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How Blackstone Became a Blackstonian

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Abstract

The bogeyman of institutions and theories that make a place for community in property law is the “Blackstonian conception” of property, based on Blackstone’s famous identification of property with “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”

Yet, as anyone who has even skimmed Blackstone’s Commentaries quickly realizes, it is clear that the great expositor of the common law did not believe that this absolutist and individualist conception squared with the actual institution of property found in English law. Replete with descriptions and justifications of doctrines that recognized and enforced a complex web of individual and community interests in land and other resources, Blackstone’s account seems much closer to the “bundle of rights” approach popularized by the American legal realists than to the “absolute dominion” view associated with his name. Why has exclusive dominion as a model for property, then, come to be associated with Blackstone, of all people?

This Article seeks, first of all, to explain why Blackstone would first characterize property as “sole and despotic dominion,” and then go on to illustrate, over several hundred pages, the falsity of this definition. The primary goal of the paper, though, is to examine the ways in which Blackstone was invoked by later jurists as authority for property-law propositions. In particular, the Article examines how Blackstone has been cited by English and American courts and writers, whether in connection with the “sole and despotic dominion view” or rather in support of doctrines more in keeping with a more complex view of property. Finally, it proposes an answer to the question set out in the title, identifying the historical context and motivations for the identification of the absolute, individualistic view of property with Blackstone in particular.

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whether in connection with the "sole and despotic dominion view" or rather in support of doctrines more in keeping with a more complex view of property. Finally, it proposes an answer to the question set out in the title, identifying the historical context and motivations for the identification of the absolute, individualistic view of property with Blackstone in particular.

I

There is perhaps nothing which strikes the imagination of the property scholar and engages the affections of certain commentators, as William Blackstone's famous characterization of property, in his *Commentaries on the Laws of England* (1765-69), as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."¹ "Blackstonian property" has become shorthand for a conception of property as individual, exclusive and absolute dominion, often set in opposition to the conception of property as a "bundle of rights" pertaining to an asset, rights which may be allocated in various ways.² It is the bogeyman of any community-oriented property law, which seemingly must at least deny either

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- 1 WILLIAM BLACKSTONE, 2 COMMENTARIES *1. See, e.g., Abraham Bell & Gideon Parchomovsky, *The Evolution of Private and Open Access Property*, 10 THEORETICAL INQUIRIES L. 77 (2009); Joshua Getzler, *Plural Ownership, Funds, and the Aggregation of Wills*, 10 THEORETICAL INQUIRIES L. 241 (2009).
- 2 See, e.g., GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: THE COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* (1997); DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 166, 172 (1941); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1362-63 (1993); MARY ANN GLENDON, *RIGHTS TALK* 23 (1991); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 224 (1965); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 351 (1996); MICHAEL TAGGART, *PRIVATE PROPERTY AND ABUSE OF RIGHTS IN VICTORIAN ENGLAND: THE STORY OF EDWARD PICKLES AND THE BRADFORD WATER SUPPLY* 143 (2002); Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980). The "bundle of rights" view is most frequently associated with Hohfeld. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); see also A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.D. Guest ed., 1961).

the individual and exclusive ("sole") or the absolute ("despotic") aspect of Blackstone's definition — often both.³

Now, here's another venerable definition of property, written a little later: "The right of property is . . . the right to enjoy one's fortune and to dispose of it as one will; without regard for other men and independently of society. It is the right of self-interest." Not quite the same definition, but arguably another way of putting "sole and despotic dominion." This passage, though, was written not by Blackstone, but by another thinker whose views on property have had some influence — Karl Marx.⁴

It is hard, I think, to imagine property scholars, or lawyers, labeling the exclusive-dominion view as the "Marxian conception" of property. It seems the "Blackstonian conception" has a certain ring to it. Why is this so? Why has this view come to be associated with Blackstone in particular?

The attribution of widely-held ideas to particular writers is a common and documented occurrence;⁵ yet the anointment of Blackstone as the symbol of property absolutism is more than a quirk of intellectual history — it is perverse. As many have noted, Blackstone's characterization of property as "sole and despotic dominion" is largely at odds with his own exposition of the property law of England.⁶ Property in the *Commentaries*, as we shall see, was full of complex arrangements of rights, creating communities with respect

3 See, e.g., Henry Horwitz, *Liberty, Law, and Property, 1689-1776*, in LIBERTY SECURED? BRITAIN BEFORE AND AFTER 1688, at 265, 285 (E.R. Jones ed., 1992) (linking Blackstone's "grandiloquent peroration" to "sole and despotic dominion" with the eighteenth-century enclosure movement).

4 Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 42 (Robert C. Tucker ed., 2d ed. 1978) (1843).

5 See ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT (Univ. of Chi. Press 1993) (1965).

6 Most every recent writer on Blackstone's view of property has noted the anomalous nature of the famous "sole and despotic dominion" statement in the overall context of the *Commentaries*, as indeed anyone who reads the work must do. The first to make the point was apparently Frederick G. Whelan, *Property as Artifice: Hume and Blackstone*, in NOMOS XXII: PROPERTY 101, 118-20 (J. Roland Pennock & John W. Chapman eds., 1980); see also, e.g., Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 31 n.175 (1996); Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CINN. L. REV. 67, 81-82 (1985); Ellickson, *supra* note 2, at 1362 n.237; Robert R. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 96 (John Brewer & Susan Staves eds., 1995); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985); Glen O. Robinson, *The Property Rights of Despots* 1-3 (Univ. of Va. Law Sch. John M. Olin Program in Law & Econ., Working Paper No. 39, 2007), available at law.bepress.com/cgi/viewcontent.cgi?article=1116&context=uvalwps; Carol M.

to specific assets and recognizing the rights of the community in what was nominally private property. Why has exclusive dominion as a model for property, then, come to be associated with Blackstone, of all people?

Before setting out to attempt an answer, let me clarify: The subject of this Article is the "Blackstonian conception" of property as an *analytical* concept or trope: the view, attributed to Blackstone, that property is essentially the unified ownership of something by one person, and that that person has absolute dominion over the object — or the negation of the "bundle of rights" metaphor. The Article will put to the side the political or constitutional aspects of property as expounded by Blackstone or attributed to him — the place of property in an overall hierarchy of rights, or the degree to which property was thought to be inviolable as against the state (whether for purposes of regulation, expropriation or taxation) — questions treated at length in earlier times.⁷ Having said that, I note that given the inverse relationship between the extent to which public-law circumscribes property rights on the one hand, and the exclusivity and absoluteness of those rights on the other, "public law" issues⁸ will be of some relevance to my discussion, not in their own right, but for their implications for the analytical dimension of property.

II

First, let us turn to the *Commentaries* themselves, and try to get a clearer view of Blackstone's view of property. Book II, "Of the Rights of Things,"⁹ opens with the famous "paean to property,"¹⁰ followed by a utilitarian justification

Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603-04, 612 n.43 (1998); E.P. THOMPSON, *CUSTOMS IN COMMON* 162 (1991).

7 See, e.g., Burns, *supra* note 6; PASCHAL LARKIN, *PROPERTY IN THE EIGHTEENTH CENTURY, WITH SPECIAL REFERENCE TO ENGLAND AND LOCKE* (1930) (discussing Blackstone at 104); C. REINOLD NOYES, *THE INSTITUTION OF PROPERTY* 301-02 (1936).

8 See Walton H. Hamilton, *Property — According to Locke*, 41 YALE L.J. 864, 865 (1932).

9 On the historical context for the structure of the *Commentaries*, see John W. Cairns, *Blackstone: An English Institutionist: Legal Literature and the Rise of the Nation State*, 4 O.J.L.S. 318, 340-52 (1984). For a critical (but ahistorical) view, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

10 Ellickson, *supra* note 2, at 1317.

of private property and inheritance.¹¹ This short introduction is followed by 500-page survey of English property law.

A perusal of Blackstone's elegant exposition of positive law in expectation of doctrinal illustrations of the "sole and despotic dominion" principle will lead to disappointment. What one finds instead is not just a "veritable flood of doctrine,"¹² but doctrines of a particular cast: at every turn, on every page, less-than-absolute property rights are explicated, delimited and qualified. And while it is true that in Blackstone (as in most property scholarship) land is the paradigmatic *object* of property, the choice of land as the primary focus of the discussion "Of the Rights of Things," far from striking a calming note about property,¹³ places its complexity, and the typical lack of an owner with sole and despotic dominion over an external thing, front and center. For the paradigmatic property *right* for Blackstone was *not* allodial ownership or dominium, which he held not to exist in England.¹⁴ In fact, it would be hard to say just what the *Commentaries'* paradigmatic property right is: Blackstone devoted a few pages to tenancy in fee-simple,¹⁵ but took pains to point out both that this right of "property in its highest degree" was always "held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides,"¹⁶ and that lesser interests were frequently vested in some other person or persons.¹⁷ Whatever hostility Blackstone may have displayed toward the vestiges of the Norman yoke in English land law,¹⁸ he made no attempt to camouflage the undeniable effects of the feudal system on the positive law of his own day.¹⁹ Not only did "absolute" ownership not exist in England, it was hardly discussed even as a mythological ideal type.

Thus the devotion of his first chapter on substantive property law²⁰ to the stunning esoterica of advowsons, tithes, rights of chase and other slender

11 It is not quite clear whether private property is, on Blackstone's account, a natural right, or a social convention; see RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 166-71 (1951); A.W. Brian Simpson, *Introduction* to 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at iii, iv-v (Univ. of Chi. Press 1979).

12 Rose, *supra* note 6, at 609.

13 See *id.* at 611.

14 2 COMMENTARIES *105.

15 *Id.* *104-09.

16 *Id.* *105.

17 *Id.* *107.

18 See Cairns, *supra* note 9, at 355-56, and citations therein.

19 On the medieval basis of land law in Blackstone's day, see Simpson, *supra* note 11, at vi.

20 "Of Incorporeal Hereditaments," 2 COMMENTARIES *20-43.

sticks in the bundle of rights appurtenant to land was more than an attempt to deflect the reader's attention from doubts over the legitimacy of existing patterns of ownership by swamping him in a flood of doctrine.²¹ These property institutions, as well as scores of others limiting the sole and despotic dominion of property owners, were not exceptions to a rule, but an illustration of the fact that the "bundle of rights" approach to property permeated early-modern English property law, especially land law, to its core.²²

The disintegration of property into a multitude of sticks²³ was first of all the product of the common law's medieval origins. Even after the abolition of feudal military tenures at the Restoration,²⁴ all land continued to be held under one of what Blackstone referred to (without a trace of irony) as the "modern" tenures — free-socage (including petit serjeanty, burgage and gavelkind), frankalmoign, grand serjeantry and copyhold — under all of which the land was held of some superior, usually with some service due.²⁵ The feudal legacy was felt in doctrines such as forfeitures for "alienation in mortmain" (alienation of land to a corporation without a royal license) or "disclaimer" (a tenant's disclaimer of holding of his lord, or claiming a tenancy of a superior class).²⁶ On top of this, the dynastic ambitions of England's landed class added a further layer of complexity, through the formidable system of estates in land: fees conditional, fees tail, contingent remainders, estates pur autre vie, dower, and other such relics of the common law.²⁷

Now, one might be tempted to argue that at least some of these institutions were not inconsistent with the "sole and despotic dominion" view trumpeted

21 See Rose, *supra* note 6, at 609.

22 See Whelan, *supra* note 6, at 102, 127, who sees Blackstone as anticipating the "bundle of rights" view of property; see also Rose, *supra* note 6, at 612 n.43. It is thus difficult to reconcile the historical Blackstone with Rose's argument that land, as the central symbol for property, is associated with "the awesome Blackstonian power of exclusion"; see Rose, *supra* note 2, at 351.

23 See Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY, *supra* note 6, at 69.

24 Statute of Tenures, 1660, 12 Car. 2, c. 24. See 2 COMMENTARIES *77; A.W.B. SIMPSON, THE HISTORY OF THE LAND LAW 23 (2d ed. 1986).

25 2 COMMENTARIES *78-102. It seems that in reality the tenure of grand serjeantry was abolished, and only its honorable services retained; SIMPSON, *supra* note 24, at 9-10, 23.

26 2 COMMENTARIES *268-76, *291. These actions triggered forfeiture since they struck at the feudal obligations owed the lord by the tenant.

27 *Id.* *109-35, *168-75, *258-60. See S.F.C. Milsom, *The Nature of Blackstone's Achievement*, 1 O.J.L.S. 1, 3 (1981); Simpson, *supra* note 11, at xi ("It is remarkable that in spite of Blackstone's exaltation of private *individual* property rights, the landowning class in reality had little use for them.").

at the beginning of Book II, or at least only mildly so. The holder of a life estate in a parcel, for example, would have absolute dominion over the land during his lifetime; the system of estates, it could be argued, shifted effective ownership between tenants, reversioners and so on, but without impinging on the absolute control each exercised over the land during the period he was seised of the land. Yet this argument is feeble: the holder of a property right in land who cannot bequeath it to an heir or sell it with full title certainly exercises something less than "sole and despotic dominion" over that land. (To confirm this intuition, consider whether a law establishing the escheat of all land upon death of the owner might be considered a taking.) Simpson has put this point about the doctrine of estates another way, writing that in contrast to an earlier conception of estates as a cake being passed about, a more accurate view of the matter

involves a recognition not simply that the sum of possible interest — the fee simple — may be cut up like a cake and distributed amongst a number of people, but that all of them will obtain present existing interests in the land, though their right to actual enjoyment . . . may be postponed. The slice of cake may be shrink wrapped, not to be actually eaten yet.²⁸

Future interests impeded current dominion, as well, by limiting the exploitation of the asset, primarily through the doctrine of waste. This forbade activities as various as removing the wainscoting in a house, reducing the number of doves resident in the land, or converting a meadow to a pasture or one sort of building to another.²⁹ That split control over land between possessors and remaindermen or reversioners was the norm is evident from the large amount of attention given by Blackstone to this type of situation.³⁰

The fragmentation of property rights in Blackstone, however, is not limited to the temporal dimension of estates in land, for the *Commentaries* are full, as well, of synchronic limits and invasions of an owner's dominion over "his" land. Though, when discussing the law of trespass, Blackstone insisted that "the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression,"³¹

28 SIMPSON, *supra* note 24, at 86-87.

29 2 COMMENTARIES *120-24, *281-84.

30 *See id.* *120-24, *281-85; 3 COMMENTARIES *171-74, *178-79, *198-207, *210-11, *213, *224-25, *232.

31 3 COMMENTARIES *209.

the exceptions to this rule were myriad. All had the right to hunt "ravenous beasts of prey" on another's turf, "because the destroying such creatures [sic] is said to be profitable to the public."³² Worse, the landholder had no right to hunt on his own lands, unless he possessed also a "liberty of free-warren," a right frequently held by others;³³ similarly, others might possess a right of "several fishery" in his land.³⁴ Private or common ways over others' fields, whether to access fields or go to church, were common, and interference with this right was actionable as a nuisance.³⁵ Others might enter one's land to stop a nuisance or confiscate property in a variety of circumstances.³⁶ Holders of future interests could enter the land upon seeing waste, and annually to check on the person on whose life the current estate depended.³⁷ Perhaps most drastic was the possibility of an owner's losing his rights through prescription.³⁸ And unlike the law in some jurisdictions today, plaintiffs bringing actions of trespass when damages were trifling were penalized.³⁹

On top of these invasions were a host of limits on the use of property, some for reasons we would find good today, others not. Usury was prohibited, as were forestalling, regrating, engrossing and monopoly.⁴⁰ A seemingly unenforced statute forbade partaking of more than two courses at dinner or supper, though three were allowed on some holidays.⁴¹ "Papists" and "persons professing the popish religion" were disqualified from purchasing lands without first taking the prescribed oath.⁴² Interests in land were forfeit for a variety of crimes.⁴³ Chattels were forfeit not only for capital offences, but for such exotic offenses as owling (smuggling wool out of the country) and challenging to fight over gambling winnings.⁴⁴

So property for Blackstone had little to do with "sole and despotic dominion"; this much is made clear by the doctrinal limitations on private ownership — but not only by doctrine. It is not only Blackstone's discussion

32 *Id.* *213.

33 2 COMMENTARIES *38-39.

34 *Id.* *40.

35 *Id.* *35-36; 3 COMMENTARIES *218.

36 3 COMMENTARIES *5-6.

37 *Id.* *211, *213.

38 2 COMMENTARIES *263-66; 3 COMMENTARIES *188-90, *196.

39 3 COMMENTARIES *214.

40 4 COMMENTARIES *158, *160.

41 *Id.* *171.

42 2 COMMENTARIES *293. As an ecumenical gesture perhaps, selling meat bought of a Jew was prohibited; 4 COMMENTARIES *162.

43 2 COMMENTARIES *267-68.

44 *Id.* *421.

of personal property that "smells of the countryside" as Simpson says;⁴⁵ it is the portrayal throughout the *Commentaries* of a world in which traditional, communal village life had not yet been snuffed out by enclosure and industrialization.

Hunting was obviously a major theme, with discussions of property rights involving hawks, badgers and foxes, and affirmation of the king's right, at the death of a bishop, to inherit his kennel of hounds.⁴⁶ Yet community life and rights went far beyond the pursuits of the leisure class. The residents' duty to continue to grind their corn at the mill where they had traditionally done so was enforceable by a special writ — *de secta ad molendinum* — as were similar duties to the owners of the local public oven and kiln.⁴⁷ As an example of a local customary property right (rights and duties among copyholders and landlords were delineated by local custom⁴⁸), Blackstone depicted an arcadia in which "all the inhabitants of [a] parish may dance on a certain close, at all times, for their recreation," an idyllic tableau of "Merrie England" perhaps too good to be true, were it not based on an actual case.⁴⁹ In a related issue, Blackstone noted that "it hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass: which human provision seems borrowed from the mosaical law."⁵⁰ While, as indicated by the noted case of *Steel v. Houghton*,⁵¹ this may not have been a perfectly accurate statement of the common law, it seems it was an accurate reflection of the custom in some areas of the country.⁵² Perhaps most striking from the lawyer's point of view is Blackstone's illustration of the rule that possession by the plaintiff was a prerequisite for an action of trespass, a situation illustrated not by what we

45 Simpson, *supra* note 11, at xii.

46 2 COMMENTARIES *213, *394, *413.

47 3 COMMENTARIES *235; the other writs were respectively denominated *ad furnum* and *ad torrale*.

48 2 COMMENTARIES *284-85.

49 *Id.* *263 (citing *Abbot v. Weekly*, 1 Lev. 176, 83 Eng. Rep. 357 (K.B. 1665)). The plaintiff conceded that the local inhabitants would not be committing a trespass if claiming an easement of necessity, such as a path to a church, but the King's Bench ruled that the claimed right of dancing was good as well, as "it is necessary for inhabitants to have their recreation"; *Abbot*, 1 Lev. at 177, 83 Eng. Rep. at 357.

50 3 COMMENTARIES *212-13.

51 1 H. Bl. 51, 126 Eng. Rep. 32 (C.P. 1788), *cited by* Christian's note to 3 COMMENTARIES *213.

52 As noted by the majority opinions in *id.*, 1 H. Bl. at 52-53, 59-63, 126 Eng. Rep. at 33, 37-38. *See also* Peter King, *Gleaners, Farmers and the Failure of Legal Sanctions in England 1750-1850*, 125 PAST & PRESENT 116 (1989).

might think of as an archetypical situation of an owner enforcing his absolute control over his private plot, but by something quite different, perhaps more reflective of actual patterns of land use in the English countryside of the Augustan Age:

Thus if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes: for they have an exclusive interest and freehold therein for the time. But before entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law.⁵³

The *Commentaries* indeed make clear that common ownership (whether in the form of joint tenancy, estates in coparceny or tenancy in common⁵⁴) and communal rights in nominally private lands were commonplace, so to speak. Commons came in several varieties: The common of pasture for persons within a given manor (common appendant) was extremely widespread, "a matter of most universal right," "arising from natural propriety . . . or necessity," according to Blackstone.⁵⁵ Commons of pasture could also be created in the lands of other manors by practice, and though it was forbidden to intentionally place one's animals on a neighboring town's commons, if the beasts found their way there on their own, "the law winks at the trespass."⁵⁶ Other commons were commons of piscary (for fishing in another's waters) and turbary (for digging turf or peat), and the various forms of estovers: house-bote (the right to take firewood and wood to repair the house), plough-bote and cart-bote (for making and repairing agricultural instruments), and hay-bote (for repairing fences).⁵⁷ If the owner's exploitation of the trees in a plot interfered with that of the commoners, he was liable for waste, as if he were their tenant.⁵⁸ Despite the threat of enclosure under certain conditions,⁵⁹ the commoners' rights to sufficient pasture were protected by a variety of remedies available against grasping lords and interfering outsiders.⁶⁰ Interestingly for modern devotees of commons theory, the common law as reflected in Blackstone had worked out a sophisticated system of rights and remedies

53 3 COMMENTARIES *210.

54 2 COMMENTARIES *179-94. For chattels, see *id.* *399.

55 *Id.* *33.

56 *Id.* *33-34.

57 *Id.* *35.

58 3 COMMENTARIES *224.

59 2 COMMENTARIES *34; 3 COMMENTARIES *240-41.

60 3 COMMENTARIES *240.

for preventing "surcharging" of the commons by unsustainable use of the commoners themselves: any one of them could bring an action on the case (for damages) or a special action for "admeasurement of pasture," in which the sustainable level of use was determined by a jury, and which could eventually result in forfeiture of the defendant's offending cattle.⁶¹

Thus far, fragmentation of property can be seen (perhaps dismissed) as a medieval vestige. Yet the modern commercial economy ascendant in Blackstone's day was based on, and demanded, the alienability and marketability of property interests that were less than ownership.⁶² So while the *Commentaries* perhaps don't say as much as they could about commercial law, they do discuss security interests.⁶³ Furthermore, writes Blackstone, "There is no absolute property in either the bailor or the bailee," and the same goes for the pledgor and pledgee.⁶⁴

More fundamentally, fragmented rights were not merely a product of historical circumstance; they were inherent in the very institution of property. As any lawyer knows (and Blackstone was no exception), land uses are inexorably intertwined, with each landholder's enjoyment of his land made possible only by limits placed on the uses of his neighbors. The freedom to do what one wished with his land was limited by the law of nuisance (or "nusance," in Blackstone's spelling): An owner could not burn his townhouse, even were no damage to others to result⁶⁵ — a sensible rule, no doubt, but yielding something less than absolute dominion for him. He could not block the "antient window" of his neighbor, nor could he open a tannery or chandlery that disturbed his neighbors, or keep hogs in the city.⁶⁶ If his failure to maintain a ditch resulted in flooding on his neighbor's land, he was liable for damage.⁶⁷ Polluting or diverting water to the detriment of others, too, was a nuisance, "so closely does the law of England enforce that excellent rule of gospel-morality, of 'doing to others, as we would they should do unto ourselves'"⁶⁸ — a most un-Blackstonian sentiment.

To these necessary limits on an owner's sole and despotic dominion over his land Blackstone added others that seemed to him equally necessary, deriving from the nature of the resource: Light, air, water, and wild animals

61 *Id.* *237-39.

62 *See* THOMPSON, *supra* note 6, at 135.

63 2 COMMENTARIES *157-61.

64 *Id.* *396.

65 4 COMMENTARIES *221.

66 2 COMMENTARIES *402-03; 3 COMMENTARIES *217; 4 COMMENTARIES *167.

67 3 COMMENTARIES *218.

68 *Id.*

must, by their nature (so thought Blackstone), remain held in common (as land originally was), with only usufructary rights capable of being held privately.⁶⁹ Stealing wild animals from another's possession was a felony if they were fit for food, "but not so, if they are kept only for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds; because their value is not intrinsic, but depending only on the caprice of the owner."⁷⁰ A traitor lost the right of transferring his property, since this part of the bundle had belonged to him only as a member of the community which he had now sinned against.⁷¹ And, as noted above, the common of pasture (appendant) was a natural right, arising from necessity.⁷²

III

It is thus clear that the body of Blackstone's *Commentaries* stands in complete contrast to the "sole and despotic dominion" conception set out in the opening lines of Book II. I have somewhat belabored the point in the hope of making clear that multiple owners of an asset and common property arrangements were not esoteric exceptions to the rule, but very much the norm in Blackstone's view of property.

If this is the case, how are we to explain "sole and despotic dominion"? How can the various estates, commons, and other unbundlings of property rights be reconciled with a view of property as individual dominion, "in total exclusion of the right of any other individual in the universe"?

The answer, I believe, is that it cannot — this is a circle that cannot be squared. I therefore propose several related lines of thought as to why Blackstone would introduce his discussion of property with the bombastic assertion that property means individual, exclusive dominion, and then proceed to elaborate with several hundred pages of counterexamples. These solutions are admittedly speculative, but I believe an attempt at solving the puzzle is in order.

The first approach builds on what many have noted is the somewhat awkward fit between the common-law content of the *Commentaries* and the work's Roman-law superstructure and natural-law theorizing.⁷³ The work as a whole has been criticized as confused; the particular confusion in

69 2 COMMENTARIES *14, *391-95.

70 *Id.* *393.

71 4 COMMENTARIES *382.

72 See *supra* text accompanying note 55.

73 For natural law in the *Commentaries*, see ERNEST BARKER, TRADITIONS OF

our case has been said to result from "a superficial overlay of Roman law usage, which conceived *dominium*, or ownership, as complete, on English common law, where this concept does not work at all."⁷⁴ In a more charitable (though hardly flattering) vein, it has been said that the "shallow theorizing" of Blackstone's introductory remarks was "designed merely to guide the general reader painlessly and uncontroversially into more rigorous matters."⁷⁵

Putting a positive cast on the matter, "sole and despotic dominion" may have been an accurate reflection of contemporary natural-law thought as it appeared to Blackstone, even as it was opposed to the actual law of the time. "The force of property is such," thus the English translation of Pufendorf available in Blackstone's time, "that we may at our pleasure dispose of the things which we hold by this Right, and may keep any other Person from the use of them."⁷⁶ In England, it seems, the recognition of a distinction between ideal property and the property of positive law was something of a convention in legal writing by Blackstone's time. Already in the early Stuart period, one writer defined property as "the highest Right that a man hath, or can have to any thing, and no wayes depending upon any other mans curtesie," but then went on to note that no land in England was held as property in this sense.⁷⁷

CIVILITY 309-11 (1948); H.L.A. Hart, *Blackstone's Use of the Law of Nature*, 1956 BUTTERWORTH'S S. AFR. L. REV. 169; Hans-Justus Rinck, *Blackstone and the Law of Nature*, 2 RATIO 162 (1960). On the Roman-law, "institutional" ambitions, see Cairns, *supra* note 9; Michael Lobban, *Blackstone and the Science of the Law*, 30 HIST. J. 311 (1987); Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795 (1988).

74 Whelan, *supra* note 6, at 128 n.15 (discussing NOYES, *supra* note 7); see NOYES, *supra* note 7, at 296-97.

75 I.G. Doolittle, *Sir William Blackstone and His Commentaries on the Laws of England (1765-9): A Biographical Approach*, 3 O.J.L.S. 99, 100 (1983).

76 BARON PUFENDORF, OF THE LAW OF NATURE AND NATIONS, IV.iv.2, at 362 (Basil Kennett trans., London, J. Walthoe et al. 1729) (1672). The original referred not to property, but to dominion, a crucial distinction: "Caeterum ea est vis dominii . . ." SAMUELIS PUFENDORFII, DE JURE NATURAE ET GENTIUM LIBRI OCTO, IV.iv.2, at 363 (Amsterdam, 1688); see the 1934 Oldfather translation of the same, SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 533 (C.H. & W.A. Oldfather trans., Clarendon Press 1934) [hereinafter PUFENDORF]. Yet it is possible that Blackstone's characterization of property was nonetheless influenced by Pufendorf, as claimed by JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 72-73 (1980), perhaps by way of the Kennett translation.

77 JOHN COWEL, NOMOTHETES, THE INTERPRETER 208 (London, Richard Atkins et al. 2d ed. 1684) (1607), cited (from the 1st edition) in G.E. Aylmer, *The Meaning and Definition of "Property" in Seventeenth-Century England*, 86 PAST & PRESENT 87, 89 (1980). See also LARKIN, *supra* note 7, at 52-56.

Later writers made the same point.⁷⁸ Other thinkers defined "full property" as the right to use and dispose of something at the owner's pleasure.⁷⁹

Now these latter authors, strictly speaking, did not necessarily hold that property was something like Blackstone's sole and despotic dominion as an analytical matter; all they said was that a property right — whatever its content or scope, no matter how slender the stick — gave its owner the liberty to use it as he would. For instance, Pufendorf, immediately after his expansive definition of property/dominium, noted that "nothing prevents, and, indeed, it very often happens, that the same thing belongs to different persons according to different ways of holding it."⁸⁰ Yet the tenor of liberal, Enlightenment thought on property, culminating in the French Revolution, did at times seem to advocate a view of property as absolute control over an object (typically land) by a private owner,⁸¹ and Blackstone may have subscribed to this antiroyalist view of the liberal role of property.⁸² It is thus possible that the "sole and despotic dominion" apostrophe represented for Blackstone the enlightened view of the true essence of property, so that his preface of the medieval-influenced English law of property with this bold statement, while seemingly odd in the context of Book II, is in keeping with his practice of prefacing discussions of positive law with accounts of ideal natural law, without the former being influenced by the latter.⁸³

A variant approach is suggested by a comment made by Whelan on the "sole and despotic dominion" notion in Blackstone: "In light of what follows, the opening assertion appears almost an ironic allusion to popular or unsophisticated usage."⁸⁴ Indirect support for this notion is provided by Lord Kames's *Historical Law-Tracts*. Writing, roughly contemporaneously with Blackstone, of the primitive conception of property which he believed was dominant in ancient times, he noted that "To this day the vulgar can form no distinct conception of property, otherwise than by figuring the man in possession, *using the subject without control, and according to*

78 See discussion in Aylmer, *supra* note 77, at 89-94.

79 See LARKIN, *supra* note 7, at 102-03; Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations: An Introductory Essay*, in WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 1 (Istvan Hont & Michael Ignatieff eds., 1983).

80 PUFENDORF, *supra* note 76, IV.iv.2, at 533 (at 363 in the original).

81 See LARKIN, *supra* note 7, at 104-05, 216; SCHLATTER, *supra* note 11, at 218, 231-32.

82 My thanks to Joshua Getzler for this point.

83 See J.M. Finnis, *Blackstone's Theoretical Intentions*, 12 NAT. L.F. 163, 169-70 (1967); Rinck, *supra* note 73, at 176.

84 Whelan, *supra* note 6, at 119.

his own will."⁸⁵ It is thus possible that the supposed paean to property in Blackstone was in reality his way of mocking a vulgar conception of property extant at the time, a possibility perhaps further buttressed by his references to "the imagination" (as opposed to the intellect?), the "affections of mankind" (as opposed to those of the bar), and the sweeping exaggeration of "in total exclusion of the right of any other individual in the universe."⁸⁶ Or it is possible that Blackstone is poking fun less at common usage than at learned opinion;⁸⁷ perhaps one can detect in these same words shades of conservative, lawyerly disapproval of natural-law scholasticism or revolutionary enthusiasm. Either way, it bears noting that examining a subject by opening with a sweeping statement like Blackstone's "There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property," and then proceeding to an extended analysis, seems to have been something of a literary convention in contemporary philosophical writing. Hume opened his discussion of causation with: "There are no ideas, which occur in metaphysics, more obscure and uncertain, than those of *power, force, energy* or *necessary connexion.*"⁸⁸ Similarly, Paley's argument for God's existence begins with commonsense notions and then subjects them to philosophical scrutiny.⁸⁹

Whatever the explanation, Barker's comment on Blackstone's use of ideas of the laws of nature in his general introduction is equally applicable to his "sole and despotic dominion" characterization of property in the introduction to Book II: "It is true that he contradicted them afterwards, and contradicted them flatly, in the *Commentaries* themselves; but it was easy to read and absorb and quote the earlier *dicta* of Blackstone without noticing, or perhaps even reading, the later course of his argument."⁹⁰

85 HENRY HOME, LORD KAMES, *HISTORICAL LAW-TRACTS* 83 (Edinburgh, A. Kincaid 2d ed. 1761) (emphasis added).

86 See 2 *COMMENTARIES* *2. For "imagination" as opposed to "substantial" considerations, see Blackstone's contemporary Gibbon on the motivations of Roman legionaires. 1 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 38 (Folio Society 1983) (1776).

87 See *supra* text accompanying notes 77-83.

88 DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 50 (Tom L. Beauchamp ed., Oxford Univ. Press 2000) (1748). My thanks to Jeremy Waldron for pointing out this similarity.

89 WILLIAM PALEY, *NATURAL THEOLOGY, OR, EVIDENCE OF THE EXISTENCE AND ATTRIBUTES OF THE DEITY* (London, J. Faulder 13th ed. 1810) (1802). My thanks to David Lieberman for pointing me to Paley.

90 BARKER, *supra* note 73, at 309.

IV

Yet in the two centuries following the publication of the *Commentaries*, what happened was precisely the opposite. What lawyers, judges and scholars noticed and appreciated when they read the work was not the glib "sole and despotic dominion" dictum, but Blackstone's learned and wide-ranging discussion of the various unbundled sticks, and of community rights in property.

We have already had occasion to refer to *Steel v. Houghton*, decided just a few years after Blackstone's death.⁹¹ In this case, some of the poor of the Suffolk parish of Timworth, sued by Steel for entering his field to glean leftover stalks after the barley harvest, claimed as justification their right to glean. The case was argued in two successive terms in 1787 and seriatim opinions were handed down by all four justices of the Common Pleas, a comparatively unusual occurrence. Sir Henry Gould, Blackstone's former colleague on the bench, was the only one of the judges to side with the defendants, invoking a wide range of sources (from Leviticus and Selden's discussion of Jewish law to a recent enclosure statute), including "that eminent Judge, Mr. Justice Blackstone, a text writer," from whom he cited the passage on the right to glean and "mosaic law" quoted above.⁹² Justices Gould and Wilson ruled that the Judaic right to glean had not been received into the common law, under which it was an obligation of conscience, or at best a local custom. Both dismissed Blackstone's mention of the practice as unauthoritative, Gould based on what he saw as Blackstone's unenthusiastic language, and Wilson because Blackstone was ultimately relying on a statement by Hale, which the majority viewed as dictum.⁹³ Most interesting for our subject is the opinion of Lord Loughborough, the Chief Justice. Agreeing that the law of Moses was not legally obligatory, he also provided a theoretical reason for his opposition to recognizing a right to glean: it would be "inconsistent with the nature of property which imports exclusive enjoyment."⁹⁴ A more "Blackstonian" judicial sentiment is hard to imagine, yet his is the only opinion of the four in which no mention of Blackstone is made. For his contemporaries and successors, Blackstone was associated with the messy bundles of rights

91 1 H. Bl. 51, 126 Eng. Rep. 32 (C.P. 1788), *discussed supra* text accompanying notes 51-52.

92 *Id.* at 54, 126 Eng. Rep. at 34 (citing 2 COMMENTARIES *212-13), *quoted supra* text accompanying note 50.

93 *Id.* at 59-63, 126 Eng. Rep. at 37-39.

94 *Id.* at 52, 126 Eng. Rep. at 33.

reflective of actual English property law, not with the "exclusive enjoyment" view.

In other English cases, too, when Blackstone was cited by counsel and court in the context of property law, it was often for the esoteric (but sometimes still practical) bits of this law: for commons of piscary,⁹⁵ the length of time which a parson or vicar could let the land of his glebe,⁹⁶ whether a "feme sole trader in London" could be a bankrupt,⁹⁷ royal ownership of game on otherwise private lands,⁹⁸ water as common property incapable of private ownership,⁹⁹ customary rights of copyholders,¹⁰⁰ forfeiture of land held by aliens,¹⁰¹ the distinction between demesne and tenemental lands,¹⁰² whether an advowson passed to the administrator or the successor of the deceased,¹⁰³ and the like. In these cases, as in *Steel*, Blackstone was an authority for the situations of split control over an asset, and for venerable rights of the community. It appears that only a sprinkling of English law journal articles — and not one English case¹⁰⁴ — have ever cited Blackstone's "sole and despotic dominion."

The powerful influence exerted by Blackstone on early American law is legendary.¹⁰⁵ So is the extreme solicitude of early Americans for private

95 *Lloyd v. Jones*, 6 C.B. 81, 84-85, 136 Eng. Rep. 1182, 1183 (C.P. 1848) (citing 2 COMMENTARIES *34). *See supra* text accompanying note 57.

96 *Jenkins v. Green*, 28 Beav. 87, 54 Eng. Rep. 299 (M.R. 1859) (citing 2 COMMENTARIES *318).

97 *Lavie v. Phillips*, 3 Burr. 1777, 1779, 97 Eng. Rep. 1094, 1095 (K.B. 1765) (citing 2 COMMENTARIES *477).

98 *Falkland Islands Co. v. R.*, 2 Moore N.S. 267, 269, 15 Eng. Rep. 902, 903 (P.C. 1863) (citing 2 COMMENTARIES *415).

99 *Mason v. Hill*, 5 B. & Ad. 1, 22-23, 110 Eng. Rep. 692, 700 (K.B. 1833) (citing 2 COMMENTARIES *14, *18).

100 *Salisbury v. Gladstone*, 9 H.L.C. 692, 694, 11 Eng. Rep. 900, 901 (H.L. 1861) (citing 2 COMMENTARIES ch. 6).

101 *Lyons Corp. v. E. India Co.*, 1 Moo. Ind. App. 175, 239-40, 18 Eng. Rep. 66, 91 (P.C. 1836) (citing 2 COMMENTARIES *249).

102 *A.G. v. Parsons*, 2 C. & J. 279, 308, 149 Eng. Rep. 120, 132 (Ex. 1832) (citing 2 COMMENTARIES *90).

103 *Mirehouse v. Rennell*, 1 Cl. & Fin. 527, 535, 576, 6 Eng. Rep. 1015, 1019, 1034 (H.L. 1833) (citing 2 COMMENTARIES *24).

104 Based on the following searches in the HeinOnline English Reports library: "despotic dominion"; "2 Com. 2" and Blackstone; dominion and Blackstone; "total exclusion" and Blackstone; and a search in the LexisNexis England and Wales Reported and Unreported Cases database for "despotic dominion."

105 *See* Alschuler, *supra* note 6, at 4-19; GLENDON, *supra* note 2, at 23; Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

property, and a connection between the two seems natural to many.¹⁰⁶ Yet early American law was replete with limitations and qualifications on private property,¹⁰⁷ and the use made of Blackstone in the courts reflected this, just as it did in English tribunals. Blackstone was seen in the generations following the *Commentaries*' publication as an authority not for the "sole and despotic dominion" view of property, but for those doctrines that undercut it, creating community property relationships.¹⁰⁸ As such, Blackstone is cited on joint and common ownership,¹⁰⁹ on the liability of a partner for debts of the partnership,¹¹⁰ on mortgages,¹¹¹ bottomry,¹¹² rents,¹¹³ waste,¹¹⁴ estates

106 See, e.g., ALEXANDER, *supra* note 2, at 87; GLENDON, *supra* note 2, at 24-26; Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248, 248 (1973); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 224 (1965); David Schultz, *Political Theory and Legal History: Conflicting Definitions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 475-77 (1993).

107 See William Fisher, *The Law of the Land* ch. 3 (1991) (unpublished Ph.D. thesis, Harvard University) (on file with author); Gordon, *supra* note 6, at 96-101; McDONALD, *supra* note 6, at 13-36; WILLIAM NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

108 In *Stevens v. State*, 2 Ark. 291 (1840), the court cited Blackstone's statement that a person's right of property "consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land," 1 COMMENTARIES *138, — but in support of the state's right to tax (billiard tables). Moreover, this sentence of Blackstone relates not the analytical question of the shape of a property right, but to the state's right to impinge on property rights, whatever they may be; see discussion *supra* text accompanying notes 7-8.

109 *Dorsey's Ex'rs. v. Dorsey's Adm'r.*, 4 H. & McH. 231 (Md. 1798) (citing 2 COMMENTARIES *399); *Ambler v. Norton*, 14 Va. 23 (1809) (citing 2 COMMENTARIES *138). See also the note at the end of *Ambler v. Wyld*, *Wythe* 235 (Va. 1793) (citing 2 COMMENTARIES *182);

110 *Parish v. Syndics of Phillips*, 1 Mart. (O.S.) 61, 63 (Orleans Terr. 1809).

111 *Harrison v. Eldridge*, 7 N.J.L. 392, 405-06 (Sup. Ct. 1801) (citing 2 COMMENTARIES *158).

112 *The Aurora*, 14 U.S. 96 (1816) (citing 2 COMMENTARIES *457); *The Draco*, 7 F. Cas. 1032, 1039 (D. Mass. 1835) (same).

113 *Newton v. Wilson*, 13 Va. 470 (1809) (citing 2 COMMENTARIES *41); *Den ex dem. Farley v. Craig*, 15 N.J.L. 191, 193 (N.J. 1836).

114 *Moore v. Ellsworth*, 3 Conn. 483, 487 (1821) (citing 2 COMMENTARIES *281).

and remainders,¹¹⁵ charitable trusts,¹¹⁶ adverse possession,¹¹⁷ nuisance,¹¹⁸ and commons of piscary,¹¹⁹ estover¹²⁰ and pasture.¹²¹ (It should be noted, too, that contrary to the claim that the Blackstonian view of property was to blame for the acceptance of slavery in U.S. law, when Blackstone was cited in the context of slavery, it was more often than not for his view that a slave landing in England became free.¹²²)

The "Blackstonian conception" of property as absolute dominion appeared on the judicial scene relatively late. Counsel for plaintiff in a case challenging a municipal tax cited "sole and despotic dominion" in an 1837 Virginia case, but the court rejected the claim without referring to it.¹²³ Apparently the earliest decision to refer to it was an Alabama prohibition case of 1859, in which the court reasoned that alcoholic beverages were property since "they are things over which a man may exercise absolute dominion, to the exclusion of every other person."¹²⁴ After that, sole and despotic dominion appears in reported cases only three more times before 1900. The ensuing century saw eleven references to the phrase, seven of them between 1900 and 1921. Recently, there seems to have been something of a mini-revival, with the phrase appearing three times in the past decade. In all, "sole and despotic dominion" seems to have been referred to only sixteen times in the entire course of American case law; in five of these, Blackstone is not

115 *Bradley v. Mosby*, 7 Va. 50 (1801) (citing 2 COMMENTARIES *398); *Keen v. Macey*, 6 Ky. 39 (1813) (same); *Hudson v. Wadsworth*, 8 Conn. 348, 359 (1831) (citing 2 COMMENTARIES *168-69).

116 *Trustees of the Philadelphia Baptist Assn. v. Hart's Ex'rs.*, 17 U.S. 1 (1819) (citing 2 COMMENTARIES *268, *376).

117 *Robinson v. Campbell*, 16 U.S. 212 (1818) (citing 2 COMMENTARIES *196); *Griswold v. Butler*, 3 Conn. 227, 233 (1820) (citing 3 COMMENTARIES *188).

118 *Merritt v. Brinkerhoff*, 17 Johns. 306 (N.Y. Sup. Ct. 1820) (citing 3 COMMENTARIES *218).

119 *Rogers v. Jones*, 1 Wend. 237 (N.Y. Sup. Ct. 1828) (citing 2 COMMENTARIES *21, 32, 34).

120 *Van Rensselaer v. Radcliff*, 10 Wend. 639, 649 (N.Y. Sup. Ct. 1833) (citing 2 COMMENTARIES *33-34).

121 *Thomas v. Inhabitants of Marshfield*, 30 Mass. 240, 248 (Sup. Ct. 1832) (citing 2 COMMENTARIES *33).

122 1 COMMENTARIES *127. *See, e.g.*, *Mahoney v. Ashton*, 4 H. & McH. 295, 324 (Md. 1799); *State v. Boon*, 1 N.C. 191, 194 (1802); *Jones v. Wooten*, 1 Del. 77, 85 (1833).

123 *Goddin v. Crump*, 35 Va. 120.

124 *Dorman v. State*, 24 Ala. 216. The decision went on to explicitly cite the full "despotic dominion" sentence from Blackstone, though it replaced "sole" with "safe."

even cited as the source.¹²⁵ Moreover, when "sole and despotic dominion" was invoked, with few exceptions it was in connection with the question of government intervention in property rights; very rarely was it cited as describing what a property right is — what I have called the analytic dimension of the Blackstonian conception.¹²⁶

The phrase was practically absent from American legal literature as well. In an essay called "Property," Madison wrote that the term "in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual,'" but this was really only an introduction to an argument that in "its larger and juster meaning," the term referred to rights such as freedom of speech, religion and person.¹²⁷ A perusal of treatises by Kent, Story and Angell reveals that Blackstone was often cited in the context of property law, but, as with American case law, for what he had to say about the intricacies of doctrine, rather than for any absolutist view of property. (Herman Melville, too, had this view of Blackstone. In a humorous scene, "a very learned . . . gentleman, with a copy of Blackstone under his arm," invokes what is portrayed as a bizarre and exotic rule of common law — the right of the Lord Warden of the Cinque Ports to take the whale hunted by some English mariners.¹²⁸)

The HeinOnline database of law journals contains only one mention of the phrase in the antebellum period and three more before the turn of the twentieth century, and the phrase is entirely absent from the works in the "Legal Classics" database. In the antebellum piece, a combative, proto-Hohfeldian article on landlord-tenant relations¹²⁹ apparently written

125 See, e.g., *Bd. of Comm'rs v. Rocky Mtn. News Printing Co.*, 61 P. 494, 496 (Colo. App. 1900) (citing Anderson's Law Dictionary).

126 See *supra* text accompanying notes 7-8. Two "analytic" examples are *Dorman v. State*, discussed *supra* at note 124, and *Perry v. Norton*, 109 S.E. 641 (N.C. 1921), in which the plaintiff alleged that he exercised "a sole, and even despotic, dominion" over a house that had been promised to him.

127 14 JAMES MADISON, *Property*, in PAPERS 266 (William T. Hutchinson et al. eds., Univ. of Chi. Press 1977) (1792), available at press-pubs.uchicago.edu/founders/documents/v1ch16s23.html.

128 HERMAN MELVILLE, *MOBY DICK* ch. 90 (1851). See 1 COMMENTARIES *216, *280; 2 COMMENTARIES *403.

129 *Distress for Rent in Virginia*, 4 AM. JURIST & L. MAG. 233 (1830) [hereinafter Trist]. Anticipating Realist descriptions of property as variable rights in relation to an asset, the article explained:

By an exclusive interest in a thing, we mean an exclusive right to *commit certain acts in relation thereto*: the acts, for instance, of eating an apple, of occupying a house, of sowing and reaping a field. This is the general idea, of appropriation: the object or thing is made proper, or *appropriated* to a particular

by Jefferson's student (and grandson-in-law) Nicholas Trist,¹³⁰ "sole and despotic dominion" came under frontal attack possibly for the first time, though the attack came in an offhanded way, as befitting a concept that had not yet achieved canonical status. Complaining that Blackstone did not provide a proper definition for property, the author dismissed "sole and despotic dominion" as a "vague notion," unrelated to any "strict analysis of the subject."¹³¹ (Perhaps support for the explanation that Blackstone was referring to common or vulgar conceptions of property?¹³²)

V

The first half of the twentieth century saw little change — until 1960, altogether thirteen uses of the phrase in all the American legal journals covered by HeinOnline. Thereafter, things began to change quickly. The sixties saw fourteen American citations, the seventies twenty-six, the eighties thirty-eight. Then, an explosion: 90 citations in the nineties, and 140 from 2000 through May 2008 (plus two by articles in this journal).¹³³ Part of this increase is no doubt due to an increase in the overall number of law journal articles, but the increase in citations of "sole and despotic dominion" from the 1950s to the 1990s outstrips the increase in articles mentioning Blackstone in any context by a factor of ten.¹³⁴

individual; and is called *property*, (a word, the ambiguity of which, by the by, could be easily shown to have caused much vagueness and confusion of ideas). The individual is called its *proprietor*, or *owner*; or is said to have a property therein, &c We may further remark that the heads into which [this subject] naturally divides itself are these: 1. What things are appropriated — what things are the *objects* of property or exclusive interest? 2. What are these exclusive interests? what are the acts, an exclusive right to commit which, constitutes these interests? 3. Who are the proprietors — the persons in whom the laws recognize these exclusive interests? To the one or the other of these heads, do all rules of property relate.

Id. at 256-57. On these three heads of property law, compare Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. (forthcoming 2008).

130 See THERESA SALASAR ET AL., NICHOLAS PHILIP TRIST: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS 13 (2005), available at lcweb2.loc.gov/service/mss/eadxmlmss/eadpdfmss/2006/ms006012.pdf.

131 Trist, *supra* note 129, at 256.

132 See *supra* text accompanying notes 84-86.

133 The figure for 2000 and on is based on a search in the LexisNexis "US Law Reviews and Journals, Combined" database.

134 According to HeinOnline, 2,044 articles in the decade 1950-1959 mentioned

Whence this newfound popularity¹³⁵ for the pithy but hoary phrase, which apparently had all but been forgotten for two centuries? Though I have no way of proving it, my intuition is that "sole and despotic dominion" was popularized through the good offices of Felix Cohen.¹³⁶ In his influential *Dialogue on Private Property*,¹³⁷ published (posthumously) in the mid-1950s, Cohen laid out a Realist and pragmatist view of the nature of property, using a series of historical personages as foils.¹³⁸ He has his student, Delaney, quote the "sole and despotic dominion" sentence, and then asks him:

C. Well, now in the world we live in, could you point to any examples of property in Blackstone's sense of "sole and despotic dominion . . . over the external things of the world, in total exclusion of the right of any other individual in the universe?"

D. No, I don't think I could.

...

C. . . . In fact, private property as we know it is always subject to limitations based on the rights of other individuals in the universe Property in the Blackstonian sense doesn't actually exist either in communist or in capitalist countries.¹³⁹

The popularity of "Blackstonian property" in the post-Cohen era, it seems to me, derives from its usefulness to two competing but symbiotic strands of thought on property that have gained popularity in recent decades, for both of which the "Blackstonian" view of property is useful not only for its content and style, but for its age.¹⁴⁰

Blackstone, while 6,548 did so between 1990 and 1999, an increase of 220%. In the same periods, mentions of "sole and despotic dominion" increased from 4 to 90 — an increase of 2,150%.

135 See J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 799 (1996) (the phrase is "both over-quoted and over the top").

136 My intuition rests on the popularity of Cohen's article, and the fact that while "sole and despotic dominion" was hardly quoted in journal articles before his article, it was cited twelve times in the decade following publication of his article. Framed differently, the phrase was cited seven times in the half-century before the *Dialogue*, and nearly 300 times in the ensuing half-century.

137 Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954).

138 Though my colleague Roy Kreitner sees the *Dialogue* as an expression of legal-process thought more than an example of Realist analysis, it seems to me that Cohen's demolition of received notions of property is classic Realism.

139 Cohen, *supra* note 137, at 362.

140 Cf. ALEXANDER, *supra* note 2, at 322 (making a similar point about Hohfeld's conception of ownership).

First, beginning with Cohen himself, there is a sort of Whiggish tradition of treating Blackstone as the exemplar of a supposedly pre-modern, outdated conception in which property was thought of as absolute dominion, incapable of incorporating the social values demanded by modern life. With increasing frequency in the ensuing years, "sole and despotic dominion" has been held up as an outmoded view, oblivious to necessary land-use and environmental regulation, or expressing a primitive view of what is obviously a much more complex institution.¹⁴¹ There is an undertone in some of the Realist and critical writing, if not in Cohen himself, that makes it seem that for many Blackstone's old-world pedigree merely contributes to his irrelevance to modern conditions — a relic in the machine age of a foreign and pre-modern milieu.¹⁴²

For the competing school of thought, it is precisely Blackstone's age which imbues "sole and despotic dominion" with special normative appeal.¹⁴³ In a curious twist, the dominant Realist view of property as a bundle of rights as an *analytical* matter has been combined with a claim that its nemesis — "Blackstonian property" — represents the actual bundle of

141 See, e.g., Richard R.B. Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135 (1963); Neal A. Roberts, *Beaches: The Efficiency of the Common Law and Other Fairy Tales*, 28 UCLA L. REV. 169 (1980); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 637 (1988).

142 I think a common portrait of Blackstone makes this point:



See NOYES, *supra* note 7, at 297 ("sole and despotic" passage "today . . . seems to us so extravagant as to be laughable"). Cf. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997) (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

143 Cf. MERTON, *supra* note 5, at 5, 312-13.

rights inherent in ownership as a matter of *positive* law. The argument is that while property can indeed, analytically speaking, be broken down into myriad interpersonal juridical relationships, in fact, *historically* speaking, as evidenced by Blackstone's "sole and despotic dominion" description, ownership under the "common law" at the time of the adoption of the American Bill of Rights consisted of as large a bundle of rights as possible (i.e., as is consistent with like bundles for other owners, as mediated through the law of nuisance).¹⁴⁴ Thus is Blackstone's famous statement constitutionalized, and the hundreds of pages of opposing doctrine relegated to a historical curiosity which no one reads anymore.

These competing visions of the bewigged Blackstone raise the issue of the role played by memory and the rhetoric of history in legal discourse, particularly in property theory. More specifically, it seems that when discussing issues concerning the relationship between community and property, the remembrance of things past (typically distorted) plays a very prominent role. As intimated at the beginning of this Article, I am quite sure that calling absolute dominion the "Marxian," or the "French Revolutionary," or even the "Epsteinian" conception of property would not do the same work as does the "Blackstonian conception," neither for the critical school nor for the property-rights camp. There is something about Blackstone which lends the absolute dominion view either an august respectability, or a sort of archaic and pompous ridiculousness, depending on one's point of view.

Yet the aim of this Article has been to show that both views are misguided: Property for Blackstone was not truly identified with absolute dominion, but was a complex set of institutions that supported and reflected community at various scales: the family, the village, the parish, business relationships and more. Jurists throughout the years recognized this. It is only in recent years, and particularly in the United States, that something like a consensus has emerged that there was, in earlier times, a Blackstonian conception of property that made no room for community. Perhaps this realization will encourage advocates of community in their efforts (even as it dulls some of the modernist luster of their cause). I hope it will also put another nail in the coffin of the view that we have fallen from some property-rights Eden of "sole and despotic dominion."

144 See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 23 (1985); the best-known judicial expression of this view is *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). For a bizarre combination of property-rights and Christian natural-law rhetoric, see ROBERT D. STACEY, *SIR WILLIAM BLACKSTONE AND THE COMMON LAW: BLACKSTONE'S LEGACY TO AMERICA* (2003).