Blackstone and American Indian Law

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Introduction

The application of William Blackstone's *Commentaries on the Law of England* (1765-1769)[1] to American law has often been noted in respect to Blackstone's great influence on the U.S. Constitution and on the practice and procedures over American law through the nineteenth century. Major American leaders, such as Chief Justice of the U.S. Supreme Court John Marshall and President Abraham Lincoln, have acknowledged the influence of Blackstone on their work.[2]

It is possible that Blackstone's influence on U.S. law may have extended further than had previously been acknowledged. Blackstone's writings on the Irish, and his rationale for treating the Irish as dependent wards of England because the Irish were inferior to the British is a model which sought to justify treating indigenous people differently than the conquering people. That model could have been learned well by Chief Justice Marshall, who is known to be both an avid student of Blackstone and the progenitor of American Indian law. Marshall used some of the same terms, such as "conqueror" and "dependent", in reference to subjugating the American Indians which Blackstone used to justify the English subjugation of the Irish. Marshall cast into legal form the American position, which still exists today, that the American Indians in Indian country are dependent, as if in the status of wards, on the U.S. government.

There may be three different answers to the question of how Marshall

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1 Blackstone, W, *Commentaries on the Laws of England: A facsimile of the first edition of 1765-1769, with an introduction by Stanley N. Katz (Vols. 1-4)*, Chicago: The University of Chicago Press, 1979.

2 Miles, A, Dagley D and Yau, C, 'Blackstone and His American Legacy' (2001) 5(2) *Australia and New Zealand Journal of Law and Education* 1.

came to his legal positions on the American Indians. The first would be that he created these ideas himself. The second is that writers such as Thomas More influenced Marshall.[3] This paper takes a third position, that Marshall applied the terms and philosophies used by Blackstone in the *Commentaries* regarding the Irish to his important structuring of American Indian law.

Today, the U.S. Congress has full power over Indian country, and need not consult the resident Indians on policies which affect them, or even on whether the status of the land they live on is "Indian country", as the residents wish, or not, as the U.S. Supreme Court decides, citing the power of Congress over the residents. Legal practices initiated or enforced by Indians on Indian country require the approval of Congress. Traditional Indian legal practices, such as those noted by Llewellyn and Hoebel, disappeared in the face of the national law noted above, "while the buffalo vanish, and the white man moves inexorably in."[4]

Frickey writes, of the United States and the American Indian, "The involuntary displacement of indigenous peoples from their lands and their political subjugation by a self-proclaimed senior sovereignty is ironic in a country that began by declaring itself free of colonial status and that soon adopted a Constitution that has served as a model for restraining the abuse of public power."[5]

What is more ironic is that the same man who wrote the "natural law" model used for the freedom-granting U.S. Constitution also wrote of the "law of nations" theory used for America's unprovoked conquest and legal oppression of the American Indian, in the same book. William Blackstone in his *Commentaries* set out themes in the British Constitution that contributed to the U.S. Constitution and institutions of law in America. He also wrote of the "right" of English conquest of Ireland, and then the dependent status of Ireland, which set out terms used in the legal treatment of the American Indian.

This paper first discusses the significant influence of Blackstone. Second will be a discussion of the reasons for Blackstone terming the Irish "inferior", and "dependent", and, thus, deserving to be conquered and dominated by England under the law of nations. The comparison to similar reasons given by American jurists such as John Marshall for treating American Indians as inferiors will be considered. Finally, in order to consider what elements would be present if the American Indian had the privileges of natural law, points in Blackstone's *Commentaries* regarding natural law will be compared with his ideas on the law of nations idea

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3 O'Melinn, L, 'The Imperial Origins of Federal Indian Law: The Ideology of Colonialization in Britain, Ireland and America" (Winter 1999) 31 *Arizona State Law Journal* 1207.

4 Llewellyn, K N and Hoebel, E A, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, OK: University of Oklahoma Press, 1941, at 340.

5 Frickey, P, 'Domesticating Federal Indian Law' (1996) 81 *Minnesota Law Review* 31 at 31.

as it applies to American Indian law. Possible ideas on why there seems to be a split personality of Blackstone still reflected in American Indian law, will be part of the conclusion.

Blackstone's Significant Influence

William Blackstone's four volumes *Commentaries On The Laws of England,* published from 1765-1769, clarified and explained the English common law. Warden wrote, "The law was particularly inexact in Blackstone's day because the common law was still in the formative stages. People in various sections of England held varying beliefs as to what the law was on particular subjects."[7] Blackstone's *Commentaries* solidified legal thinking. They sold widely in England, in Ireland and even more so in America, where most lawyers and judges for at least a century, the authors of the Declaration of Independence, the Federalist Papers, and the framers of the U.S. Constitution in 1787[6] took the *Commentaries* as the main authority on the common law.[8]

The *Commentaries* became "both the only law school and the only law library most American lawyers used to practice law in America for nearly a century after they were published. For generations of lawyers, including John Marshall and Abraham Lincoln... the *Commentaries* became the Bible of American lawyers."[9] Today, when a question arises about the meaning of the United States Constitution, United States judges and scholars still turn to Blackstone to understand the United States Constitution. For example, Biegon, in his article about presidential immunity in civil actions, refers to the *Commentaries.*[10] Also, the U.S. Supreme Court cites Blackstone in its opinions about 10 times a year.[11]

Constitutional Theory

Richard H. Fallon, writing in 1999, suggests criteria on how to choose a Constitutional theory, and the purpose for the theory. The theory can be based on either texts, the expected results of decisions, or other factors. It seems that U.S. Supreme Court Justice Hugo Black's revolutionary judicial theories on school desegregation in the mid 1900s are text-based, since

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6 Miles, Dagley and Yau, above n 2.
7 Warden, L C, *The Life of Blackstone,* Charlottesville, VA: Michie, 1938, at 152.
8 Warden, above n 8, 140-159.
9 Boorstin, D J, *The Mysterious Science of the Law, An Essay on Blackstone's Commentaries.* Boston: Beacon Press, 1941, at ix, 4.
10 Biegon, B E, 'Presidential Immunity in Civil Actions: An Analysis Based upon Text, History and Blackstone's Commentaries' (May 1996) 82 *VA. Law Review* 677.
11 Alschuler, A W, 'Rediscovering Blackstone' (1996) 145 *University of Pennslyvania Law Review* 1 at 16.

they centre on an understanding of the Bill of Rights and the Fourteenth Amendment, and one of the aims of these is to increase civil liberties. Conversely, it appears that U.S. Supreme Court Chief Justice John Marshall's *Use of Constitutional Theory for American Indian Law,* written more than a century before Hugo Black's work, is based on the expected results of the decisions as a criteria and the purpose was to promote the values of the new American nation regarding the inferiority and the subjugation of the American Indian. It is probable that Marshall derived much of the basis for his approach to the American Indian by reading the work of William Blackstone.

The Other Face Of Blackstone

Also in the *Commentaries,* however, if shorter, less known and less quoted, is a discussion of England's conquest of Ireland and the English subjugation of the Irish. For Blackstone, this conquest was based not on natural law, but on the "law of nations", which covers a "superior" country conquering a "dependent" and "inferior" indigenous people.[12] These terms were included in American Indian Law.

U.S. Supreme Court Chief Justice John Marshall applied Blackstone's law of nations to issues such as property and other questions in Indian law. Marshall's statement that the American Indian has a "ward" status in respect of the U.S. federal government, and his use of other terms such as "conqueror" and "fierce savages", are so linguistically powerful that Marshall is often thought of as the "progenitor of Indian law."[13]

First, it is useful to note that Marshall is widely acknowledged as the leading legal thinker in building American Indian law.[14] It is suggested that Chief Justice Marshall is the link between Blackstone's writings and the legal positions which now constitute American Indian law. O'Melinn writes, "Scholars sometimes imagine that Chief Justice Marshall invented the doctrines of wardship and domestic dependency", and takes a position that Marshall was influenced by Thomas More and earlier English writers who articulated ideas which involved a Utopian (based on Thomas More's Utopia) social contract.[15] We agree with those who state that Marshall was influenced by other writers. However, we disagree with O'Melinn's position that Marshall was only directly influenced by Thomas More and earlier English writers.

What reasons exist for holding that Marshall's main influence regarding American Indian law was Blackstone's *Commentaries*? It is certainly

[12] Blackstone, above n 1.
[13] O'Melinn, above n 3 at 1271.
[14] Ibid.
[15] Ibid 1240.

true that Blackstone read widely and absorbed many ideas of others, and incorporated them into his writing. Thus, even if Blackstone, through the *Commentaries*, gave thoughts to Marshall, they were not all necessarily the original ideas of Blackstone. Because Marshall is known to have studied Blackstone closely and used the same terms in reference to the American Indians which Blackstone used concerning the Irish, it is likely that Marshall applied those ideas and terms of Blackstone to American Indian law.

Marshall applied the thinking in the *Commentaries* to many issues. Marshall wrote the *Marbury v. Madison*[16] case which gave the U.S. Supreme Court the right to decide Constitutional questions in the United States. Marshall had read Blackstone since Marshall's parents gave him the *Commentaries* at the age of 16, in hopes of persuading Marshall, who fought in the revolutionary war, to be a lawyer. He was a farmer in frontier Virginia and fought in the war to win American Independence. He loved the style of the *Commentaries*, and said, "This legal classic is the poetry of law, just as Pope is logic in poetry." His opinions were in many respects "an echo of Blackstone." He relied on the *Commentaries* when on the U.S. Supreme Court bench to apply the ideas present there to develop torts and contract laws and other key issues such as federal government power over the states.[17] Marshall also uses terms in the *Commentaries* to fashion Indian law.

Blackstone, widely read by the American founders, presented in the *Commentaries* a dichotomy of power and law. The first part of this dichotomy, the conquest of Ireland by force, was supported by a rationale for the conquest of "inferior" people by the law of nations, which seems to have been used by the former colonialists to displace the American Indians. The second part, which stressed natural law, the liberty of the individual and the rule of law, inspired the U.S. Declaration of Independence, the U.S. Constitution, including the Bill of Rights, as well as anti-slavery positions and later civil rights laws. This part is antithetical to the unprovoked conquest and subordination of people living on their own land.

Marshall also applies a "rigid dichotomy between power and law" in denying Indians full property rights, while upholding full constitutional rights for ex-colonials.[18] The fact that these are contradictory ways to treat people has been at the root of the confusing and often cruel treatment of American Indians by the United States government. It is likely that Blackstone may have been one inspiration for Marshall in his reasoning with respect to this disparate treatment.

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[16] 5 U.A. (1 Cranch) (1803).
[17] Warden, above n 6, at 325-329.
[18] Frickey, P, 'Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law' (1993) 107 *Harvard Law Review* 381.

Assimilating Scots and the Welsh As Equals

In section four of the Introduction to the *Commentaries*, entitled, "Of the Countries Subject to the Laws of England", Blackstone describes the two types of conquered or ceded people. First, he notes the Roman example for conquering, and then conferring full citizenship on, indigenous people who can assimilate into the laws and religion of the conqueror. Blackstone includes Wales and Scotland in this category, as conquered or ceded people who now have full rights to be treated under natural law as British subjects.

Secondly, Blackstone mentioned "infidels", and those who offended the "laws of men and God."[19] These people must, under the law of nations, if not natural law, be made subordinate and dependent until they adopt the laws and customs of the conqueror, and agree with the master who conquered them. The American plantations and Ireland fell into this category for Blackstone.

He states that "the claim to our distant colonies and territorial dependencies" is by right of, firstly, occupancy (a deserted area is occupied by British subjects), Australia was occupied by the British, according to Blackstone, or secondly by either conquest, or cession by treaties.[20] Wales and Scotland were conquered or ceded nations which were able to come under English natural law with their people granted all the rights of English subjects.[21] Blackstone cites the English conquest of Wales as one in which the conquered people could be brought into full English citizenship. "Thus were this brave people gradually conquered into the enjoyment of full liberty... and made fellow citizens with their conquerors. A generous method of triumph, which the republic of Rome practiced with great success... by admitting the vanquished states to partake of the Roman privileges."[22] He cites the statute 27 Henry VIII, that Wales be united with England and "That all Welshmen born shall have the same liberties as the other king's subjects."[23]

Likewise, Blackstone approved of the union of England and Scotland under the English monarchy and Parliament in 1707, to be thereafter called Great Britain, or the United Kingdom. He makes no mention of the many years of English struggle with Scotland, nor of any Scottish resistance to English rule. He writes as if this were a joint wish of both countries to join together under English rule. To Blackstone, this would be a "cession" by Scotland to England, and the Scottish people would be assimilated as English subjects just as had been the "conquered" Welsh.[24]

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[19] Blackstone, above n 1 at 110.
[20] Ibid 119.
[21] Ibid 94, 95.
[22] Ibid 94.
[23] Ibid 94.
[24] Ibid 95, 96.

Marshall thus believed that conquered Europeans could become assimilated as citizens of the conquerors "where this incorporation is practicable". However, he takes the view that this assimilation is "impossible" for the Indians.[25]

The Need To "Subordinate" The "Inferior" Irish

Blackstone mentions Ireland as an example of British rule by conquest. He ignores Irish history in describing the Irish. He writes of Ireland, "[t]he inhabitants of Ireland are, for the most part, descended from the English who planted it as a kind of colony, after the conquest of it by Henry II."[26] Blackstone must have known, first, that Henry II, lived in the 12th Century, several centuries before the English planters came to Ireland; secondly, that King John declared the loyalty of England and Ireland to the Catholic Pope; and, thirdly, that English influence in Ireland thenceforth declined: so much that before the Reformation, only the area around Dublin, (called the Pale) was controlled by the English, and the rest of Ireland was "beyond the Pale."[27]

It was later, after Henry VIII declared himself King of Ireland, and dissolved the monasteries there, that strong opposition to that course of action arose from all sections of Ireland. Many indigenous Irish (mostly Catholics) were forced off their land, which was given to Protestant English and Scottish planters and companies, to build a Protestant presence, which was thought to be loyal to England.

In fact, the English planters brought to Ireland by the English sowed the seeds for religious disharmony in Ireland for centuries. Blackstone ignored the rich monastic and Catholic traditions of the Irish, including Ireland's heritage of scriptural writing which attracted scholars in the "dark ages."[28] Therefore, Blackstone, writing in the *Commentaries*, held that Ireland began with the English planters. Even a very limited knowledge of Ireland would tell American Colonial readers of the *Commentaries* that Blackstone chose not to give attention to the indigenous Irish people.

Similarly, according to the documents of the U.S. Founders, America began with the white colonials, just as Ireland was said by Blackstone to begin with English planters. Indians are mentioned only three times in the U.S. Constitution, twice to say that Indians not taxed will not be considered in the census, and once that Congress will be able to vote on commerce with Indian tribes. Even slaves were considered three fifths of a person in the U.S. Constitution, and were given full U.S. citizenship

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[25] Frickey, above n 18.
[26] Blackstone, above n 1 at 110.
[27] Gerard-Sharp, L and Perry, T, *Ireland*, London: Dorling Kindersley, 1995.
[28] Ibid.

after the Civil War, with fundamental rights in Fourteenth Amendment equal protection. No fundamental rights, such as tribal integrity, under the U.S. Constitution have ever been enumerated for Indians.

As a case study of when to apply the law of nations to an inferior country, Blackstone refers to the indigenous Irish people in derogatory terms, and notes their cultural inferiority. "At the time of the conquest, the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons. King John ordained that the laws of England should govern Ireland. But to his ordinance many Irish were averse to conform, and still stuck to their Brehon law ... and at length ... the Brehon law was formally abolished, it being indeed... no law, but a lewd custom... And yet... the wild natives still kept and preserved their Brehon law...in many things repugnant quite both to God's laws and man's."[29]

In *Johnson v. Mcintosh*[30] Marshall refers to American Indians as "fierce savages". Just as Blackstone dismisses the Irish as inferior to the English, Marshall refers to the European conquest of Indians and says that these ideas of subordinating inferiors, "may find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them". Using natural law, Marshall felt that Indians could not be assimilated. "To leave them in possession of their country, was to leave the country a wilderness " (*Johnson*, 1823, p. 588).

Religion And "Inferiority"

Blackstone's words "in many things repugnant to God and man" show that he felt that Irish behavior repulsed God.[31] It may have been the predominant Catholic religion, and the Irish resistance to Protestants (who were given the land of Irish who were driven off their property) which Blackstone felt offended God, and permitted conquest.

Chief Justice Marshall wrote that one justification for American colonization and conquest - the conversion of the Indians to Christianity-would be better accomplished "by conciliatory conduct and good example; not by extermination."[32]

Blackstone also notes with approval the union of Scotland and England and the recognition of both of their churches. This is probably because both the churches of Scotland and England are Protestant Christian, and were thus compatible with Blackstone's thinking.

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[29] Blackstone, above n 1 Volume 1 at 110, 111.
[30] 21 U.S. (8 Wheat) 543 (1823)
[31] Blackstone, above n 1, Introduction at 111.
[32] *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 546.

The Vocabulary of Conquest

Blackstone states that Ireland is a "dependent, subordinate kingdom...And as Ireland, thus conquered, planted and governed, still continues in a state of dependence, it must necessarily conform to, and be obliged by such laws as the superior state thinks proper to prescribe."[33]

Blackstone defines his idea of a dependent state; "dependence being very little else, but an obligation to conform to the will or law of that superior person or state, upon which the inferior depends. The original and true ground of this superiority is the right of conquest: a right allowed by the law of nations, if not by that of nature; and founded by a compact either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies."[34]

Marshall applied the above terms used by Blackstone to American Indian law. He bases American Indian law on Blackstone's idea of conquest. Marshall calls Indian tribes "domestic dependent nations" and "[t]heir relation to the United States resembles that of a ward to his guardian."[35]

Marshall actually calls the U.S. courts those of the conqueror, in explaining why Indian land now belongs to the U.S. "Conquest gives a title which the courts of the conqueror cannot deny.... The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies... It asserted also a limited sovereignty over them.... These claims have been maintained and established... by the sword. The title we now hold ... originates in them. It is not for the courts of this country to question the validity of this title."[36]

Marshall laments that the Indians were brave and "ready to repel by arms every attempt on their independence...".[37] Thus, only conquest and the law of nations would be appropriate in this circumstance, as no natural law rights could be granted to such people (just as Blackstone had put the case in Ireland) for Marshall. He wrote that the conquerors either had to leave American soil and maintain their ideas of natural law for all, or stay and conquer. "The Europeans were under the necessity of either abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword."[38]

Marshall further enunciates the principles of federal Indian law, which had been put into practice before he wrote the *Johnson* opinion.[39] "However

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33 Blackstone, above n 1 Introduction at 98, 99.
34 Ibid Introduction at 101.
35 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) at 15.
36 *Johnson v. Mcintosh*, 21 U.S. (8 Wheat) 543 (1823) at 588.
37 *Johnson v. Mcintosh*, 21 U.S. (8 Wheat) 543 (1823) at 588.
38 *Johnson v. Mcintosh*, 21 U.S. (8 Wheat) 543 (1823) at 588.
39 O'Melinn above n 3 at 1207.

extravagant the pretension of converting the discovery of a country... into conquest may appear...if a country has been acquired and held under it ...it becomes the law of the land... and cannot be questioned... however this restriction may be opposed to natural right."[40]

The word "dependent" is also used in American references to Indians, as dependent entities, for instance. Blackstone's definition of dependence, thus, was probably used in Marshall's opinions in regard to American Indians. In *Worcester,* Marshall, applying Blackstone's terms regarding the Irish to American Indians, writes that "The settled doctrine of the law of nations" is that a weak state should place itself under the protection of a superior state, and become dependent on it for protection.[41] Marshall held that Indian nations were dependent, sovereign states, not responsible to the laws of states, but on a sovereign to sovereign relationship with the federal government. Marshall courageously angered the U.S. president, by holding that the state of Georgia could not enforce state laws on Indian land because the Indian nation is sovereign, and subject only to federal law.[42]

"Indian Country" Is Decided By Non-Indians

Marshall's idea of Indian sovereignty has grown into the important concept of "Indian country". Tribal sovereignty means self-governing by a tribe, and, depending on the circumstances, can include "measured separatism" to preserve cultural vitality, regulatory and taxing authorities, civil and criminal jurisdiction, exemption from state income and property taxes, and eligibility to receive the benefits of appropriate federal legislation. Three types of land are recognized as Indian country: a) reservations, b) dependent Indian communities and c) Indian allotments.[43] In *State of Alaska v. Native Village of Venetie Tribal Government,*[44] the U.S. Supreme Court decided on the Indian country status of a native village, and regarded this as a "dependent Indian community." The Court specified two requirements for Indian country status; first that the Federal government set aside land for the use of Indians as Indian land, and second, that they must be under federal superintendence. Finding that neither requirement was present, the Court held that Indian country status did not exist in that case. The Court's opinion concludes, "Whether the concept of Indian country status should be modified is a question entirely for Congress."[45] Blackstone and Marshall would both probably have approved of the

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40 *Johnson v. Mcintosh,* 21 U.S. (8 Wheat) 543 (1823) at 590.
41 *Worcester v. State of Georgia,* 31 U.S. (6 Pet.) 515 (1832).
42 *Worcester v. State of Georgia,* 31 U.S. (6 Pet.) 515 (1832).
43 Biggs, C, 'Is There Indian country in Alaska?' (1993) 64 *University of Colorado Law Review* 849.
44 118 S. Ct. 948 (1998).
45 *State of Alaska v. Native Village of Venetie Tribal Government.* 118 S. Ct. 948 (1998) at 534.

government, and not the Indian people, making decisions on Indian land. Treating the Indians as dependents and guardians, in 1998, was presumably still under the law of nations, and not natural law.

Outcomes Of A Superior's Conquest

With the similar attitude of the English to the Irish and the Americans to the Indians, it is understandable that the outcomes could seem nearly the same. Two well-documented historic events in Ireland, not mentioned by Blackstone, are eerily similar to experiences involving American Indians. After the Catholic forces of James II were defeated by the Protestant William of Orange at the Battle of the Boyne in 1690, the remnant of the Catholic army retreated to Limerick, where the defeated Irish subsequently signed a treaty with the English. The English later broke the terms of the treaty. This experience was all too familiar to American Indian tribes who had made treaties with the American government. Also, Cromwell razed cities such as Waterford in 1643 and drove Irish Catholics off their land, forcing them to go to the arid, underpopulated West of Ireland.[46] In America, it became federal government policy in the early to mid- 1800s to forcibly remove Indians from the lands previously promised to them in the East, and force them to the dry, underpopulated West of America. These actions could be rationalized by reference to Blackstone's law of nations and conquest by the superior.

Natural Law

Natural Law, with its consequential individual rights, was not part of the constitutional theory applied to the American Indian. Marshall's constitutional theory of the dependent sovereignty and ward status of the American Indian supported this view. The American founders applied natural law only to themselves. Blackstone's suggestion of the idea of the law of nations, in which a conqueror subjected the inferior people to a dependent status was reflected in constitutional theory set by Marshall. The following points illustrate the lack of natural law applied to the American Indian. Blackstone's natural law could not be a justification for subjugating the American Indians, and natural law was not applied to American Indians in early court cases.

To Blackstone, natural law comes from God. Blackstone stressed the importance of natural law: "The law of nature is a supreme, invariable and uncontrollable rule of conduct to all men."[47] He stated that, "the law

[46] Gerard-Sharp, and Perry, above n 27.
[47] Blackstone, above n 1, Volume 1 at 39.

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."[48]

In the United States, natural law, used in the way cited by Blackstone, was noted in one of the first U.S. Supreme Court cases on American Indian rights. Justice McClean in *Worcester v State of Georgia*[49] cites natural law as giving the new (ex-colonial) American citizens the right to the enjoyment to a reasonable extent of country and states of Indians that "they should not be permitted to roam."[50] Thus, natural law, at least to one early U.S. Supreme Court justice, was applicable to the white ex-colonialists, but not to the American Indians.

Absolute Rights

The absolute rights as listed by Blackstone are (a) life (which can mean personal security), (b) liberty, and (c) property. These three absolute rights are mentioned, probably due to the influence of Blackstone, in the Fifth and Fourteenth Amendments to the U.S. Constitution. "The absolute rights of every Englishman, ... as they are founded on nature and reason, so they are co-eval with our form of government; though subject at times to fluctuate and change; their establishment (excellent as it is) being still human."[51] He felt that society must protect these rights; "the principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them...".[52]

The idea of the "law of nations", a phrase used by Blackstone, over Indian affairs was further emphasised by *United States v. Kagama*,[53] which gave Congress plenary power over Indian lands.[54] *Kagama* is inconsistent with the earlier case of *McCulloch v. Maryland*,[55] which held that Congress has only that authority delegated to it in the Constitution. Newton describes *Kagama* as "an embarrassment to humanity." It was a constitutional theory used to show why the conquering and dependency of the American Indian is justified.

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48 Ibid Volume 1 at 41.
49 *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832).
50 *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 563-596.
51 Blackstone, above n 1 Volume 1 at 123.
52 Blackstone, above n 1 Volume 1 at 124.
53 *U.S. v. Kagama*, 118 U.S. 375 (1886).
54 Newton, N, 'Federal Power Over Indians' (1984) 132 *University of Pennslyvania Law Review* 195 at 207-228.
55 17 U.S. (4 Wheat) 316 (1819).

Life (Personal Security)

"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[56] "Both life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them."[57] Personal security protects one's enjoyment of one's life and limbs.

In the *Worcester* opinion, Marshall noted that Great Britain "planted" colonies in America (as England put the "planters" into Ireland). He noted that the charter given by the King to the state of Connecticut includes the words, "and upon just cause to invade and destroy the natives", and similar language was to be found in royal charters given to other American colonies. By citing this charter, Marshall indicates that the life of the American Indians was not to be protected by their self-defence and was not as precious as the lives of the colonists. All of the above is allowed under the law of nations, but not natural law.

Liberty

The second absolute right, liberty, represents a specific right to go where one chooses, which is one of three absolute rights which flow from the larger, encompassing idea of freedom or liberty. "This personal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."[58] Blackstone condemns slavery in the section of the *Commentaries* which discusses the liberty right. "[T]his spirit of liberty is so deeply implanted in our constitution... that a slave... the moment he lands in England, becomes a free man."[59] Nothing similar to this was written by Marshall (who reflected much of Blackstone's thinking) concerning the liberty rights of American Indians.

Indians had no liberty rights to go where and when they chose. The words of Justice McClean, above, and other restrictions placed on Indians, showed no right of locomotion as described by Blackstone.

Property

The lack of a property right of American Indians is clearly against natural

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[56] Blackstone, above n 1 Volume 1 at 127.
[57] Ibid 130.
[58] Ibid 134.
[59] Ibid 127.

law's absolute rights, as set out by Blackstone. For Blackstone, property was probably seen as the most important of the three absolute rights of Englishmen. "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."[60] To Blackstone, property is an absolute right vested in the individual by natural law as opposed to John Locke's idea that property rights depended on a social compact, on society's recognition that the owner "had made something his own by mixing his labor in it."[61]

Blackstone stated that, by natural law, "every man has ... a power over his own property."[62] Reflecting these words of Blackstone's, the Taking Clause of the Fifth Amendment to the United States Constitution states, "private property [shall not] be taken."[63]

To further show there are no property rights in respect of Indian nations, merely a year after *Brown v. Board of Education*[64] held that racial segregation in public schools is unconstitutional, the U.S. Supreme Court held that the federal government could take Indian lands without any constitutional consequences, including just compensation in, *Tee-Hit-Ton Indians v. U.S.*[65] This involved the taking of Indian land in Alaska. If the Supreme Court decided the Indians had "property" for Fifth Amendment purposes and that just compensation must be paid for taking such property, the federal government would have been exposed to approximately nine billion dollars in claims and interest against the federal government.[66]

Kagama[67] and *Lone Wolf v. Hitchcock*[68] held that Indian treaties might be unilaterally abrogated by Congress.[69] By using plenary power, Congress ran roughshod over tribal interests. Under the policy of allotment, Congress deprived Indians of more than two thirds of their land base between 1887 and 1934.[70] This again showed the lack of a property right. The ramifications of Marshall's constitutional theory regarding American Indians are still present in American law.

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60 Ibid 139.
61 Burns, R P, 'Blackstone's Theory of the "Absolute" Rights of Property" (1985) 54 *University of Cincinnati Law Review* 67 at 67.
62 Blackstone, above n 1 Volume 1 at 448.
63 Garnett, P W, 'Forward-looking Costing Methodologies and the Supreme Court's Takings Clause Jurisprudence' (Winter 1999) 7 *CommLaw Conspectus* 119 at 120.
64 347 U.S. 483 (1954).
65 348 U.S. 272 (1955) at 288, 289.
66 *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955) at 283, n 17.
67 *U.S. v. Kagama*, 118 U.S. 375 (1886).
68 187 U.S. 553 (1903).
69 *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) at 556.
70 Frickey, above n 18.

Conclusion

The work of Blackstone provided two different models for the Americans to use. One model, found in the introduction to the *Commentaries* discusses conquest by force as an option, and justifies treating an "inferior" indigenous people as dependent once it is established that they are inferior. This model was applied by Marshall to the American Indian. The second model, which starts in the first book of the *Commentaries*, speaks to the rule of law and a constitution based on liberty for the individuals. It has been applied in subsequent court decisions as a constitutional theory which affects white and minority Americans other than American Indians. The plenary power of the Congress over American Indian country has no parallel in the treatment of any other population in America. These two models are contradictory. The contradiction was born with the U.S. and it is still with the U.S. What reflections are fitting on the seemingly split personality of Blackstone, as followed and put into constitutional theory by Marshall, and the American government?

Modern scholars note that twice in 1998 the Supreme Court ruled that once Indian land passes into private ownership, it is no longer part of Indian country, regardless of the wishes of the American Indians on that land. In both *Cass County v. Leech Lake Band of Chippewa Indians*[71] and *Venetie*[72] the court held that ownership in fee simple means the lands owned cannot be part of Indian country. The reason for this holding is rooted in Blackstone's idea on the necessary subjugation of inferior people, as applied by Marshall to American Indian law. Justice Thomas cited the plenary power of Congress over Indian lands, which comes from Marshall's ward of the federal government theory. This was based on Blackstone's law of nations and the right of conquest. In deciding both of these cases, the Court looked only to the will of Congress, and did not consult the Indians affected by the decision.[73] Thus, the concept of dependency, articulated by Blackstone regarding the Irish in the *Commentaries*, lives on in the U.S. through Marshall's seminal legal concepts about the American Indian.

Today one may ask, was Blackstone a creature of his time? Is that why he wrote of the right of the "superior" to conquer the "inferior" indigenous people, and rationalized this by stating that this conquest could be done under the law of nations? It would be comforting to think that, of the writer whose *Commentaries* provided great guidance in the writing of the U.S. Constitution.

Yet the truth is that other great Protestant writers of roughly the same era as Blackstone spoke out against the English oppression of largely

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[71] *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).
[72] *State of Alaska v. Native Village of Venetie Tribal Government*. 118 S. Ct. 948 (1998).
[73] O'Melinn, above n 3 at 1208.

Catholic Ireland, and of English laws which punished Catholics. Jonathon Swift, the Protestant (Church of Ireland) Dean of St. Patrick's Cathedral, and the writer of *Gulliver's Travels*, was vocal against the Penal Code which denied certain civil rights to Catholics. Swift wrote a satirical essay, "A Modest Proposal", to challenge the anti-Catholic Penal Code.

In the early 1800's, John Henry Newman, then a vicar of the Protestant Church of England, and an Oxford scholar, yearly petitioned Parliament in favor of the Catholic Emancipation Act, which allowed some Catholics to vote, and was passed in 1829. Newman, who converted to Catholicism in 1846, was sent to Dublin to start the first Catholic University there. His "Idea of a University,"[74] which he wrote during this, is a major influence on higher education still today, with its advocacy of a liberal education and a core curriculum. Newman's later defense of his conversion to Catholicism, *Apologia Pro Vita Sua*[75] had a broad and sympathetic readership in England and other countries.

Today, Ireland is divided by the old religious lines, but free, and following the natural law rights in both Northern Ireland (part of the U.K.), and the Republic of Ireland.

In America, strong civil rights laws protect people from discrimination based on race, gender, sex, religion, age, disability and national origin. Blackstone's courageous anti-slavery stance was put into the U.S. Constitution a century after the original Constitution was ratified. Blackstone's words of absolute rights; life, liberty and property, were used in the Fourteenth Amendment, which gives full citizenship to all Americans.

Thus, natural law as understood by Blackstone is practiced in Ireland, and the oppression of America's terrible time of slavery has been addressed in the Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution. Unfortunately, the American Indian reservations and "Indian Country" are still under plenary control of the U.S. Congress. The U.S. Supreme Court has recently held that Congress still has power to say what laws apply on Indian lands[76] and, far from Supreme Court Chief Justice John Marshall's idea[77] (*Worcester*, 1832) that Indian tribes had sovereignty and states could not sue them, a recent U.S. Supreme Court decision, *Seminole*[78] has come full circle, emphasizing the sovereignty of states and holding that Indian tribes may not use federal statutes to sue states.

Blackstone was in error concerning the right of "superiors" to conquer and subordinate "inferiors" by the law of nations, which inspired Marshall's constitutional theory of dependency for the Indians. He was right

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[74] Newman, J H, The Idea of a University Defined and Illustrated: I. In Nine Discourses Delivered to the Catholics of Dublin. II. In Occasional Lectures and Essays Addressed to the Members of the Catholic University, London: Longmans, 1852/1927.

[75] Ibid.

[76] *State of Alaska v. Native Village of Venetie Tribal Government.* 118 S. Ct. 948 (1998).

[77] *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[78] *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996).

in his ideas on natural law, that government should have limited power over individuals. The plenary power of the U.S. Congress over American Indian tribes is a holdover from Blackstone's law of the conqueror and the law of nations, as articulated and written into constitutional theory by John Marshall and other jurists. Blackstone's brilliant legacy in influencing the content of the U.S. Constitution and American legal institutions must be coupled with an end to American double standards in regard to the American Indian.