²⁷⁴ Prest, *supra* note 3, at 115–18.

²⁷⁵ See *id.* at 118–21.

Blackstone to picture some statutes as monstrous add-ons.²⁷⁷ But the fault of such statutes is that they are in a sense ahistorical — they reflect “visionary schemes” and “have not the foundation of the common law to build on.”²⁷⁸ Statutes that bring the law closer to the natural law will find their basis not in imagined exploits but rather in the principles already to be found in the common law itself, the generally trustworthy, if imperfect, presentation of the natural law.

Blackstone’s commitment to the common law as holding within it immanent natural law reflects both the Roman law and also the Roman notion that the *jus gentium*, the law of nations, is a sound guide to the content of the natural law.²⁷⁹ While the common law may embody the natural law more perfectly than do other systems of human law, those other systems may shed light on the natural law to be found within the common law. Blackstone subscribed to the uniformity of human nature and God’s purpose, to the consequent uniformity of natural law, and to the expectation that the laws of all nations, past and present, would reflect these truths.²⁸⁰ Comparative law illuminates the universality of English legal principles, the deposit of natural law.²⁸¹ The Age of Reason looked for the natural law in the *jus gentium*,²⁸² and the *Commentaries* looks to other legal systems to help find reason in the English law.²⁸³ In the spirit of Hooker, Blackstone found natural law principles behind the diversity of laws even on aspects indifferent under the natural law. And in the spirit of Butler, he found marks of reasonableness in the similarity of English law to the law of other nations. (The dominant role of reasonableness in the *Commentaries* occupies our attention soon.)

²⁷⁶ See *id.* at 104.

²⁷⁷ See Cook, *supra* note 12, at 175–76 (noting Blackstone’s preference for the common law over statutes); Kadens, *supra* note 5, at 1561 (discussing Blackstone’s imagery of the law as a house deformed by statutes).

²⁷⁸ 1 BLACKSTONE, *supra* note 23, at 353.

²⁷⁹ See *supra* text accompanying notes 63–65; MAINE, *supra* note 24, at 41–43.

²⁸⁰ See BOORSTIN, *supra* note 1, at 47.

²⁸¹ See generally Alschuler, *supra* note 1, at 27; McKnight, *supra* note 2, at 404.

²⁸² See MOSSNER, *supra* note 167, at 26.

²⁸³ See BOORSTIN, *supra* note 1, at 43. Blackstone reflects upon comparative law several times in the *Commentaries*. See 1 BLACKSTONE, *supra* note 23, at 5, 21, 35–36; 2 *id.* at 258; 3 *id.* at 108; 4 *id.* at 181, 237, 241.

The Bible itself often found its way into the *Commentaries* under the aspect of comparative law — again, this was similar to the approach of Hooker.²⁸⁴ Blackstone kept the Bible close to him while writing the *Commentaries*,²⁸⁵ and he considered the divine law to be found therein the authoritative source on what he called the “law of nature”²⁸⁶ and on the development of legal rules and doctrine.²⁸⁷ Most typically, however, he used the Bible as a source of comparative law, a source presenting a body of law perfectly devised to embrace the natural law for a specific people at a specific time.²⁸⁸ Natural law then was to be found within biblical law and not to be identified with it in its particulars.²⁸⁹

In these diverse ways — from finding natural law embedded within the common law, to the use of science, history, and comparative law — the *Commentaries* takes account of natural law in its treatment of English law, all in keeping with an Anglican understanding of natural law and its application to human affairs. But the most distinctively Anglican feature of how the *Commentaries* treats the natural law has escaped for the most part our attention until now. That feature is the testing and justification of the law of England by its reasonableness. Hooker, and especially Butler and the Latitudinarians, lent to Anglican theology its distinct emphasis on reasonableness. It is in this aspect of his jurisprudence that Blackstone most shows himself an Anglican.

For Blackstone, natural law does not dictate the content of most human law.²⁹⁰ It supplies a few core principles, and those few do not

²⁸⁴ See *supra* notes 116–18 and accompanying text.

²⁸⁵ See Cook, *supra* note 12, at 175.

²⁸⁶ See *supra* text accompanying note 39. Again, this paper uses the term “natural law” for what Blackstone usually called “the law of nature.” He himself defined “natural law” to be human theorizing about the law of nature, *see id.*, though his actual usage seems not to be uniform on this point, *see supra* note 7.

²⁸⁷ See Wilfrid Prest, *William Blackstone’s Anglicanism*, in GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY 213, 231–32 (Mark Hill & R. H. Helmholz eds., 2017).

²⁸⁸ See DAVIES, *supra* note 151, at 16, 21.

²⁸⁹ In keeping with its comparatist approach, the *Commentaries* with seeming approval notes within or alongside the common law itself a diversity of sources and even of rules of law. See 1 BLACKSTONE, *supra* note 23, at 63–64, 74–78; 4 *Id.* at 403.

fundamentally overbear human law.²⁹¹ Furthermore, the state of civil society itself modifies primordial natural law, introducing a context where natural law principles take on a different cast or a subservient role.²⁹² For Blackstone, the application of natural law is not so much a matter of tracing specific precepts in human law. Rather, it is more like the practice of Roman lawyers, finding reasonable and appropriate legal norms suited to the situation at hand — the nature of the thing. The *Commentaries* presents the common law as a “rational, integrated” system, but also consistently traces its reasonableness, the reasons behind its details.²⁹³

The quest for life in accordance with nature, and therefore with reason, was a mark of the Age of Reason.²⁹⁴ But Blackstone sought reasons for the law as a mark of God’s own perfection, to be discerned through human experience.²⁹⁵ Blackstone derived his passion for “reasonableness” in the law, and the consequent searching out of reasons for the law, from his Anglican theology.²⁹⁶ The very core of the *Commentaries* is this essential use of natural law, this examination of reasonableness in light of the way things are. Reasons for the law, reasons resting upon on fundamental principles, animate the *Commentaries*.²⁹⁷

²⁹⁰ See Alschuler, *supra* note 1, at 2, 24-27.

²⁹¹ See *id.* at 26.

²⁹² See 1 BLACKSTONE, *supra* note 23, at 410, 423; 2 *id.* at 8-13, 258, 293; 3 *id.* at 145, 168, 208, 327; 4 *id.* at 3, 9-12, 42, 375.

²⁹³ Posner, *supra* note 45, at 579, 590. The *Commentaries* is so dedicated to this tracing of reasons that at least one commentator tags the reasons as “often shallow, formalistic, indeed sometimes plain dishonest.” Langbein, *supra* note 14, at 77.

²⁹⁴ See MOSSNER, *supra* note 167, at 25.

²⁹⁵ BOORSTIN, *supra* note 1, at 121.

²⁹⁶ See Berman & Reid, *supra* note 50, at 502. Although reasonableness became a hallmark of Butler and the Latitudinarians, reasonableness figures in Hooker’s work also. See VOAK, *supra* note 118, at 137. Perhaps in some distinction from “reasonableness,” “reason” had longed served as a touchstone of English law. See NORMAN DOE, *FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW* 83, 106-31, 153, 176-77 (1990). Blackstone no doubt draws upon this tradition as well as upon post-Reformation Anglicanism.

²⁹⁷ See Lobban, *supra* note 50, at 334; Posner, *supra* note 45, at 572. Posner discovers the maximization of welfare in Blackstone’s approach, Posner 573-74, much as Maine found “utilitarianism” in the Roman law, McKnight, *supra* note 2, at 406 n.67. Finnis notes that Blackstone in some respects bases even the human institution of rights upon reason. Finnis, *supra* note 24, at 166.

Throughout the *Commentaries*, Blackstone weighs law against the standard of reasonableness.²⁹⁸ The weighing is not rigorous. Fallen humans cannot understand all by reason, and the reason for some law may now evade our discovery.²⁹⁹ It is enough that the law not be contrary to reason:³⁰⁰

[W]hat is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.³⁰¹

Most often, however, the *Commentaries* highlights the place of reason in the formulation of the law and supports the reasonableness of its rules.³⁰² Furthermore, the *Commentaries* endorses reasonableness in interpreting laws according to their equity, reason, and justice.³⁰³ This overall emphasis on reasonableness in the law, seeking sound reasons for rules and for their proper application, largely shapes the *Commentaries*.³⁰⁴

Blackstone thought human law most significant on matters indifferent, taking full advantage of the Anglican tradition regarding such matters, an essential contribution of Hooker.³⁰⁵ But though “indifferent” may describe a matter not dictated by a precept of natural law, it does not describe a matter to be determined by human will undirected by reason. Support for this proposition derives from Blackstone’s theory of natural rights. We already have noticed the emphasis Blackstone placed upon

²⁹⁸ Lobban describes this as supplying a natural law “external test of reasonableness of the law.” Lobban, *supra* note 50, at 333.

²⁹⁹ See BOORSTIN, *supra* note 1, at 27.

³⁰⁰ See *id.*

³⁰¹ 1 BLACKSTONE, *supra* note 23, at 70 (footnote omitted); see also *id.* at 77-78, 91.

³⁰² See *id.* at 47, 146, 148, 150, 163, 165, 185-86, 211, 226-27, 238, 246, 280, 287, 411, 443, 446, 449-50, 464; 2 *id.* at 4, 8, 10-15, 68, 128, 162, 210-11, 228, 230, 385, 390, 401, 411-12, 453-54, 486; 3 *id.* at 31, 158, 161, 176-77, 188, 219, 226, 241, 244, 271, 379-80, 385, 430, 434; 4 *id.* at 14-16, 32, 51, 103, 105, 186, 216, 237, 248, 280, 364, 382-81, 409-12, 416, 425, 428-29.

³⁰³ See 1 *id.* at 61; 3 *id.* at 192, 207, 226, 392, 429; 4 *id.* at 423.

³⁰⁴ This search for sound reasons is not for Blackstone an individual affair; he distrusted individual reason. See BOORSTIN, *supra* note 1, at 50, 103, 117; Posner, *supra* note 45, at 603.

³⁰⁵ See *supra* notes 147-56 and accompanying text.

liberty as a mark of English culture.³⁰⁶ Liberty — personal freedom — is so important that only reasonable constraint upon it is licit.³⁰⁷ “[L]aws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of our liberty.”³⁰⁸ Rights therefore play a fundamental role in the *Commentaries*, and help support the natural law test of reason even in matters indifferent according to the more limited reach of explicit natural law precepts.

And Blackstone does make much of the notion of matters indifferent, a mark of Hooker’s theology and the Anglican tradition.³⁰⁹ His frequent use of the test of reasonableness supplies a natural law standard in the absence of precise precepts themselves drawn from nature.³¹⁰ In a sense then, the *Commentaries* presents most human law as prescribing rules for matters indifferent.³¹¹ In another sense, however, Blackstone’s insistence upon the reasonableness of human law supplies a standard and justification much like that of the Roman law, a standard and justification from natural law assuring that human law is suited to the reality of things.³¹²

The reality of things can become clouded by human artifice, so the primitive state — and primitive law — offer a useful corrective.³¹³ For Blackstone, Saxon law stood for law based upon reason, not authority,³¹⁴

³⁰⁶ See *supra* note 240 and accompanying text.

³⁰⁷ Social contract theory plays a role in Blackstone’s development of natural law, see Finnis, *supra* note 24, at 178-79, and even property rights are contingent, developed in the context of society, see *supra* note 152 and accompanying text; Allen, *supra* note 21, at 197. Natural liberty yields to social convention, but only for good reasons.

³⁰⁸ 1 BLACKSTONE, *supra* note 23, at 122.

³⁰⁹ See, e.g., *id.* at 54-55, 185; 2 *id.* at 2, 211, 491; 3 *id.* at 87; 4 *id.* at 238; see also *supra* notes 147-56 and accompanying text.

³¹⁰ See Finnis, *supra* note 24, at 181; David Lemmings, *Editor’s Introduction to Book I of 1 BLACKSTONE*, *supra* note 2, at xvii, xxxi. H.L.A. Hart has suggested that Blackstone’s presentation of natural law is expressly to provide gaps to be filled by human law settling matters indifferent, Hart, *supra* note 52, at 174, but Finnis has demonstrated the difficulty with Hart’s view. See Finnis, *supra* note 24, at 171-74.

³¹¹ See Lobban, *supra* note 50, at 324; McKnight, *supra* note 2, at 404-06.

³¹² Again, it bears repeating that “the reality of things” speaks not only of mere physicality but also of the norms appropriate to the situation at hand. The reality of things holds as much *ought* as *is*. See *supra* notes 66-76 and accompanying text.

³¹³ See BOORSTIN, *supra* note 1, at 65, 68.

³¹⁴ See Posner, *supra* note 45, at 604.

he himself esteeming primitive law the most rational and therefore most true to nature.³¹⁵ The corruption of Saxon law by “Norman subtlety”³¹⁶ left it an ideal to be recovered by progress under the hand of Providence.³¹⁷ The law is to conform to reason, and Saxon law points the way to reasonable law untainted by later human error.

Likewise, Blackstone’s emphasis on the reasonableness of the law helps make sense of his theory of judging. A judge is “sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.”³¹⁸ This declaratory theory of judging has come under wide-ranging attack,³¹⁹ and some doubt has been cast on whether Blackstone himself really subscribed to it.³²⁰ Though judges even now may pay lip service to the theory,³²¹ it may seem unlikely that the development of the common law and the decision of difficult questions proceed simply from the declaration of pre-existing principles and rules, and not from judicial invention.³²² But the matter might be less puzzling if, rather than thinking that the theory entails some preexistent code of natural-law rules ready to fill gaps in the previously declared

³¹⁵ See BOORSTIN, *supra* note 1, at 70.

³¹⁶ *Id.* at 69.

³¹⁷ See *id.* at 83–84; McKnight, *supra* note 2, at 403; Posner, *supra* note 45, at 583; cf. MAINE, *supra* note 24, at 60 (noting that Roman lawyers respected the natural law within their own law for its “descent from the aboriginal reign of nature”). Presumably, Blackstone melds his endorsement of both Saxon primitivism and historical development in the notion of sound development upon Saxon principle.

³¹⁸ 1 BLACKSTONE, *supra* note 23, at 69; see also 3 *id.* at 327 (“For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is only to *declare* and *pronounce*, not to *make* or *new-model*, the law”). This understanding of the work of the judge is in keeping with Blackstone’s view of the use of reason in law to discover, not to invent. See BOORSTIN, *supra* note 1, at 51, 123. So law apparently created by human beings has also a divine quality. *Id.* at 59.

³¹⁹ See, e.g., JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 59–64 (David Campbell & Philip Thomas eds., Dartmouth Publ’g 1997) (1921); William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone’s Declaratory Theory*, 22 J.L. & RELIGION 255 (2006).

³²⁰ See Alschuler, *supra* note 1, at 4, 37, 42.

³²¹ See, e.g., *Frankland & Moore v. Regina* [1987] 1 AC 576, 585, 594 (PC) (appeals taken from Isle of Man).

³²² At the same time, however, Helmholz has noted the traditional role for natural law in adjudging cases, Helmholz, *supra* note 55, at 18, and one may wonder how the rule of law could be respected were judges to invent rules to apply to cases before them but arising from facts long past. See STEVEN D. SMITH, *LAW’S QUANDARY* 61–64 (2004).

common law, one could see instead that the question in any case is governed either by principles marked in precedent or by whichever of the rules proposed by the parties is the more reasonable in the light of precedent and the facts of the instant case.³²³ The judicial resolution of otherwise uncertain questions of law demands the application of reason and not ex post legislative will.

As we have seen, Blackstone does take natural law seriously, but in an Anglican sense. The common law reflects the natural law, understood as the rule of reasonableness, a norm that aligns the law with the realities of the situation at hand, much as the Roman law is celebrated for doing so well. That is the natural law as the *Commentaries* most often applies it.

6. CONCLUSION

After the spread of the Benthamite positivism, the sense of the natural law enterprise was forgotten and (despite the eclipse of Bentham's epistemology) it has remained usual to believe that the heart of any theory of natural law is, not the problem of the varying derivation of positive from natural law, but the thesis that positive law is "for all purposes" void if it contradicts natural law. Thus Blackstone's introductory discourse and definition of municipal law have standardly been interpreted on the assumption that any discussion of the relation between natural and positive law must be headed for an assertion or denial of that crude slogan, *lex iniusta non est lex*.³²⁴

³²³ Apparently, on the bench Blackstone himself adhered to the declaratory theory and faithfully applied precedent. See Kadens, *supra* note 5, at 1556-58, 1578, 1580, 1583, 1586, 1590, 1598, 1600-01. That Blackstone does not subscribe to judicial review, see 1 BLACKSTONE, *supra* note 23, at 91; Helmholz, *supra* note 55, at 14, in no way compromises his commitment to natural law. Finnis, *supra* note 24, at 169-70.

³²⁴ Finnis, *supra* note 24, at 182-83 (footnote omitted).

Readers of the *Commentaries* committed to a narrow understanding of natural law — often so committed only to reject the concept of natural law altogether — find Blackstone at best an epigone of natural law thinkers. He pays his natural-law lip service and then goes about his merry (and disguised) positivist way.³²⁵ Ignoring the relation of law to morals as well as historical normativity,³²⁶ we lack eyes to see Blackstone's use of natural law in explaining, justifying, and criticizing English law.

At the same time, how strange to think that human law somehow exists apart from reasons for its existence, reasons that connect it to the world it is to govern. Holmes supplies such reasons.³²⁷ Posner supplies such reasons.³²⁸ Blackstone does too. His reasons, his general recursion to reasonableness, is not simply a platitudinous reference. Within his Anglican context, reason and reasonableness are notes of God's order and providence. They are notes of natural law.

The concept of law without values is incoherent. The “reason” and “reasonableness” peppering the *Commentaries* are meant to supply the link between the laws of England and the values that developed and undergird them. Blackstone's Anglican approach to systematizing and explaining English law — the systematizing and explaining that made his *Commentaries* such a success — renders this link a natural-law enterprise.³²⁹ And this enterprise should strike lawyers, and especially law students, as something familiar. They may not share Blackstone's theological commitments, but when they strive to make sense of the rules of law, to see the rules as reasonable, to find reasons for the rules, they

³²⁵ See Alschuler, *supra* note 1, at 54; cf. Allen, *supra* note 21, at 198 (stating that “the *Commentaries* is a checkerboard of natural law and positivist perspectives”).

³²⁶ See Berman & Reid, *supra* note 50, at 521.

³²⁷ See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

³²⁸ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014).

³²⁹ This approach bears a resemblance to the natural law of Roman law, “smuggling” into the law values under the guise of a merely “technological” approach. See D'ENTREVES, *supra* note 61, at 151. Also, Lon Fuller's explanation of the development of the common law case-by-case comes to mind: he described each case presenting to the court the opportunity to discern the necessary implications of the enterprise the law at issue is to govern. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 357-77 (1978).

follow a course not unlike the course Blackstone famously set for his celebrated *Commentaries*, a course marked by natural law.