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Bruce P. Frohnen
Cornell University

Charles J. Reid Jr.
Emory University School of Law

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Diversity In Western Constitutionalism: Chartered Rights, Federated Structure, And Natural-law Reasoning In Burke's Theory Of Empire

Bruce P. Frohnen*
Charles J. Reid, Jr.**

I. INTRODUCTION

Britain in the latter decades of the eighteenth-century was well along the path to becoming an imperial power, with commercial interests and rivalries stretching from the South Pacific, to the Indian subcontinent, to the Atlantic coast of Africa, and thence to the Caribbean and North America.¹ Indeed, the American War of Independence represented only a brief interlude in this period of expansion, and its conclusion only served to open new opportunities to British merchants and manufacturers.²

British thinkers were accordingly being forced to come to terms with a novel and important problem: how to govern an empire comprised of European and non-European peoples with vastly different cultures and histories?³ One important answer to this question was provided by Edmund Burke, eighteenth-century parliamentarian and political thinker. Born in Ireland in 1729 of a Catholic mother and a father who had only recently—and in all probability only nominally—converted to Protestantism, Burke was himself an outsider in both an ethnic and social sense.⁴ Burke attended college in Dublin, and subsequently received substantial legal training at the Inns of Court in London, although he preferred as a young man to pursue a career as

* B.A., California State University, Sacramento, 1984; M.A., University of California, Davis, 1985; M.A., Cornell University, 1987; Ph.D., Cornell University, 1988; J.D., Emory University, 1993. Dr. Frohnen is a legislative analyst and speech writer on the staff of Senator Spencer Abraham (R.-Mich.).

** B.A., University of Wisconsin-Milwaukee, 1978; J.D., the Catholic University of America, 1985; M.A., Cornell University, 1987; Ph.D., Cornell University, 1995. Dr. Reid is Research Associate in Law and History, Emory University School of Law.

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1. See RICHARD BROWN, *SOCIETY AND ECONOMY IN MODERN BRITAIN 1700-1850*, 163 (1991) ("After 1750 both the amount of trade and the rate of growth showed dramatic increases. Between 1750 and 1770 the average rate of growth was 1.7 per cent per annum and between 1770 and 1800 2.6 per cent annually.").

2. *Id.* at 164.

3. It must be borne in mind that in the eighteenth century "the almost unquestioningly positive imperialist spirit we associate with the Victorian empire was a thing of the future." See FREDERICK G. WHELAN, *EDMUND BURKE AND INDIA: POLITICAL MORALITY AND EMPIRE* 19 (1996).

4. On the details of Burke's parentage, see CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE* 3-11 (1992).

a writer.⁵ Raised in modest economic circumstances, Burke experienced financial difficulties nearly all of his life.⁶ Whether this background and its attendant experiences made him the willing mouthpiece of “traditional landed aristocracies” or “a defender of the oppressed and an opponent of power when wielded arbitrarily” need not be resolved here.⁷ No doubt, however, this background conferred on Burke an acute awareness of what it meant to be subject to distant and arbitrary authority. Unlike most of his contemporaries in British politics, Burke was raised in what was in many respects a colonial setting, among a people grown restive at English domination.⁸

By the late 1750s Burke was actively attempting to chart a political career for himself. In 1759, he took a position as assistant to William Gerard Hamilton, a leading member of Parliament, and, after quarreling with Hamilton, in the summer of 1765 became personal secretary to Charles Watson Wentworth, the Second Marquis of Rockingham, the Lord of the Treasury and the prime minister of England.⁹ He was elected to Parliament in his own right in December, 1765, and almost at once came to prominence with a speech on American affairs.¹⁰ Much of Burke’s subsequent career—he would serve in Parliament until retiring in 1794—would be taken up with debates on the proper response to empire—whether it be India, Ireland, or America.

This Article hopes to provide insight on Burke’s whole notion of empire, but also intends to shed light on his understanding of chartered rights, constitutionalism, and natural law. The question of empire is, of course, a perennially important one, but it is made more urgent today by the rise of a world that features, on the one hand, political domination by a single “superpower,” and, on the other, a newly heightened sense of cultural awareness among non-Western peoples.¹¹ One should thus not find

5. On this background, see STANLEY AYLING, *EDMUND BURKE: HIS LIFE AND OPINIONS* 1-22 (1988).

6. See *id.* at 23-38 (discussing the vicissitudes of Burke’s fortune).

7. This is the problem framed by WHELAN, *supra* note 3, at 8. Very likely, it helped make Burke “one of the first major Western thinkers to grapple with the moral and political problems of European empire over non-Western nations.” *Id.* at 5.

8. See JOHN O’BEIRNE RANELAGH, *A SHORT HISTORY OF IRELAND* 33-34 (2d ed. 1994) (noting that Ireland has experienced a turbulent relationship with Great Britain since the twelfth century, when Pope Adrian IV, by the terms of the decree *Laudabiliter* conferred on Henry II the right to rule in Ireland). Matters became particularly bloody in the mid-seventeenth century, during the Protectorate of Oliver Cromwell, who made it English policy to resettle Protestant loyalists in Ireland at the expense of the native Irish population. *Id.* at 60-65. The Irish Catholic population in the late seventeenth and eighteenth centuries were subjected to a series of legal disabilities, called collectively the “Penal Laws,” that stripped them of most of their civil rights. *Id.* at 67-77.

9. On biographical details, see O’BRIEN, *supra* note 4, at 39, 44-48; see also AYLING, *supra* note 5, at 16-24 (chronicling Burke’s accomplishments).

10. See O’BRIEN, *supra* note 4, at 50 (discussing Burke’s election); *id.* at 107-08 (reacting to Burke’s first speech); see also AYLING, *supra* note 5, at 26 (explaining the impression Burke made in his first months in Parliament).

11. Influential thinkers have recently argued for the consolidation of an American global hegemony to ensure world order. Thus Charles Krauthammer has written: “The center of world power is the unchallenged superpower, the United States, attended by its western allies Our best hope for safety . . . is in American strength and will—the strength and will to lead a unipolar world, unashamedly laying down the rules of world order

it surprising that Burke's writings on imperial relations are now being discussed as a foundation for future world order.¹²

But Burke's writings on empire are also a chief source for much contemporary constitutional and jurisprudential analysis since it was in the cauldron of debate over imperial governance that Burke articulated his more basic constitutional and philosophical concerns. Scholars have looked to this body of work for inspiration in resolving pressing constitutional controversies,¹³ as a means of criticizing contemporary conservative legal thought,¹⁴ and as a source of basic constitutional principles.¹⁵ Others have looked to Burke's traditionalism as a foundation for American thought on the process of adjudication and the doctrine of precedent.¹⁶

and being prepared to enforce them." See Charles Krauthammer, *Unipolar Moment*, in *RETHINKING AMERICA'S SECURITY: BEYOND COLD WAR TO NEW WORLD ORDER* 56-57 (Graham Allison and Gregory F. Treverton, eds., 1992). William Kristol and Robert Kagan, similarly, have argued that America's international role should aim toward "benevolent global hegemony." See William Kristol & Robert Kagan, *Toward a Neo-Reaganite Foreign Policy*, *FOREIGN AFFAIRS* 20 (July/August, 1996). Cf. LEA BRILMAYER, *AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD* (1994) (arguing that if American hegemony is necessary, it ought to follow basic principles of political liberalism, such as respect for human rights); Fernando R. Teson, *International Ethics for a New Era: The Problem of the Kind World Policeman*, 16 *MICH. J. INT'L L.* 681, 681 (1995) (reviewing Brilmayer).

At the level of political theory, one sees a division between those who argue that with the collapse of the competing ideology of Soviet-style communism, we have reached the end of history, i.e., the completion of the dialectic that gave shape and substance to Western political liberalism, and those who claim that we are entering a new world of cultural rivalry and political fragmentation. See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (arguing for the "end of history"); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) (arguing that we are entering a new period of global competition centered on competing civilizations); Samuel P. Huntington, *The West: Unique, Not Universal*, *FOREIGN AFFAIRS* 28 (Nov./Dec., 1996) (arguing for the uniqueness of Western political experience); BENJAMIN F. BARBER, *JIHAD vs. McWORLD* (1995) (exploring the clash between cultural integrity and economic development); ROBERT D. KAPLAN, *THE ENDS OF THE EARTH: A JOURNEY AT THE DAWN OF THE 21ST CENTURY* (1996) (recounting a vivid account of contemporary political fragmentation).

12. See David P. Fidler, *Caught Between Traditions: The Security Council in Philosophical Conundrum*, 17 *MICH. J. INT'L L.* 411, 440, 445 (1996).

13. See, e.g., Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 *IOWA L. REV.* 51, 94-99 (1994) (arguing for a "Burkean" reform of free-speech practice). Cf. Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 *N.C. L. REV.* 1567, 1593-94 (1995) (examining the Burkean foundations of Niebuhr's thought).

14. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 *N.C. L. REV.* 619, 659-86 (1994) (using Burke to criticize contemporary conservative legal scholarship); James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 *U. MIAMI L. REV.* 913, 943-73 (1986) (criticizing Justice Scalia and Judges Bork, Posner, Easterbrook, and Winter in light of Burkean principles).

15. See RUSSELL KIRK, *THE CONSERVATIVE CONSTITUTION* 80-98 (1990) (reviewing Burke's influence on American constitutional principles); Russell Kirk, *Natural Law and the Constitution of the United States*, 69 *NOTRE DAME L. REV.* 1035, 1037 (1994) (examining Burke's constitutionalism). Cf. E.F. Roberts, *Book Review*, 70 *CORNELL L. REV.* 1213, 1220-21 (1985) (reviewing FERNAND BRAUDEL, *THE PERSPECTIVE OF THE WORLD* (1984)) (looking to Burke to argue that the American Revolution was the result of different interpretations of the British Constitution).

16. See, e.g., Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1047-64 (1990) (grounding his jurisprudential traditionalism in Burkean thought); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567, 1605 (1985) (considering the Burkean foundations of Bickel's

This Article, however, does not intend to draw inevitably simplistic “lessons” from Burke’s time for the proper structuring of international law, or for constitutional analysis, or for jurisprudence. In focusing our analysis on a careful reconstruction of Burke’s arguments on empire and the ways in which vastly different societies—Indian, Irish, and American—might live together under one sovereign, we are following the admonition of Martin Flaherty to avoid history “lite” when writing about constitutional development. We write rather as historians, who hope that the patient reconstruction of the arguments and ideas—indeed, the drama—of Burke’s response to empire might deepen our awareness and enrich our response to the vital issues of the day. We hope that a close study of Burke’s texts will assist in the “rediscovery of America’s formative constitutional tradition” through an examination of the ideas of a leading British statesman acutely sensitive to the American cause.¹⁷

II. THE FRAGILITY OF ORDER

Fundamentally, Burke’s prescriptions for colonial policy rest on his respect for pre-existing societies. Indeed, he believed such respect was mandated by a British Constitution which was based not only on principles of limited government and separation of powers, but on a universal, immutable natural law requiring that governors protect the varied interests of the peoples governed.¹⁸ The English were required by morality and tradition to govern their possessions in accordance with the needs of their inhabitants.¹⁹ Otherwise, they would become tyrants and undermine their own Constitution, along with the liberties it protected.²⁰

thought); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 692-93 (1993) (tracing Alexander Bickel’s philosophy to Burke); Peter Read Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073, 1077-80 (1986) (analyzing Burke’s influence on Lon Fuller). Anthony Kronman’s recent call to the legal profession to return to the ideal of the “lawyer-statesman,” who embodies a sense of prudence and wisdom, is itself influenced in part by Alexander Bickel and Bickel’s reliance on Burke. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 24-26, 50 (1993).

17. See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 528 (1995).

18. See BRUCE P. FROHNEN, *VIRTUE AND THE PROMISE OF CONSERVATISM: THE LEGACY OF BURKE AND TOCQUEVILLE* 15-41 (1993) (explaining Burke’s use of the natural-law tradition); PETER STANLIS, *EDMUND BURKE: THE ENLIGHTENMENT AND REVOLUTION* 3-61 (1990). On the relationship of the British Constitution and natural law in Burke’s mind, see *id.* at 73-74.

19. Jennifer Welsh has observed: “Most importantly, British rule over the Empire must conform itself to the ‘character and circumstances’ of the people who comprise this ‘strangely diversified mass.’” JENNIFER M. WELSH, *EDMUND BURKE AND INTERNATIONAL RELATIONS: THE COMMONWEALTH OF EUROPE AND THE CRUSADE AGAINST THE FRENCH REVOLUTION* 64 (1995) (quoting Edmund Burke, *Letter to the Sheriffs*, II WORKS 217).

20. See IAIN HAMPSHER-MONK, *THE POLITICAL PHILOSOPHY OF EDMUND BURKE* 15 (1987) (explaining that the fear of the empire degenerating into tyranny was a constant concern for those, like Burke, with classical training, since “the acquisition of empire—as the examples of Athens and Rome showed—was bound to bring about the eventual destruction of the free institutions which had given rise to it, and their substitution by a single absolute ruler.”).

Burke argued that societies are fragile and must be allowed to develop through the natural interaction of pre-existing institutions, beliefs, and practices with changing circumstances.²¹ Prudence (or practical wisdom) was the prime political virtue because it would guide the statesman in facing changing circumstances so as to maintain the coherence of his society.²² Burke also placed great weight on the importance of the contingent and the particular in forming a society.²³ On the other hand, abstract, rationalist plans for the perfection of society would tear the fragile social fabric and bring chaos.²⁴

Not all societies are worth conserving. French revolutionary society, for example, was hostile to moral order and so could not be tolerated.²⁵ But any society capable of maintaining a stable moral order deserved acceptance. Thus Burke argued that England had a moral duty to run its empire so as to preserve the fragile fabric of the societies it ruled.

Burke's theory of empire rested on three essential foundations: the need to respect the chartered rights of the members of the empire and their traditional course of dealings with the central authority; the preservation of the basic rights and liberties of the British Constitution; and the observance of the teachings of natural law.²⁶

Francis Canavan has characterized Burke's views on England's duties toward its possessions as amounting to a theory of trusteeship.²⁷ Indeed, Canavan sees trusteeship at the root of much of Burke's political philosophy. According to Canavan, "Government by the landed aristocracy is for the benefit, not of the

21. *Id.* at 36 ("The preservation of political institutions, the customs and beliefs on which they depend, and the transmission of the whole through time is, for Burke, the most important duty of the politician . . . Customs, values, and institutions are, [Burke] suggests, the very tools of the politician's trade, without which nothing can be achieved except by force and violence. They are not something to be squandered or wantonly destroyed. Not that we may not change at all, but we must change cautiously and gradually lest we disturb the complex and inscrutable balance of the parts.").

22. See FROHNNEN, *supra* note 18, at 76-80.

23. *Id.* at 50 ("The character of a people is determined, not by some metaphysical human nature, but by particular experiences. History produces a particular set of institutions and prejudices within a given society, and these institutions and prejudices determine, in large measure, the nature of the people of that society.").

24. *Id.* at 43-44.

25. See R.J. Vincent, *Edmund Burke and the Theory of International Relations*, 10 REVIEW INT'L STUDIES 205, 209 (1984).

The truth was that France, that is the robbers in possession, had gone beyond the principles of the law of nations, 'the great ligament of mankind,' to challenge the very structure of European society. They had constructed their republic on three principles fundamentally opposed to those on which all other European communities were built. It was based on Regicide, Jacobinism, and Atheism.

Id.

26. Indeed, in his thought on empire, one might see Burke as a practitioner of what Harold Berman has called "integrative jurisprudence." See generally Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988) (noting that the requirement to respect chartered rights and traditional patterns of dealing corresponds to Berman's demand to observe historical precedent; the preservation of the structure of the British Constitution corresponds to Berman's politics and policy; and the observance of the teachings of the natural law corresponds to Berman's requirement that law have a moral character).

27. See FRANCIS CANAVAN, *THE POLITICAL ECONOMY OF EDMUND BURKE: THE ROLE OF PROPERTY IN HIS THOUGHT* (1995).

aristocrats, but of the people at large, whose trustees the aristocrats are."²⁸ In Canavan's view, English overlords were to their foreign subjects what English aristocrats were to English commoners.²⁹ In both cases those with power and property were duty-bound to use their advantages for the benefit of the disadvantaged.

As proof of Burke's commitment to colonial trusteeship Canavan cites his indictment of Indian governor-general Warren Hastings for abuse of his charges: "When a British governour is sent abroad, he is sent to pursue the good of the people as much as possible in the spirit of the laws of [England], which in all respects intend their conservation, their happiness, and their prosperity."³⁰

But this sort of language also shows the limits of a mode of analysis in which Burke's theory of empire is seen as a matter of trusteeship. Trusteeship should not be understood as a general and overarching philosophical principle that can explain all of Burke's thought on empire. Rather, to the extent one may talk about trusteeship at all, it is preferable to see it as arising out of a legally binding set of obligations, much like the doctrine of trust found at common law.³¹ It is the result of past practice as well as mutual agreement and consent memorialized in charters that enumerate the rights and obligations of all concerned. Where such agreement is lacking, Burke would not impute it. Indeed, it is preferable to substitute for the word "trusteeship," the term "chartered rights."

And if the particular features of a chartered relationship are the product of a settled course of dealings and mutual consent, the relationship itself also rests on firmer ground than mere contract or convention. As Frederick Whelan has observed, the "general duty implicit in the idea of government as a trust, the duty of rulers to promote the well-being of those under their authority . . . [is] derived from natural law."³² As well, there must be a bond of affection uniting the governor and the governed. Where affection and loyalty has died, the continuance of the relationship itself is called into doubt.³³

28. *Id.* at 40.

29. *Id.* at 40-41.

30. *Id.* at 40 (quoting Burke). Burke continues: "God forbid it should be bruited from Peking to Paris, that the Laws of England are for the rich and the powerful; but to the poor, the miserable, the defenceless, they afford no resource at all." *Id.* (quoting Burke).

31. *Id.* at 39-41.

32. See WHELAN, *supra* note 3, at 280.

33. As an aside, Canavan makes the interesting point that trusteeship was of limited use in Ireland because the English rulers had an insufficient common bond of affection with the local inhabitants and governed the populace with an eye to their own private interests, rather than the common good. See CANAVAN, *supra* note 27, at 41. Cf. James Conniff, *Burke and India: The Failure of the Theory of Trusteeship*, 46 POL. RES. Q. 291 (1993) (making a similar argument about India). Conniff would like to see the "theory of trusteeship [as] perhaps the central focus of [Burke's] thought." *Id.* at 292. This Article, however, demonstrates trusteeship was never more than one aspect of a larger theory of empire and was carefully circumscribed by qualifications. Conniff is also mistaken in attempting to read into Burke a modern democratic preoccupation with procedural democracy. He argues that lack of democratic representation was the key flaw in England's trusteeship over India. *Id.* at 306-07. But Conniff's closing paragraph, in which he acknowledges the need for a commonality of interest and affection as foundational

The parts of the empire governed by the center must not be seen merely as the passive beneficiaries of the central authority's solicitude and judgment. They were their own separate societies and had their own unique interests.³⁴ Thus the English should not, in Burke's view, take over any more of their property and rights than was allowed for by the relevant charters and the necessity to maintain the well-being of possession and empire.

In addition to chartered rights, Burke looked to the English constitution as furnishing principles essential to the proper governance of Britain's imperial possessions. Most fundamentally, he took the constitution as establishing, as a matter of general principle, that all state power was of limited scope. Nongovernmental institutions, accordingly, enjoyed a substantial autonomy determined by tradition as much as by statute.³⁵ Burke advanced the same sort of claim regarding Britain's overseas possessions—they should enjoy sufficient autonomy (that is, local power and authority) to maintain the coherence of their given societies.

At the same time, however, respect for local customs must not degenerate into exploitation on the basis of alleged cultural inferiority. Burke denounced "geographical morality"—the belief that "standard practices, institutions, and conduct vary in the different societies around the world, and that moral judgments can be made only with reference to the varying cultural norms acknowledged in those societies."³⁶ Such a belief allowed rapacious British governors to excuse or rationalize their conduct by claiming that British constitutional and moral principles did not apply in their territories.³⁷

Finally, Burke looked to the natural law as a guide to the proper governance of empire. Not only did the natural law require that the promises made in charters be kept, it also set standards below which British governors must not fall. This is particularly evident, for instance, in Burke's treatment of religious persecution in Ireland, which, he charged, violated fundamental principles of human relationships.³⁸ Burke's theory of empire, based as it was on chartered rights, the English

to imperial governance, points to a problem deeper than the mechanics of politics, and one to which Burke himself looked as the key to empire. *Id.* at 307-08.

34. The same can also be said of England. Assertions that the aristocracy served as trustees for commoners occupying the position of passive beneficiaries must be balanced with the fact that numerous classes and callings had their particular rights, privileges, liberties, powers, immunities and responsibilities.

35. STANLIS, *supra* note 18, at 26. Quoting Burke as stating:

The constitution . . . says to an encroaching prerogative, your sceptre has its length, you cannot add a hair to your head, or a gem to your crown, but what an eternal law has given to it. Here it says to an overweening peerage,—your pride finds banks that it cannot overflow: here to a tumultuous and giddy people,—there is a bound to the raging sea. Our constitution is like our island, which uses and restrains its subject sea; in vain the waves roar. In that constitution I know, and exultingly feel, both that I am free, and that I am not free dangerously to myself or to others. I know that no power on earth, acting as I ought to do, can touch my life, my liberty, or my property.

Id.

36. See WHELAN, *supra* note 3, at 281.

37. *Id.*

38. See *infra* notes 99-163 and accompanying text.

constitution, and fundamental precepts of the natural law, was intended to stand as a bulwark against the exploitation that all too easily could occur in the conduct of imperial governance.³⁹

It must finally be stressed that these principles were not the result of abstract theorizing carried on at some remove from public affairs. Rather they were forged in the heat of political controversy as Burke the parliamentarian sought to develop principled responses to the great conflicts of the day—the proper governance of India, Ireland, and the American colonies. Ever sensitive to the needs and contingencies shaping particular societies, Burke fashioned a unique response to each of these great imperial controversies. This Article will consider the ways in which Burke developed and articulated his response to the problems of empire.

III. INDIA: ARGUING FOR SYMPATHY TOWARD A FOREIGN PEOPLE

Britain's rule in India was of a very peculiar sort: It had its origin not with state conquest or official policy, but with the steady increase in the trading activities of the East India Company.⁴⁰ Founded by London merchants in the late 1590s to organize and promote trade with the "East Indies," the Company received a royal charter and was given a monopoly over trade routes in 1600.⁴¹ Trade and investment policy and practice with the east remained in private hands through the end of the eighteenth century and beyond. This is not to say that the English state played no role in the activities of the Company; rather, the assistance it provided was of an indirect nature. It supported the Company's monopoly status against traders who challenged it in the royal courts and provided naval reinforcements when the occasion required it, while

39. Language in Burke's time was rather imprecise concerning just what constituted a people, or a country for that matter. Burke, for instance, refers to the "countries" of Staten Island and Long Island. See *Letter to the Sheriffs of Bristol on the Affairs of America*, I WORKS 18. It seems clear that Burke differentiated among groups according to their ancestry and circumstances. Even the colonial children of England had developed a separate character over the 150 years since landing in the New World. The inhabitants of England's possessions in India had their own, vastly different but ancient and respectable civilization. Ireland's people shared a civil establishment with the English, one in which Burke—being of Irish stock—was a prominent figure. For a more complete discussion of Anglo-American usage of the terms "people" and "country," see BRUCE P. FROHNER, *THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM* 217-18 (1996).

40. Burke himself took note of the unusual circumstances by which Britain came to rule in India:

A new disposition took place, not dreamt of in the theories of the speculative politicians, and of which few examples in the least resembling it have been seen in the modern world, none at all in the ancient. In other instances, a political body that acts as a commonwealth was first settled, and trade followed as a consequence of the protection obtained by political power; but here the course of affairs was reversed. The constitution of the Company began in commerce and ended in empire.

Speech in Opening the Impeachment of Warren Hastings, IX THE WRITINGS AND SPEECHES OF EDMUND BURKE 329, 349 (1901).

41. See PHILIP LAWSON, *THE EAST INDIA COMPANY: A HISTORY* 1-17 (1993) (explaining the founding of the English East India Company); BRIAN GARDNER, *THE EAST INDIA COMPANY: A HISTORY* 17-32 (1971) (same).

the Company established permanent enclaves in India in the latter half of the seventeenth century.⁴²

By the 1690s, it had become apparent “to even the most cynical [members of Parliament]”⁴³ that the East India Company had used various corrupt practices to retain its favored status. Parliament attempted by statute to create a new Company with trading privileges to the East, an effort that was effectively frustrated when the old Company purchased nearly twenty percent of stock in the new venture and used its controlling position to “undermine[] the new Company from within.”⁴⁴ The two companies eventually merged in 1709.

Sharp dealing such as this continued to characterize the operation of the Company throughout the eighteenth century, both in its activities in India and in Britain. In India, the Company established trading centers, called “presidencies,” in Bombay, Madras, and Calcutta.⁴⁵ It soon enjoyed phenomenal success, attributable to its ability to “exploit[] all the opportunities offered to its traders.”⁴⁶ Lawson cautions his readers to avoid the “simplistic explanation” that would see the Company’s activities as singularly “rapacious.”⁴⁷ While such an admonition is certainly in order, Lawson also provides evidence suggesting that corruption was a steady feature of Company practice at this early date.⁴⁸

As the eighteenth century progressed, the Company established itself not only as an economic, but as a political force to be reckoned with on the Indian sub-continent. In the 1740s, ‘50s, and ‘60s, the Company fought a series of wars with French trading outposts in India, as well as with various native Bengali principalities.⁴⁹ At the close of these adventures, the Company found itself deeply

42. See LAWSON, *supra* note 41, at 45 (discussing litigation challenging the Company’s monopoly status); *id.* at 46-47 (discussing the use of naval power to support the Company’s trading posts). See also JOHN KEAY, *THE HONOURABLE COMPANY: A HISTORY OF THE EAST INDIA COMPANY* 130-68 (1991) (discussing the Company’s aggressive expansion at the close of the seventeenth century).

43. See LAWSON, *supra* note 41, at 54.

44. *Id.* at 55.

45. *Id.* at 66.

46. *Id.*

47. *Id.* at 70.

48. Thus Lawson indicates that the employees of the Company had two purposes while in India: “to make money for the Company and to enrich oneself while doing so.” *Id.* at 72. Lawson continues:

To avoid penalty . . . many [of the Company’s employees] supplemented the official wage by indulging in private trade with Indian merchants in the Company’s orbit. In this way the Company employee ran two businesses: one account covering trade for the East India Company and the other for himself The opportunity and, more sinister, temptation to cheat in such circumstances became manifest. In consequence, whole illicit networks of credit, debt, and deceit evolved wherever Company interests overlapped with private trading enterprises.

Id. at 72-73. Cf. P.J. MARSHALL, *EAST INDIAN FORTUNES: THE BRITISH IN BENGAL IN THE EIGHTEENTH CENTURY* 158-79 (1976) (detailing means by which private wealth was accumulated).

49. See LAWSON, *supra* note 41, at 86-102; see also GARDNER, *supra* note 41, at 53-92. More than anyone else, the man responsible for this expansion of the Company’s aims was Robert Clive, one of the most controversial figures of the eighteenth century and one of the most romanticized of the nineteenth. Of Clive, Macaulay wrote:

enmeshed in the political system of India, the recipient of various favors and offices from local leaders and the chief guarantor of political stability.⁵⁰ In 1765, Sir Robert Clive took the logical step of collecting taxes directly from the native population and using the funds “to support the administration in Bengal.”⁵¹

The emergence of the Company as a political force in Bengal demanded that it also become an ever more vigorous political presence in Britain. From at least the 1760s, one finds that a substantial percentage of members of Parliament were also shareholders in the East India Company,⁵² and one finds as well the growth of a dense network of close relationships between the Company and parliamentarians and those aspiring to office.⁵³ Indeed, it can fairly be said that “the Company had become involved in the initial stages of a relationship in which divorce ceased to be an option

...⁵⁴

This, then, forms the backdrop to Burke’s writings on India. Burke himself studied and wrote on the problem for the better part of two decades. While his thought on the subject changed substantially over time, probably his two most important statements on the proper response England should take to its newly acquired Indian empire are his speech on Fox’s East India Bill, and the speeches he prepared on the occasion of the impeachment of Warren Hastings, the governor-

Clive committed great faults But his faults, when weighed against his merits, and viewed in connection with his temptations, do not appear to us to deprive him of his right to an honorable place in the estimation of posterity. From his first visit to India dates the renown of the English arms in the East. Till he appeared, his countrymen were despised as mere pedlars, while the French were revered as a people formed for victory and command. His courage and capacity dissolved the charm.

See MACAULAY’S ESSAY ON LORD CLIVE 126 (Vida D. Scudder ed., 1889). For a more recent, and more balanced presentation of Clive’s life, see NIRAD C. CHAUDHURI, CLIVE OF INDIA: A POLITICAL AND PSYCHOLOGICAL ESSAY (1975).

50. See LAWSON, *supra* note 41, at 103 (“Where commerce had once reigned supreme there now appeared territorial and political power in India with all its vexed responsibilities for the Company. Indeed, the East India Company became nothing less than the *de facto* ruler of the wealthiest area of the subcontinent—Bengal.”).

51. *Id.* at 106.

52. See H.V. BOWEN, REVENUE AND REFORM: THE INDIAN PROBLEM IN BRITISH POLITICS, 1757-1773 (1991) [hereinafter BOWEN, REVENUE AND REFORM].

Many MPs [members of Parliament] did have close political or financial links with the East India Company. Some 23 per cent of all the members of the 1768 Parliament owned Company stock at one time or another between 1764 and 1774, and there were, on average, 118 sitting Members holding stock at any given time between 1768 and 1774. This strong financial connection between parliamentarians and the East India Company also manifested itself in the upper House where thirty-four peers owned stock between 1764 and 1774.”

Cf. H.V. Bowen, ‘Dipped in the Traffic:’ *East India Stockholders in the House of Commons, 1759-1774*, 5 PARLIAMENTARY HIST. 39 (1986) (providing further details on parliamentary stockholding).

53. See LUCY S. SUTHERLAND, THE EAST INDIA COMPANY IN EIGHTEENTH-CENTURY POLITICS (1952). See also BOWEN, REVENUE AND REFORM, *supra* note 52, at 41-42 (discussing the use of the East India Company by aspiring politicians).

54. See LAWSON, *supra* note 41, at 96.

general of Bengal.⁵⁵ These speeches, prepared for momentous events of the day, reflect his mature and considered judgment on the matter.

Fox's East India bill was first proposed in December, 1783, and "stands out as a relatively radical legislative proposal, which would have effectively transferred authority over British India, both political and commercial, from the company to commissioners who were members of Parliament and directly responsible to that legislative body."⁵⁶ Burke's defense of this bill—which was eventually defeated—amounts to a sustained indictment of East India Company practices and a program for the coexistence of Indian and British interests. It represents a specific application of the major aspects of his thought on empire—the appropriate respect due chartered rights, the principles of the English constitution, and the dictates of natural law—to the intensely practical matter of the governance of British India.

Burke commenced his speech by addressing an important problem: The East India Company acted as it had on the basis of a charter granted to it by the Crown. The charter conferred on the Company certain rights that have been "bought for money, for money honestly and fairly paid."⁵⁷ The rights were further secured to the Company "by every sort of public sanction. They are stamped by the faith of the king; they are stamped by the faith of parliament. . . ."⁵⁸ But, Burke continues, these rights carried with them certain obligations:

Those who carry the rights and claims of the Company the furthest do not contend for more than this; and all this I freely grant. But granting all this, they must grant to me in my turn that all political power which is set over men, and that all privilege claimed or exercised in exclusion of them, being

55. This is not, however, to overlook the importance of Burke's speech on the Nabob of Arcot's debts. Delivered in 1785, this speech exposed the corrupt influence agents of the East India Company acquired over Muhammad Ali Khan, the nawab of the Carnatic. Frederick Whelan has described the condition of Company rule in the Carnatic:

A group of company servants . . . began to lend large sums of money to the irresponsible or inept nawab at exorbitant interest rates, and these debts (running eventually into the millions of pounds) were secured by mortgages on the future public revenues of the Carnatic. As the nawab fell ever more deeply in arrears, his regime fell under the sway of his creditors. At the same time, these individuals acquired a strong interest in the continuing viability and solvency of the nawab's government, from which they were extracting immense fortunes, and they exerted considerable influence to ensure that the company's official policies toward its ally were consistent with their private interest. The nawab was willing to keep on borrowing at high interest, and the creditors were willing to lend, because both were confident that the company, and perhaps ultimately the British government, would bail them out at the end.

In Burke's view, the collusive relations among the nawab, his British creditors, and the East India Company (which permitted or, as Burke saw it, connived at the financial dealings, since the private loans permitted the nawab to repay debts he owed to the company) amounted to a massive corrupt scheme for the profit of speculators, a scheme that had detrimental, in fact nearly disastrous, consequences both for the people of the region and for the public interest of the British Empire.

See WHELAN, *supra* note 3, at 109-10.

56. *Id.* at 44.

57. *Speech on Mr. Fox's East India Bill*, I THE WORKS OF EDMUND BURKE 332 (1837).

58. *Id.*

wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit.⁵⁹

It is in this respect that the East India Company failed to execute its part of the bargain. In a sense, Burke argues, the Company broke its faith not only with Parliament, but with the Indian people. And having broken faith, the Company forfeited its prerogatives.⁶⁰

A large part of Burke's speech is taken up with documenting the many ways in which the Company broke its faith and forfeited its contractual rights. The Great Mogul, one of the hereditary princes of India, who had conferred important privileges on the East India Company, found himself and his territory "sold." "The descendant of Tamerlane now stands in need almost of the common necessities of life."⁶¹ The nation of the Rohillas found itself similarly sold to a foreign prince, and, when their leader resisted, British officers participated in the armed reduction of the country.⁶² The ruler Fizullah Khan had his territory extorted from him through a fraudulent legal process.⁶³

Where the Company established its rule, tyranny and despotism soon followed. Originally a trading concern, the Company had set up a government based on bribery, which ruled every aspect of Indians' lives for its own benefit. And its government had become as corrupt as its business dealings.⁶⁴ Where the Company had its way, the traditional Indian legal system was abolished, replaced by an

59. *Id.*

60. *Id.* ("[I]f the abuse is proved, the contract is broken . . ."). Burke also observed that the Company governed India in trust, but that its powers as trustee were derivative from Parliament. Upon forfeiture of its rights, Parliament, as ultimate trustee, was obliged to intervene. *Id.*

61. *Id.* at 335.

62. *Id.*

63. *Id.* at 343-44.

64. *See id.* at 350 (discussing the corrupt dealings agents of the Company had with the Nawab (or "nabob") of the Carnatic, Burke outlines the Company's wholesale destruction of ordered society:

[Under the] new system [] it was their policy to consider hoards of money as crimes; to regard moderate rents as frauds on the sovereign; and to view, in the lesser princes, any claim of exemption from more than settled tribute, as act of rebellion. Accordingly, all the castles were, one after the other, plundered and destroyed. The native princes were expelled; the hospitals fell to ruin; the reservoirs of water went to decay; the merchants, bankers, and manufacturers disappeared; and sterility, indigence, and depopulation overspread the face of these once flourishing provinces.

Id.

arrogant and arbitrary cleptocracy.⁶⁵ Summarizing these findings, Burke observed that “the Company never has made a treaty which they have not broken.”⁶⁶

Having established to his satisfaction the deplorable nature of Company rule, Burke raised the question of simply withdrawing altogether. Such an action, however, seemed impossible: “[T]here we are; there we are placed by the Sovereign Disposer; and we must do the best we can in our situation. The situation of man is the preceptor of his duty.”⁶⁷ If duty thus required that the fates of Britain and India be joined, how might the nation respond?

The first step that must be taken is to recognize the depth and quality of Indian civilization. Burke understood that it may be difficult to generate sympathy in Britain for the Indian people: “[T]he very names of the sufferers are so uncouth and strange to our ears, that it is very difficult for our sympathy to fix upon these objects.”⁶⁸ But if one took the time to learn about India, one would quickly notice that the Indians had a great civilization that deserved the respect of outsiders:

This multitude of men does not consist of an abject and barbarous populace . . . but a people for ages civilized and cultivated; cultivated by all the arts of polished life, whilst we were yet in the woods. There, have been (and still the skeletons remain) princes once of great dignity, authority, and opulence. There, are to be found the chiefs of tribes and nations. There, is to be found an ancient and venerable priesthood, the depository of their laws, learning and history, the guides of the people whilst living, and their consolation in

65. *Id.* at 354.

In effect . . . every legal regular authority in matters of revenue, of political administration, of criminal law, of civil law, in many of the most essential parts of military discipline, is laid level with the ground; and an oppressive, irregular, capricious, unsteady, rapacious, and peculating despotism, with a direct disavowal of obedience to any authority at home, and without any fixed maxim, principle, or rule of proceeding to guide them in India, is at present the state of your charter-government over great kingdoms.

Id.

66. *Id.* at 336. At one point Burke asserted that English rule in India had been more devastating to the local inhabitants than the conquests of the Tartars:

The Tartar invasion was mischievous; but it is our protection that destroys India. It was their enmity, but it is our friendship. Our conquest there, after twenty years, is as crude as it was the first day Every rupee of profit made by an Englishman is lost forever to India. With us are no retributory superstitions, by which a foundation of charity compensates, through ages, to the poor, for the rapine and injustice of a day. With us, no pride erects stately monuments which repair the mischief which pride had produced, and which adorn a country out of its own spoils. England has erected no churches, no hospitals, no palaces, no schools; England has built no bridges, made no high roads, cut no navigations, dug out no reservoirs. Every other conqueror of every other description has left some monument, either of state or beneficence, behind him. Were we to be driven out of India this day, nothing would remain, to tell that it had been possessed, during the inglorious period of our dominion, by anything better than the ourangoutang or the tiger.

Id. at 340.

67. *Id.* at 341.

68. *Id.*

death; a nobility of great antiquity and renown; a multitude of cities not exceeded in population and trade by those of the first class in Europe; merchants and bankers, individual houses of whom have once vied in capital with the bank of England; . . . millions of ingenious manufacturers and mechanics; millions of the most diligent and not the least intelligent, tillers of the earth. Here are to be found almost all the religions professed by man, the Braminical, the Musselman, the Eastern and the Western Christian.⁶⁹

The second step, then, is to develop means of protecting both British and Indian interests. The proper vehicle for this development, Burke continues, are the principles of the British Constitution. The charter by which the East India Company held claim to India should be replaced by the *Magna Carta*, the Great Charter of English liberties. Indeed, Fox's Bill was "intended to form the *Magna Charta* of Hindostan."⁷⁰ In this way, fundamental natural rights would be secured in the English tradition—through recognition by charter. The "natural rights of mankind" are thus

69. See *id.* at 334. Comparing India to Germany:

The nabob of Oude might stand for the king of Prussia; the nabob of Arcot I would compare as superior in territory, and equal in revenue to the elector of Saxony. Cheyt Singh, the rajah of Benares, might well rank with the prince of Hesse, at least; and the rajah of Tanjore . . . to the elector of Bavaria. The Polygars and the northern Zemindars, and other great chiefs, might well class with the rest of the princes, dukes, counts, marquisses, and bishops in the empire.

Id.

70. *Id.* at 333. Burke continued: "Whatever the treaty of Westphalia is to the liberty and freedom of the princes and free cities of the empire, and to the three religions there professed—Whatever the great charter, the statute of tallage, the petition of right, and the declaration of right, are to Great Britain, these bills are to the people of India." *Id.*

transformed into “the chartered rights of men.”⁷¹ Parliament, by the terms of Fox’s Bill, would stand as the guarantor of such rights.

Burke continued his campaign for fair treatment for India even after the defeat of Fox’s Bill, his struggle culminating in another failed exertion—the seven-year impeachment trial of Warren Hastings for misconduct during his tenure as British governor-general of Bengal.

Many of the abuses attacked in the speech on Fox’s East India Bill occurred during Warren Hastings’s tenure as governor-general and would subsequently form the core of many of the charges Burke brought against the man who served as the chief representative of Company interests in India from 1772 to 1785. The office of governor-general had been created in 1773 by Lord North’s Regulating Act, which went on to set requirements for proper performance in office and to name Hastings explicitly to the position.⁷² Impeachment, under British law, amounted to “a charge by the Commons of violations of ‘the already known and existing law,’ tried before the Lords as ‘the most high and supreme court of criminal jurisdiction.’”⁷³ By virtue

71. *Id.* at 331. It must be noted that Burke was no advocate of an abstract conception of rights, immediately knowable without regard to social circumstances or historical development. See REFLECTIONS ON THE REVOLUTION IN FRANCE 67 (Thomas H.D. Mahoney ed., 1955). Contrasting the true and false rights of men:

If civil society be made for the advantage of man, all the advantages for which it is made become his right. It is an institution of beneficence; and law itself is only beneficence acting by a rule. Men have a right to live by that rule; they have a right to do justice, as between their fellows, whether their fellows are in public function or in ordinary occupation. They have a right to the fruits of their industry and to the means of making their industry fruitful. They have a right to the acquisitions of their parents, to the nourishment and improvement of their offspring, to instruction in life, and to consolation in death. Whatever each man can separately do, without trespassing upon others, he has a right to do for himself; and he has a right to a fair portion of all which society, with all its combination of skill and force, can do in his favor. In this partnership all men have equal rights, but not to equal things.

Id. These rights, Burke notes, are the product of “convention,” the rules and customs developed through the experience of living in the community for a long passage of time. *Id.* at 67-68. The revolutionaries, however, wished to substitute for experience abstract principles:

They despise experience as the wisdom of unlettered men; and as for the rest, they have wrought underground a mine that will blow up, at one grand explosion, all examples of antiquity, all precedents, charters, and acts of parliament. They have ‘the rights of men.’ Against these there can be no prescription, against these no agreement is binding; these admit no temperament and no compromise; anything withheld from their full demand is so much of fraud and injustice. Against these rights of men let no government look for security in the length of its continuance, or in the justice and lenity of its administration.

Id. at 66. The very abstractness of these rights was their signal failing: “[T]heir abstract perfection is their practical defect. By having a right to everything they want everything.” *Id.* at 68.

See also J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in J.G.A. POCOCK, POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 202, 207 (1971) (analyzing Burke on rights).

72. See *An Act for Establishing Certain Regulations for the Better Management of the Affairs of the East India Company, as well in India as in Europe*, 13 Geo. III 63 (1773). Cf. JOHN T. NOONAN, BRIBES 395, 761-62 & n.14 (1984) (analyzing the statute).

73. See NOONAN, *supra* note 72, at 397 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1984)).

of his statutory appointment, "Hastings was open to impeachment."⁷⁴ The proceeding brought against him was comprehensive in scope, including twenty-two articles naming every sort of abuse of power.⁷⁵

Our interest in studying the impeachment proceeding is less in its details than in the general principles Burke articulated as governing the relationship between India and Britain. Again, Burke began with the proposition that Indian civilization was ancient and great and deserving of respect. Its legal system is older and more illustrious than that of the British.⁷⁶ Indian law possesses great stability and is a force for moral order in that country.⁷⁷ In this context, Burke had no difficulty in asserting that "their morality is equal to ours."⁷⁸

The obligation to respect Indian civilization, however, rested on more than a simple moral duty to respect an ancient legal and moral order. It was an integral part of the authority by which the Company acted in India. The Company governed India in virtue of power derived from two sources—its royal charter of incorporation and a variety of chartered rights conferred upon it by the Mogul government of Bengal. Under Hastings's management, it succeeded in violating the terms of both. The Company's royal charter rendered its officers liable to prosecution under English law for misconduct in office.⁷⁹ But the charters granted to the Company by the Mogul emperor conferred on certain of its officers the powers of "lord high steward" under

74. *Id.*

75. See P.J. MARSHALL, *THE IMPEACHMENT OF WARREN HASTINGS* xiv-xv (1965) (summarizing the Articles of Impeachment). The Articles are set out in detail in VIII *THE WRITINGS AND SPEECHES OF EDMUND BURKE* 307-486 (1901); IX *THE WRITINGS AND SPEECHES OF EDMUND BURKE* 1-325 (1901).

76. "My Lords, these Gentoo people are the original people of Hindostan . . . , God forbid that we should pass judgment upon people who framed their laws and institutions prior to our insect origins of yesterday!" *Speech in Opening—First Day*, IX *WRITINGS AND SPEECHES OF EDMUND BURKE* 382 (1901).

77. Burke argued that the source of Indian legal stability lay in the antiquity of its laws:

Their stability has been proved by their holding on a uniform tenor for a duration commensurate to all the empires with which history has made us acquainted; and they still exist in a green old age, with all the reverence of antiquity, and with all the passion that people have to novelty and change. They have stood firm on their ancient base; they have cast their roots deep in their native soil,—perhaps because they have never spread them anywhere else than in their native soil.

Id. at 382-83. The Indian moral order, Burke continues, is the product of the close congruence of law and religious belief:

The second consideration in the Gentoo institutions is their beneficial effects, moral and civil. The policy, civil or religious, or, as theirs is, composed of both, that makes a people happy and a state flourishing . . . must undoubtedly, so far as human considerations prevail, be a policy wisely conceived in any scheme of government. It is confirmed by all observation, that, where the Hindoo religion has been established, that country has been flourishing.

Id. at 383-384.

78. *Speech in Opening—Second Day*, IX *WRITINGS AND SPEECHES* 476 (1901). Burke continued: "I challenge the world to show in any modern European book more true morality and wisdom than is to be found in the writings of Asiatic men in high trust, and who have been counsellors to princes." *Id.*

79. *Speech in Opening—First Day*, *supra* note 76, at 346 ("As [the Company's powers] have emanated from the supreme power of this kingdom, the whole body and the whole train of their servants, the corporate body as a corporate body, individuals as individuals, are responsible to the high justice of this kingdom.").

Indian law and obliged them additionally to respect local customs.⁸⁰ This source of authority, in turn, obliged the British government to serve as the guarantor of Indian law and custom:

When the Company acquired that high office in India, an English corporation became an integral part of the Mogul Empire. When Great Britain virtually assented to that grant of office, and afterwards took advantage of it, Great Britain guaranteed the performance of all its duties. Great Britain entered into a virtual act of union with that country, by which we bound ourselves as securities to preserve the people in all the rights, laws, and liberties which their natural, original sovereign was bound to support, if he had been in condition to support them. By the disposition of events, the two duties, flowing from two different sources, are now united in one.⁸¹

The British nation had thus become the guarantor of Indian law and liberty. How should it act? Burke looked to the British Constitution and British law for guidance. Burke's conception of the Constitution, furthermore, is a dynamic one, emphasizing the necessity of governing for the benefit of the people governed. As Burke put it, "My Lords, to obtain empire is common; to govern it well has been rare indeed. To chastise the guilt of those who have been instruments of imperial sway over other nations by the high superintending justice of the sovereign state has not many striking examples among any people."⁸² Such, however, might have been expected of Great Britain, a "free country" that enjoyed "the full benefit of the vital principle of the British liberty and Constitution"⁸³ It was Britain's obligation to "shed down the sweet influences of order, peace, science, and security to the natives of that vexed and harassed country[.]"⁸⁴ Had they done so, "we should have been covered with genuine honor. It would have been a beautiful and noble spectacle to mankind."⁸⁵

80. *Id.* at 346-47.

[B]y the Mogul charter of 1765 [the Company] obtained the *dewanny*, that is, the office of lord high-steward, of the kingdoms of Bengal, Bahar, and Orissa. By that charter they bound themselves (and bound inclusively all their servants) to perform all the duties belonging to that new office, and to be held by all the ties belonging to that new relation. If the Mogul empire had existed in its vigor, they would have been bound, under that responsibility, to observe the laws, rights, usages, and customs of the natives, and to pursue their benefit in all things: for this duty was inherent in the nature, institution, and purpose of the office which they received.

Id.

81. *Id.* at 347; *see id.* (explaining that the people of India might therefore press their claims before Parliament as of right: "The people of India, therefore, come in the name of the Commons of Great Britain, but in their own right, to the bar of this House, before the supreme royal justices of this kingdom, from whence originally all the powers under which they have suffered were derived.").

82. *Speech in Opening—Second Day, supra* note 78, at 398.

83. *Id.* at 399.

84. *Id.* at 398.

85. *Id.*

In the particular circumstances of India, furthermore, Burke asserts, the “municipal forms” of the British Constitution were not “communicable,” even though “the liberty and spirit of the . . . Constitution” might be.⁸⁶ The Indian people, especially the upper classes, were quite insulated from outsiders, bound as they were by strict rules of caste.⁸⁷ Thus:

If we undertake to govern the inhabitants of such a country, we must govern them upon their own principles, and maxims, and not upon ours. We must not think to force them into the narrow circle of our ideas; we must extend ours to take in their systems of opinions and rites, and the necessities which result from both: all change on their part is absolutely impracticable. We have more versatility of character and manners, and it is we who must conform.⁸⁸

Respect for Indian ways, however, did not amount to cultural relativism or the sanctioning of arbitrary authority. Burke goes to extraordinary lengths to refute the contemporary common belief that all Eastern forms of government were “arbitrary” and “despotic.” This was the position Hastings relied upon to justify his own arbitrary rule,⁸⁹ and Burke would have none of it. He here put to good use the classically medieval belief that all political power was derived, either immediately or indirectly, from God. Since God is the source of all political authority, it is not possible to govern legitimately as a despot:

Every good gift is of God; all power from whom alone it originates, will never suffer the exercise of it to be practiced upon any less solid foundation than the power itself. If, then, all dominion of man over man is the effect of

86. *Id.* at 399.

87. *Speech in Opening—First Day, supra* note 76, at 378.

88. *Id.* at 378-79. This is also essentially the point of Burke’s argument that it ought to be the spirit and not the form of British law that should be used in governing India:

My Lords, we contend that Mr. Hastings, as a British governor, ought to govern on British principles, not by British forms—God forbid!—for if ever there was a case in which the letter kills and the spirit gives life, it would be an attempt to introduce British forms and the substance of despotic principles together into any country. No!

Id. at 447.

89. *Speech in Opening—Second Day, supra* note 78, at 448.

Mr. Hastings comes before your Lordships . . . [and] says: ‘I had an arbitrary power to exercise: I exercised it. Slaves I found the people: slaves they are,—they are so by their constitution; and if they are, I did not make it for them. I was unfortunately bound to exercise this arbitrary power, and accordingly I did exercise it. It was disagreeable to me, but I did exercise it; and no other power can be exercised in that country.’

Id.

the Divine disposition, it is bound by the eternal laws of Him that gave it, with which no human authority can dispense⁹⁰

Burke subsequently expended enormous energy to establish, to his own and his listeners' apparent satisfaction, that Eastern forms of government were not despotic.⁹¹ "Law and arbitrary power," as Burke phrased it, "are in eternal enmity."⁹² Quite opposite Hastings's reasoning, Burke argued that, the fewer the rights traditionally possessed by a subject people, the more carefully they ought to be governed.⁹³

What is important for our purposes is that Hastings's every line of defense was by now shattered. He was required by charter with the Great Mogul to govern in accord with Indian principles, and the name of the British government was invoked as guarantor. Hastings could not rely on the claim that his conduct was in keeping with principles of responsible government, nor could he claim that by acting despotically he was simply behaving in accord with Indian constitutional principles. All power was of God, and God's gift could not be perverted into despotic rule.

Burke sought to "waken something of sympathy for the unfortunate natives" of India. He sought this sympathy, not because he wanted to give Indians stricter government, but because he wanted to protect them from a plundering tyrant in the form of a trading company. England should accept the region's pre-existing religions and cultures. It should grant greater autonomy to local native officials so that they could protect Indian civilization. It must as well protect the people from the rapaciousness of its creature, the East India Company.⁹⁴ Only a more distant, lenient,

90. *Id.* at 456 (calling attention to the grounding of Burke's political morality in natural law). See GERALD W. CHAPMAN, EDMUND BURKE: THE PRACTICAL IMAGINATION 273 (1967) (citing Burke's assertion of "'one great, immutable, pre-existent law, prior to all our devices, and prior to all our contrivances, paramount to all our ideas and all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the universe, out of which we cannot stir.'"). Natural law, as Burke understood it, is not an exclusively Christian phenomenon; all religions join in teaching a common basic morality—to treat others with respect. As Chapman characterizes it, "this cosmic and existential responsibility binds every man to every man (and to God) and imposes commensurate duty upon every power conventionalized by society in functions, rights, and privileges." *Id.*

91. See *Speech in Opening—Second Day*, *supra* note 78, at 463 ("I do challenge the whole race of men to show me any of the Oriental governors claiming to themselves a right to act by arbitrary will."); see also *id.* at 463-76 (opining that Islamic and Hindu principles of government, properly administered, are not "oppressive").

92. *Id.* at 458.

93. See *Ninth Report of the Select Committee on the Affairs of India*, VIII WRITINGS AND SPEECHES 173-74 ("[R]uling over a people guarded by no distinct or well-ascertained privileges, whose language, manners, and radical prejudices render not only redress, but all complaint on their part, a matter of extreme difficulty,—such an administration, it is evident, never can be made subservient to the interests of Great Britain, or even tolerable to the natives, but by the strictest rigor in exacting obedience to the commands of the authority set over it.").

94. *Speech on the Nabob of Arcot's Debts*, I WORKS OF EDMUND BURKE 414-15 (1837).

It is difficult for the most wise and upright government to correct the abuses of remote delegated power, productive of unmeasured wealth, and protected by the boldness and strength of the same ill-got riches. These abuses, full of their own wild native vigour, will grow and flourish under mere neglect. But where the supreme authority, not content with winking at the rapacity of its inferior instruments, is so shameless and corrupt as openly to give bounties and premiums for disobedience to its laws; when it will not trust to the activity of avarice in the pursuit of its own gains; when it secures public robbery by all the careful jealousy and attention with which it ought to protect property from such violence; the

and generous empire could prevent the destruction of the great civilization it was charged with keeping safe.

Hastings was ultimately acquitted, although the proceedings left him “a ruined man.”⁹⁵ He had spent lavishly on his defense, and had also laid out “great sums” in buying favorable newspaper and pamphlet coverage.⁹⁶ He would subsequently regain his reputation, however, and died in 1818, full of years and honors.⁹⁷ Burke, for his part, found himself censured by the House of Lords in 1789 for “the asperity and indecency of some expressions which he had used” during the impeachment proceedings.⁹⁸ He had, however, defended the constitutional order and laid out a way by which Britain and India might live together.

IV. IRELAND: OF ALTARS AND FIRESIDES

Ireland has had a troubled relationship with England since the twelfth century, although the difficulties grew immeasurably worse during the reign of Henry VIII, when the English monarch renounced allegiance to the Church of Rome and had himself declared head of the English Church. At a time when the powers of Church and State were united in the hands of a single ruler it was dangerous—as the martyrdoms of St. Thomas More and St. John Fisher attested—to question royal policy in religion. Indeed, to do so could quite easily lead to the charge of treason.⁹⁹

In 1534, Silken Thomas Fitzgerald, son of the Earl of Kildare, taking advantage of the rupture in the relationship between Henry VIII and the papacy, rebelled, and called upon the Pope to back him.¹⁰⁰ Thomas’s rebellion was short-lived and unsuccessful,¹⁰¹ but it nevertheless set a pattern for Anglo-Irish relations for much of the sixteenth and seventeenth centuries: the Irish would remain Catholic, and would use their loyalty to the Pope both as symbol of their national independence and as a political card to play in times of national crisis.¹⁰²

commonwealth then is become totally perverted from its purposes; neither God nor man will long endure it; nor will it long endure itself.

Id.

95. See MACAULEY’S ESSAY ON WARREN HASTINGS 146 (Joseph Villiers Denny ed., 1907) [hereinafter MACAULEY’S WARREN HASTINGS].

96. *Id.* at 147.

97. See NOONAN, *supra* note 72 at 393 (noting Hastings retirement).

98. See MACAULEY’S WARREN HASTINGS, *supra* note 95, at 142.

99. See GEOFFREY ELTON, REFORM AND REFORMATION: ENGLAND, 1509-1558 174-200 (1977) (describing the breach with Rome); *id.* at 193-94 (reporting on the trial of More and Fisher for treason).

100. See RANELAGH, *supra* note 8, at 46.

101. See RANELAGH, *supra* note 8, at 46 (noting that Thomas and his co-conspirators were subsequently put to death at Tyburn in 1537).

102. Ranelagh details some of the instances of foreign intervention in Anglo-Irish affairs:

In 1579 Pope Gregory XIII and Philip II of Spain launched an expedition announced as a crusade which landed at Dingle, Co[unty] Kerry. The following year a papal force landed at Smerwick, Co[unty] Kerry. In 1601, over 3,000 Spaniards landed at Kinsale, Co[unty] Cork, to help an Irish rebellion. In 1690, Louis XIV of France sent a 7,000 strong army to Cork, which later fought for James II at the

England's response to Irish intransigence was simultaneously to tighten the legal bonds that held Ireland to England, and to make life uncomfortable for the Catholic majority. According to the terms of Poynings' Law, enacted prior to the Reformation in 1495, the Irish Parliament could only meet upon approval by the English king.¹⁰³ For most of the next three centuries, Ireland occupied a confused but subordinate position in British Constitutional thought, as "neither kingdom nor nation."¹⁰⁴ In addition to dominating Ireland constitutionally, the English also attempted, beginning in the early years of the seventeenth century, to transplant English legal institutions, such as the common-law forms of land-tenure, to Ireland.¹⁰⁵

Life was made difficult for the Irish Catholic majority as well by the development of an ideology that stressed their uncivilized and conquered status. With roots in medieval canonistic teaching,¹⁰⁶ this belief system denied that the Irish, as a subject people lacking the basic ingredients of civilization, could enjoy any of the meaningful rights of political society.¹⁰⁷ English lawyers and publicists made use of this ideology as the underlying justification for their attempts to eradicate the vestiges of native Irish law.¹⁰⁸

Matters grew far more oppressive in the middle and closing decades of the seventeenth century. In the 1640s and 1650s, Oliver Cromwell embarked upon a program of confiscating land from the Catholic population and resettling it with Protestant loyalists.¹⁰⁹ The Glorious Revolution of 1688/89 only worsened

Battle of the Boyne. In 1798 over 4,000 French soldiers landed in Ireland to help another rebellion. RANELAGH, *supra* note 8, at 46. at 47.

103. RANELAGH, *supra* note 8, at 45-46.

104. For a detailed treatment of the constitutional status of Ireland within the British empire, see NEIL LONGLEY YORK, *NEITHER KINGDOM NOR NATION: THE IRISH QUEST FOR CONSTITUTIONAL RIGHTS, 1698-1800* (1994).

105. See HANS S. PAWLISCH, *SIR JOHN DAVIES AND THE CONQUEST OF IRELAND: A STUDY IN LEGAL IMPERIALISM* 55-83 (1985).

106. *Id.* at 9 (discussing the canonistic origins of this doctrine).

107. See James Muldoon, *The Indian as Irishman*, 111 *ESSEX INST. HIS. COLLECTIONS* 267, 269 (1975).

As one official wrote . . . describing the Irish, they 'wanted neither wit nor valour' but they lacked the basic institutions and skills of civilized people. They 'did neuer builde any houses of Bricke or stone (some few poor Religious Houses excepted)' before Henry II's invasion in 1170. Furthermore they did not 'plant any Gardens or Orchards, Inclose or improve their lands, liue together in settled Villages or Townes, nor made any prouision for posterity.' In a word their whole way of life was 'against all sense and reason.'

(quoting SIR JOHN DAVIES, *DISCOVERY OF THE TRUE CAUSES WHY IRELAND WAS NEVER ENTIRELY SUBDUED* (1969)). Muldoon's larger point in writing is to argue that this view of the Irish came to be transplanted to the New World and helped to shape colonists' views of the native population.

108. See PAWLISCH, *supra* note 105, at 9-10 (writing, concerning Sir John Davies' reliance on this belief system: "As propounded by Davies, the application of conquest right vested England with a public law title to Ireland. . . . Davies invoked the now familiar powers of conquest to justify the eradication of domestic Irish law as little more than a barbarous and lewd custom, with an eye to eliminating all competing claims to Irish dominion").

109. See RANELAGH, *supra* note 8, at 64-65 (revealing that over eleven million acres of land were confiscated in the 1650s). "In 1685, at the accession of King James II, only 22 per cent of the land of Ireland was owned by Catholic Irishmen." *Id.*

conditions: The British Protestant establishment had rightly concluded that their monarch, James II, had grown overly sympathetic to Catholicism.¹¹⁰ James was deposed as king in January, 1689,¹¹¹ and subsequently fought a losing battle to regain his throne.¹¹² The Catholic Irish made the catastrophic decision to support James, and found themselves militarily crushed at the Battle of the Boyne in 1690.¹¹³

The English response to what they took as treasonous support for James II was to enact a series of laws, called variously the penal or the popery laws, intended to eradicate Irish Catholicism itself. These laws had as their twin objects the crippling of the organized Church and the subjugation of all those who maintained allegiance to it. In 1697, the Banishment Act declared that "All popish archbishops, bishops, vicars general, deans, Jesuits, monks, and all other regular clergy and all Papists exercising regular jurisdiction" were required to leave the realm by May, 1698.¹¹⁴ The terms of this Act were given strength with the enactment of legislation in 1709 requiring the immediate gaoling of all diocesan clergy, and offering large rewards to those turning in such persons.¹¹⁵ While an underground clergy remained active in Ireland throughout the eighteenth century,¹¹⁶ it was subjected to frequent harassment by the authorities.¹¹⁷

A second series of laws aimed at disabling Catholics from participating in the life of the state. An Act of 1695 prohibited Catholics from owning arms or from educating their children in their faith either at home or abroad.¹¹⁸ The "Popery Act" of 1704 attacked Catholic landholding, prohibiting Catholics from buying landed estates, entering long-term leases, or passing their property through primogeniture to their eldest son.¹¹⁹ Should a prospective heir turn Protestant, he might take a fee-simple interest at once, reducing his father's interest to that of a life estate.¹²⁰ A network of informers was set in place by an Act of 1709 to help enforce this

110. See GOLDWIN SMITH, *A HISTORY OF ENGLAND* 365-68 (2d ed., 1957).

111. *Id.* at 367-68.

112. *Id.* at 370.

113. *Id.*

114. 9 Will. III c. 1; cf. MAUREEN WALL, *THE PENAL LAWS, 1691-1760: CHURCH AND STATE FROM THE TREATY OF LIMERICK TO THE ACCESSION OF GEORGE III* 13-15 (1961) (analyzing this Act).

115. 8 Anne c. 3; cf. WALL, *supra* note 114, at 23-24. Subsequent legislation declared it a capital crime for a priest to preside at the marriages of Catholics and Protestants and declared invalid any marriage so performed. *Id.* at 24, n.1. Another Act declared that any priest found in Ireland after May, 1720, should "be branded with a hot iron on the cheek, so that he could be easily identified if he returned after banishment." *Id.* at 26. Other legislation imposed heavy civil penalties on convents and chapels. *Id.*

116. See WALL, *supra* note 114, at 34-42 (addressing the state of the hierarchy under the penal laws); see *id.*, at 42-64 (describing the condition of the larger Church); see generally John Brady & Patrick J. Corish, *The Church Under the Penal Code*, IV *A HISTORY OF IRISH CATHOLICISM*, fasc. II 1-88 (Patrick J. Corish ed., 1971).

117. See, for example, the practice of "priest-hunting" documented by WALL, *supra* note 114, at 31-33.

118. 7 Will. III, c. 4, c. 5. Cf. J.G. Simms, *The Establishment of Protestant Ascendancy, 1691-1714*, in *A NEW HISTORY OF IRELAND*, vol. IV 1, 16 (T.W. Moody & W.E. Vaughan eds., 1986) (analyzing the legislation).

119. 2 Anne c. 6; cf. Simms, *supra* note 118, at 19 (analyzing the statute).

120. *Id.*

legislation.¹²¹ The 1709 Act also decreed that only Catholics who took an Oath of Abjuration, renouncing allegiance to Rome, could vote in parliamentary elections.¹²² Irish Catholics lost the franchise entirely in 1728.¹²³

Burke's *Tract on the Popery Laws* was directed against this network of laws and policy.¹²⁴ An incomplete work in five parts, the *Tract* was probably written in 1761, but was not published until after Burke's death.¹²⁵ It was Burke's purpose to establish that the popery laws were "unjust, impolitic, and inefficacious."¹²⁶ To prove this contention, Burke felt required to examine the nature and function of law itself. Indeed, he opens his treatise by posing the question, "[W]hether such a system, respecting such an object, be in reality agreeable to any sound principles of legislation or any authorized definition of law."¹²⁷ In the course of answering this question, Burke developed a natural-law argument against the very structure of the popery laws and argued for the necessity of recreating the bonds of affection that had been so badly ruptured by English persecution. Only then might Ireland be incorporated voluntarily into the larger British empire.

Burke begins his case with the premise that all legislation depends upon the consent of the governed.¹²⁸ The popery laws fail this test. It is obvious at first glance that the laws are opposed to the beliefs and practices of a majority of Irish men and women. Burke estimates that at least two-thirds of the Irish population suffer "penalty and incapacity" as a result of these laws.¹²⁹ He concludes:

The happiness or misery of multitudes can never be a thing indifferent. A law against the majority of the people is in substance a law against the people itself; its extent determines its invalidity; it even changes its character as it enlarges its operation: it is not particular injustice, but general oppression; and can no longer be considered as a private hardship, which might be borne, but spreads and grows up into the unfortunate importance of a national calamity.¹³⁰

121. 8 Anne c. 3; cf. Simms, *supra* note 118, at 19-20 (observing that "The effect of the property legislation was to make a drastic reduction in the area that was still left in catholic ownership at the conclusion of the Williamite settlement.").

122. See 8 Anne c. 3; cf. Simms, *supra* note 118, at 21.

123. See Simms, *supra* note 118, at 21.

124. See VI WRITINGS AND SPEECHES OF EDMUND BURKE, TRACT ON THE POPERY LAWS 299-360 [hereinafter TRACT].

125. See THOMAS H.D. MAHONEY, EDMUND BURKE AND IRELAND 16, 355-56 (1960) (illustrating the circumstances surrounding the drafting and publishing of the TRACT).

126. TRACT, *supra* note 124, at 318.

127. *Id.*

128. "[I]n all forms of government the people is [sic] the true legislator; and whether the immediate and instrumental cause of the law be a single person or many, the remote and efficient cause is the consent of the people, either actual or implied; and such consent is absolutely essential to its validity." *Id.* at 320-21.

129. *Id.* at 318.

130. *Id.* at 320.

But how can one distinguish between a law that is generally oppressive and one that serves the interest of the people? This question is not easy to answer. The Protestants, after all, claimed that the popery laws were in the best interests of the Catholics, since they were thereby being induced to join the true religion and save their souls. The people, furthermore, “are presumed to consent to whatever the legislature ordains for their benefit; and they are to acquiesce in it, though they do not clearly see the propriety of the means by which they are conducted to that desirable end. This they owe as an act of homage to and just deference to the reason which necessity of government has made superior to their own.”¹³¹

Burke’s first response to this question was simply to assert that it is obvious to all that the Irish were being harmed by the popery laws:

But though the means, and indeed the nature, of a public advantage may not always be evident to the understanding of the subject, no one is so gross and stupid as not to distinguish between a benefit and an injury. No one can imagine, then, an exclusion of a great body of men, not from favors, privileges, and trusts, but from the common advantages of society, can ever be a thing intended for their good, or can ever be ratified by any implied consent of theirs.¹³²

Burke, however, must have felt that this answer was incomplete, because he was then led to a deeper consideration of the nature of law. Legislation does not rest solely on the consent of the majority. Had the popery laws been consented to by a majority of the Irish Catholic population, they would still have been invalid,¹³³ since such an act would have violated a higher law, the law established by God, “which it is not in the power of any community, or of the whole race of man, to alter.”¹³⁴

“In reality,” Burke continued, “there are two, and only two foundations of law,” “both of them conditions without which nothing can give it any force.”¹³⁵ These are “equity and utility.”¹³⁶ Equity Burke understands as arising “out of the great rule of

131. *Id.* at 321.

132. *Id.* at 321.

133. In considering this matter, Burke raises the question whether a people might ever consent, not virtually but actually, to a prejudicial law. This question had been an important one in the debates over slavery in the seventeenth century, and writers like Grotius had argued that such consent was possible. Burke, however, would have none of it: “But if we could suppose that such a ratification had been made, not virtually, but actually, by the people, not representatively, but even collectively, still it would be null and void. They have no right to make a law prejudicial to the whole community, even though the delinquents in making such an act should be themselves the chief sufferers by it.” *Id.* at 321-22.

134. *Id.* at 322 (continuing “It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society, than the position, that any body of men have a right to make what laws they please,—or that laws can derive any authority from their institution merely, and independent of the quality of the subject-matter.”). Hobbes endorsed the position that majorities can take what action they please, and Burke notes, he has been “ably” and “frequently” refuted. *Id.*

135. *Id.* at 323.

136. *Id.*

equality, which is grounded upon our common nature, and which Philo, with propriety and beauty, calls the mother of justice.”¹³⁷ Laws such as the popery laws, which “create an artificial difference between men . . . in order to induce a consequential inequality in the distribution of justice” are no laws at all.¹³⁸

Burke saw utility, furthermore, not as the followers of Bentham do, by reference to the greatest good of the greatest number. It must not be “partial or limited,” but instead be “general and public” and “connected in the same manner with, and derived directly from, our rational nature”¹³⁹ Burke finds support for this proposition from such varied sources as an excerpt of Paulus found in Justinian’s *Digest* and a declaration by the seventeenth-century Spanish Jesuit Francisco Suarez that a universally accepted axiom about the reason and substance of law is that it is enacted *pro communi bono*,¹⁴⁰ “to advance the common good.” Burke concluded that the popery laws also violate utility because they advance the interest of a minority at the expense of the majority’s well-being.¹⁴¹

These arguments bring Burke to the heart of the *Tract*: The contention that the sort of religious persecution which Britain was practicing was, without more, a violation of natural law and natural rights.¹⁴² In arriving at this conclusion, Burke returned to the Protestant contention that since the laws’ purpose is itself a thing beneficial to their subjects and to society as a whole, the means employed to achieve

137. *Id.*

138. *Id.*

139. *Id.*

Law is a mode of human action respecting society, and must be governed by the same rules of equity which govern every private action; and so Tully considers it in his *Offices* as the only utility agreeable to that nature: *Unum debet esse omnibus propositum, ut eadem sit utilitas uniuscujusque et universorum; quam si ad se quisque rapiat, dissolvetur omnis humana consortio.* [One proposition must be held before all others, that the same utility prevails for each individual and for the entire group; for if everyone takes for himself, all human sociability will be dissolved].

Id.

140. *Id.* at 324-25.

141. *Id.*

142. *Id.* at 326.

When people are gone, if not into a denial, at least into a sort of oblivion of those ideas, when they know them only as barren speculations, and not as practical motives for conduct, it will be proper to press, as well as to offer them to the understanding; and when one is attacked by prejudices which aim to intrude themselves into the place of law, what is left for us but to vouch and call to warranty those principles of original justice from whence alone our title to everything valuable in society is derived?

Id.

this end must accordingly be “instrumentally good.”¹⁴³ Such an assertion amounts to a justification of religious persecution, which is intolerable:

I observe, that, if the principle of their final and beneficial intention be admitted as a just ground for such proceedings, there never was, . . . nor ever can be, such a thing as a religious persecution in the world. Such an intention is pretended by all men,—who all not only insist that their religion has the sanction of Heaven, but is likewise and for that reason, the best and most convenient to human society. All religious persecution, Mr. Bayle well observes, is grounded upon a miserable *petitio principii*. You are wrong, I am right; you must come over to me, or you must suffer.¹⁴⁴

Freedom of religion, Burke continues, is a fundamental natural right, which it is the purpose of civil government to secure.¹⁴⁵ Religious persecution destroys the substance of this right and is for that reason wrong—a violation of the natural law. Also, because it goes against the nature of the Irish people, such a persecution will inevitably prove ineffectual. “Ireland, after almost a century of persecution, is at this hour full of penalties and full of Papists.”¹⁴⁶ The popery laws ought, therefore, to be repealed.¹⁴⁷ Burke saw no difficulty in retaining the established Irish Church, with

143. *Id.* at 332.

They will lay it down as a principle, that the Protestant religion is a thing beneficial for the whole community, as well is in its civil interests as in those of a superior order. From thence they will argue, that, the end being essentially beneficial, the means become instrumentally so; that these penalties and incapacities are not final causes of the law, but only a discipline to bring over a deluded people to their real interest, and therefore, though they may be harsh in their operation, they will be pleasant in their effects; and be they what they will, they cannot be considered as a very extraordinary hardship, as it is in the power of the sufferer to free himself when he pleases, and that only by converting to a better religion, which it is his duty to embrace.

Id.

144. *Id.* at 332-33.

Let me add, that the great inlet by which a color for oppression has entered into the world is by one man's pretending to determine concerning the happiness of another, and by claiming a right to use what means he thinks proper in order to bring him to a sense of it. It is the ordinary and trite sophism of oppression.

See also PIERRE BAYLE'S PHILOSOPHICAL COMMENTARY: A MODERN TRANSLATION AND CRITICAL INTERPRETATION (Amie Godman Tannenbaum, ed. & trans., 1987) (analyzing and translating Pierre Bayle, an important early exponent of religious tolerance).

145. See TRACT, *supra* note 124, at 333 (“Everybody is satisfied that a conservation and secure enjoyment of our natural rights is the great and ultimate purpose of civil society, and that therefore all forms whatsoever of government are only good as they are subservient to that purpose to which they are entirely subordinate.”).

146. *Id.* at 334.

147. Burke acknowledges that the repeal of a law should only be undertaken in extreme circumstances. “[L]aws, like houses, lean on one another, and the operation is delicate . . .” *Id.* at 319. Repeal of the popery laws, however, is necessary because the laws themselves are “fundamentally wrong, [and] the more perfect the law is made the, worse it becomes.” *Id.* at 320.

the King of England as its head, but it should not persecute Catholics who hold differing views about religion.¹⁴⁸

Having demonstrated that the popery laws violated the natural law by advancing the illegitimate aim of religious persecution, Burke considered the ways in which they also shattered the bonds of affection that Irish and English ought to have for one another. By dispossessing parents of their estates in land should their offspring convert, the laws have provoked a “revolt” of children “against their parents.”¹⁴⁹ The prohibition on Catholic education, furthermore, destroys the natural responsibility parents have for assisting children to find their place in the world.¹⁵⁰ The prohibition on Catholic ownership of firearms is so extreme as to amount to “a scheme of tyranny.”¹⁵¹ The land laws have been so applied against Catholics that they have effectively destroyed all habits of industry or frugality.¹⁵² Taken collectively, these laws operate as “a direct discouragement to melioration,—as directly as if the law had said in express terms, “Thou shalt not improve.”¹⁵³

But matters might be changed for the better. As in his arguments on India, Burke places the burden on England to respect the pre-existing culture. The Irish hold their religious beliefs close to their hearts as by a sort of prescriptive right that predates the Reformation.¹⁵⁴ They have rebelled against an English rule that has made “the most unparalleled oppression.”¹⁵⁵ Should England allow Irish Catholics to experience “temporal happiness” they will not be so willing to invoke their religion as grounds for revolt.¹⁵⁶ Religious fanaticism is kept alive “by ill usage.”¹⁵⁷ A gentle rule, which

148. *Id.* at 339. In an important article, Michael W. McConnell has demonstrated that Burke's conception of religious establishment necessarily embraced the notion of tolerance of dissenting faiths. The Establishment in England, McConnell continues, enjoyed its status not because it was the one, true faith, to which others had to conform, but because the experience of the English people had taught that this arrangement was best for England. See *Edmund Burke's Tolerant Establishment*, in *RELIGIOUS LIBERTY IN WESTERN THOUGHT* 203, 219 (Noel B. Reynolds and W. Cole Durham, Jr. eds., 1996). McConnell concludes: “Toleration and establishment are . . . not inconsistent principles, but alternative strategies for attaining the same objective: to nurture and strengthen the religious sensibilities that are the best and most reliable source of moral restraint.” *Id.* at 244.

149. *TRACT*, *supra* note 124, at 306.

150. *Id.* at 311-13.

151. *Id.* at 314.

152. *Id.* at 351-55.

153. *Id.* at 353.

154. “It is proper to recollect that this religion, which is so persecuted in its members, is the old religion of the country, and the once established religion of the state . . .” *Id.* at 336.

155. *Id.* at 356.

156. *Id.* at 356-57. “The principle of religion is seldom lasting; the majority of men are in no persuasion bigots; they are not willing to sacrifice, on every vain imagination that superstition or enthusiasm holds forth, or that even zeal and piety recommend, the certain possession of their temporal happiness.” *Id.* This passage must not be read as a criticism of religion as such, but of the kind of religious fanaticism that undermines the relationships on which a healthy society depends. Burke was deeply opposed to atheism and once wrote that “I am attached to Christianity at large; much from conviction; more from affection.” (Quoted in McConnell, *supra* note 148, at 206). McConnell offers the following observation about Burke's own brand of Christianity:

[W]hile it is surely dangerous to deduce a statesman's theology from public statements and writings on political themes, these sources convey an impression that Burke understood religion almost exclusively as a source of a moral code, of hope and consolation on earth, and of rewards and punishments in the

stresses the common interests of Irish Catholics and English Protestants, on the other hand, is founded on the “home-bred connections” which are the “natural basis” of society.¹⁵⁸ In this way, “the passions of men are cooled” and the Irish can be incorporated within the empire on the basis of consent and mutual interest.¹⁵⁹

In the 1790s, near the end of his life, Burke returned to the subject of Ireland in a series of letters intended, for the most part, to be made public. These letters represent variations on themes already struck in the *Tract on the Popery Laws*. The worst of the popery laws had been repealed, but conditions for Irish Catholics remained deplorable.¹⁶⁰ Burke stressed repeatedly the counterproductive nature of English rule. English attacks on the papacy have only partially succeeded: They have diminished Irish Catholic respect for that office, but have not thereby won any converts for the Protestant cause; rather, they have driven luke-warm Catholics into the arms of the Jacobins threatening Christian Europe.¹⁶¹ The Protestant Ascendancy that ruled in Ireland, furthermore, by arrogating to itself special prerogatives and

life to come Notably lacking in Burke’s extensive speeches and writings about religion is any reference to the central tenet of mainstream Christianity: the vicarious atonement of Jesus Christ and the redemption through faith in Him On the other hand, Burke did not move in the direction of rational religion, so attractive to many of his contemporaries.

Id. at 207.

157. *Tract on the Popery Laws*, IV WRITINGS AND SPEECHES 299, 367 n.145.

158. *Id.* at 330. Burke was generally troubled by those who considered religious ties close and endearing and their country to be no bond at all. Such persons celebrate the cause of Protestant or Papist, while brutally oppressing countrymen who disagreed with their persuasion:

[T]o lose all feeling for those who have grown up by our sides, in our eyes, the benefit of whose cares and labors we have partaken from our birth, and meretriciously to hunt abroad after foreign affections, is such a disarrangement of the whole system of our duties, that I do not know whether benevolence so displaced is not almost the same thing as destroyed, or what effect bigotry could have produced that is more fatal to society.

Id. at 330.

159. *Id.* at 360.

160. In 1782, legislation was enacted abolishing restrictions on Catholic landownership and allowing Catholic clergy to perform most ecclesiastical ceremonies. *See* 21 & 22 Geo. III c. 24 (1782). Other legislation passed the same year permitted Catholics to “keep school,” although this had to be done under the supervision of the Protestant clergy. *See* 21 & 22 Geo. III c. 62 (1782). The most restrictive features of Poyning’s Law were also repealed, thus conferring on the Irish Parliament a substantial degree of autonomy. 21 & 22 Geo. III c. 47 (1782). *See* R.B. McDowell, COLONIAL NATIONALISM AND THE WINNING OF PARLIAMENTARY INDEPENDENCE, 1760-1782, in IV A NEW HISTORY OF IRELAND, *supra* note 118, at 233.

161. *Second Letter to Sir Hercules Langrishe, May 26, 1795*, VI WRITINGS AND SPEECHES 378, 380-81.

The worst of the matter is this: you are partly leading, partly driving into Jacobinism that description of your people whose religious principles, church polity, and habitual discipline might make them an invincible dike against that inundation. This you have a thousand mattocks and pickaxes lifted up to demolish. You make a sad story of the Pope. *O seri studiorum!* It will not be difficult to get many called Catholics to laugh at this fundamental part of their religion. Never doubt it. You have succeeded in part, and you may succeed completely. But in the present state of men’s minds and affairs, do not flatter yourselves that they will piously look to the head of our Church in the place of that Pope whom you make them forswear, and out of all reverence to whom you bully and rail and buffoon them. . . . You have no security for anything, but that they will become what are called *Franco-Jacobins*, and reject the whole together.

Id.

privileges at the expense of the Catholic majority had turned itself into a despotism.¹⁶² Burke remained deeply concerned to the end of his days about Irish affairs: By remaining fixated on popery, the Protestant overlords of Ireland had lost sight of the actual dangers threatening them.¹⁶³

Ultimately, after much bloodshed, the Republic of Ireland was able to establish its political independence in the early part of this century. The subsequent course of Irish history, however, is less important to our concerns than the prescriptions Burke laid down for proper British governance in Ireland. Attempting to force a people to change its religion was tyrannous and futile in the same way the French Revolutionary attempt to destroy religion would later prove futile. The Irish people had chosen Catholicism, with its reverence for a priestly class and its other particular institutions, beliefs, and practices. They had maintained this attachment in the face of severe penalties. The habits of thought and action arising from this choice had been ingrained into their nature over the course of centuries and become central to their identity. It was therefore against their nature to become Protestants. It was unjust and unnatural to force them to convert.

Burke urged the English to face Irish discontent with compromise and generosity. He counseled a light hand, not because he thought that one opinion or culture was better than another, but because he was convinced that governments and empires can exist only with the acceptance and affection of the people. Better to let a people out of the Empire than to allow habits of rule by force and terror to establish themselves in a free country like England. Such habits would corrupt the motherland as they would tyrannize the possession and impoverish the whole British Empire.

V. AMERICA: A DIFFERENT KIND OF ENGLISHMAN

When Burke took his seat in Parliament in December, 1765, the nation was confronted with a growing crisis over its North American colonies. The conclusion of the Seven Years' War (usually called the French and Indian War in the United States) left the treasury in need of revenue and the American colonies with a new

162. *Letter to Richard Burke, esq., on the Protestant Ascendancy in Ireland, 1793*, VI WRITINGS AND SPEECHES, 385, 389-90.

But it will be said, in that country some people are free. Why, this is the very description of despotism. *Partial freedom is privilege and prerogative, and not liberty.* Liberty, such as deserves the name, is an honest, equitable, diffusive, and impartial principle. It is a great and enlarged virtue, and not a sordid, selfish, and illiberal vice. It is the portion of the mass of the citizens, and not the haughty licence of some potent individual or some predominant faction.

Id.

163. The Protestants continue to carry with them "the burden of the old song about Popery. Poor souls, they are to be pitied, who think of nothing but the dangers long passed by, and but little of the perils that actually surround them." *A Letter on the Affairs of Ireland, 1797*, VI WRITINGS AND SPEECHES 413, 428.

sense of accomplishment and independence.¹⁶⁴ In order to raise needed funds, the new Chancellor of the Exchequer, George Grenville, shepherded through Parliament the Sugar Act, which, at least superficially, offered the promise of a reduction in the duties on molasses shipped to the colonies, but in reality amounted to a significant new tax.¹⁶⁵ The colonists, however, reacted with protests and also began to question the constitutional status of British rule in North America.¹⁶⁶

Undeterred by American complaints, Grenville next saw through Parliament the Stamp Act of 1765, which had as its purpose the imposition of a tax on all official documents, such as marriage licenses and pleadings filed in civil litigation, as well as many other items of everyday commerce.¹⁶⁷ The outcry against the Stamp Act far exceeded the protest against the Sugar Act: The colonists set about putting an embargo on British goods and young firebrands such as Patrick Henry questioned whether England could constitutionally impose taxes or otherwise oblige the colonists to obey English laws.¹⁶⁸

Within months, a move to repeal the Stamp Act was well underway, although its ultimate repeal was accompanied by the passage of the Declaratory Act, which maintained that the English Parliament had the constitutional authority to impose taxes on its American colonies.¹⁶⁹ Burke himself spoke against the Stamp Act and in favor of the Declaratory Act, seeing the tax on documents as a flawed, but ultimately constitutional policy.¹⁷⁰ Quickly, however, British politicians began to regret the repeal of the Stamp Act and set about devising a new scheme for taxing the

164. See DON COOK, *THE LONG FUSE: HOW ENGLAND LOST THE AMERICAN COLONIES, 1760-1785* 2 (1995) ("The end of the Seven Years' War set the stage on both sides of the Atlantic for the American War of Independence. The British Army had routed the French from Canada and the American colonies, but sizable English forces stayed behind, ostensibly to guarantee the peace")

"The American colonies . . . emerged from the war with their western frontiers secure, free of any threat from a foreign power now that the French were gone There was not the slightest doubt at that time about the overwhelming loyalty of the colonial population to King George III But America was also imbued with a heightened sense of independent political and economic strength and a vision of expansion and destiny.")

165. By its terms, the Sugar Act reduced by half the duty on molasses, but extended it to cover previously untaxed molasses from the British West Indies. More effective means of enforcement were also provided for, including the transference of cases to admiralty courts, to avoid the widespread refusal by colonial juries to convict those who evaded payment on the tax. See EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-1789* 16 (3d ed., 1992); COOK, *supra* note 164, at 60-62 (discussing the Sugar Act).

166. See MORGAN, *supra* note 165, at 16-20 (opining that the Sugar Act gave rise to the argument that Parliament lacked the authority to tax the colonies because the colonists lacked representation in that body).

167. See COOK, *supra* note 164, at 63-64 (summarizing of the provisions of the Act). Cook lists some of the items which required government stamps for validity: "Stamp taxes would be levied on the probate of wills, liquor licenses, deeds, leases, mortgages, insurance policies, bonds, ship charters, bills of lading, customs clearances, newspapers, pamphlets, books, almanacs, advertisements, playing cards, dice." *Id.* at 64. On the political circumstances involved in the passage of the Stamp Act, see generally P.D.G. THOMAS, *BRITISH POLITICS AND THE STAMP ACT CRISIS: THE FIRST PHASE OF THE AMERICAN REVOLUTION, 1763-1767* (1975); JOHN L. BULLION, *A GREAT AND NECESSARY MEASURE: GEORGE GRENVILLE AND THE GENESIS OF THE STAMP ACT, 1763-1765* (1982).

168. See COOK, *supra* note 164, at 70-87.

169. *Id.* at 89-91. The duties imposed by the Sugar Act were also reduced by two-thirds. *Id.* at 108.

170. *Id.* at 90-91. See PAULL LANGFORD, *THE FIRST ROCKINGHAM ADMINISTRATION, 1765-1766* 152-53 (1973) (addressing the drafting of the Declaratory Act and Burke's support of it).

colonies,¹⁷¹ as much for reasons of politics as for reasons of revenue.¹⁷² These efforts resulted in the Townshend Duties, passed by Parliament in 1767.¹⁷³

Once again, the colonists greeted the new taxes with a mixture of alarm and outrage. Benjamin Franklin argued that the time had come for the colonies to enjoy “fair and equal representation” in Parliament.¹⁷⁴ John Dickinson asserted that constitutionally Parliament had the power only to regulate trade with the colonies, not raise revenue from them.¹⁷⁵ Samuel Adams rejected in even clearer terms the right of Parliament to tax.¹⁷⁶ Finally, in 1770 “all the Townshend duties were repealed except the tea tax, which was retained as a symbol of Parliament’s right to tax.”¹⁷⁷

The repeal of the Townshend duties seemed to defuse the crisis, at least for a while. Feelings were once again aroused in 1773, when Parliament, in order to help the East India Company through a financial crisis, reduced the taxes owed on tea transshipped to America and permitted “the East India Company to carry its tea directly to the colonies.”¹⁷⁸ The practical effect of this subsidy would be to lower prices for American consumers of tea and thereby “secure for the company a monopoly of the American market.”¹⁷⁹ The American—especially the New England—merchant class took the reduction in the duty paid on English tea as an attack on their interests, and quickly found common cause with the radical opponents of British rule.¹⁸⁰ They realized that “if Parliament could manipulate taxes to produce a tea monopoly, it could do so as well for any and all commodities.”¹⁸¹

The colonists now responded with more than protests and pamphlets. In December, 1773, a group of men, dressed as Indians, boarded British ships in Boston

171. See Edmund Burke, *Speech on American Taxation*, in *SELECTED WRITINGS AND SPEECHES ON AMERICA* 105 (Thomas H.D. Mahoney ed., 1964) (stating, as Burke put it, “The very next session, as the fashion of this world passes away, the repeal began to be in as bad an odor in this House as the Stamp Act had been in the session before.”).

172. See P.D.G. THOMAS, *THE TOWNSHEND DUTIES CRISIS: THE SECOND PHASE OF THE AMERICAN REVOLUTION, 1767-1773* 30 (1987) (observing, concerning the motivation of Charles Townshend, who led the fight for the new taxes: “His aims were political rather than financial, the reestablishment of the practice of colonial taxation and the making of Parliamentary provision for the costs of civil government and the administration of justice in the colonies”).

173. See COOK, *supra* note 164, at 121-27 (examining the Townshend Duties). The items upon which duties were imposed included “paints, painters’ colors, lead, glass, and tea imported into America from Great Britain.” See T.H.D. Mahoney, *Introduction*, in *SELECTED WRITINGS AND SPEECHES ON AMERICA* xii (Thomas H.D. Mahoney ed., 1964). Mahoney adds: “These acts also authorized writs of assistance, set up an American customs board to supervise enforcement of the revenue laws, and provided that tax revenues should pay the salaries of royal officials in America and defray the expenses of British troops in the colonies.” *Id.*

174. See COOK, *supra* note 164, at 124 (quoting Franklin).

175. *Id.* at 124-27.

176. *Id.* at 129.

177. See Mahoney, *supra* note 173, at xiii.

178. *Id.* at xiv.

179. *Id.*

180. *Id.*

181. *Id.*

harbor and dumped their cargoes of tea overboard. This event simultaneously captured the imagination of restive Americans who stopped British merchant ships from entering American ports up and down the coast, and goaded the English Parliament into passage of the Coercive Acts, meant to punish Massachusetts for the destruction of British tea.¹⁸²

Burke was a member of Parliament throughout these events, as well as a member of the Rockingham Administration that repealed the Stamp Act in 1766. In the year 1770, because of his avowed sympathies for the colonies, he was elected London Agent for New York Affairs, a position he held until 1774.¹⁸³ American affairs figured prominently in his writings from the mid-1760s to the early 1780s.¹⁸⁴ Two speeches in particular, however, composed respectively in 1774 and 1775, as the American situation moved rapidly toward war, represent his most sustained contribution to the debate.¹⁸⁵

Delivered in April, 1774, in the aftermath of the Boston Tea Party and in the midst of legislative debate and action on the Coercive Acts, the Speech on American Taxation was an effort to reverse English revenue policy toward the American colonies.¹⁸⁶ Much of the speech was concerned with interpreting the history of British dealings with the colonies, which divided roughly into two periods: that before and that after 1764. For most of the period before 1764, economic relations with the colonies were governed by the Navigation Acts, which created a monopoly of British trade in North America, thereby giving British industries an assured market for their

182. See COOK, *supra* note 164, at 186-88 (reviewing the provisions of the Coercive Acts). See generally P.D.G. THOMAS, *TEA PARTY TO INDEPENDENCE: THE THIRD PHASE OF THE AMERICAN REVOLUTION, 1773-1776* (1991).

183. See ROSS J.S. HOFFMAN, *EDMUND BURKE, NEW YORK AGENT, WITH HIS LETTERS TO THE NEW YORK ASSEMBLY* (1956).

184. See Mahoney, *supra* note 173, at ix-xxi (reviewing Burke's writing on America during this time).

185. Also of importance is Burke's essay *Observation on a Late Publication entitled 'The Present State of the Nation*, in *SELECTED WRITINGS* 6-56. Written in 1769, this essay was a response to a pamphlet by William Knox which had attacked the Rockingham Whigs for their repeal of the Stamp Act, called for American representation in Parliament thereby removing the colonials' chief constitutional objection to Parliament's power to tax, and argued for the imposition of substantial new taxes on the colonies, to be collected according to means established by the colonial assemblies.

Perhaps sensing that Knox's arguments were pretextual—give the Americans representation expressly to facilitate the imposition of taxes—Burke attacked the practicality of the proposals. To provide the Americans with representation was impossible, according to Burke. The distance to be traversed was simply too great: The American representatives might arrive to find Parliament already dissolved, or the monarch dead, or important matters already decided. Americans, furthermore, could not afford to serve in Parliament, since members were required to provide for their own transportation and lodging. As well, disputed elections could never be properly resolved, because of time and travel constraints. *Id.* at 27-31.

Elsewhere, Burke asserted that another reason at least some Americans should be denied representation was the slave-holding character of their colonies: "[C]ommon sense, nay self-preservation, seems to forbid, that those who allow themselves unlimited right over the liberties and lives of others, should have any share in making laws for those who have long renounced such unjust and cruel distinctions." RUSSELL KIRK, *EDMUND BURKE: A GENIUS RECONSIDERED* 57 (1967).

186. See *Speech on American Taxation*, in *SELECTED WRITINGS*, *supra* note 185, at 57-115.

goods.¹⁸⁷ The Acts, however, left untouched the question of revenue collected from the colonies in the form of taxes, and in practice virtually no taxes were imposed. These Acts collectively established as British policy the principle that the American colonies “contribute . . . to the strength of the empire” by their exclusive trade with the motherland.¹⁸⁸ But with the enactment of the Sugar Act, this policy was altered; it seemed that a new fundamental ground had been established for the relationship, the collection of revenue from the colonies, which was simply superimposed on the old trade monopoly.¹⁸⁹

Burke believed that a return to the status quo before 1764 would have salutary effects on British-North American relations. He based his argument on customary practice, sound public policy, and a respect for Americans as participants in a British constitutional order that prided itself on the liberty of the subject. As a matter of customary practice, the colonists had been loyal British subjects from 1660 to 1764. In explaining why the Americans endured a monopoly of trade for this period of time, Burke stated:

[M]en do bear the inevitable constitution of their original nature with all its infirmities. The Act of Navigation attended the colonies from their infancy, grew with their growth, and strengthened with their strength. They were confirmed in obedience to it even more by usage than by law. They scarcely had remembered a time when they were not subject to such restraint.¹⁹⁰

187. *Id.* at 76 (“Permit me then, Sir, to lead your attention very far back—back to the Act of Navigation, the cornerstone of the policy of this country with regard to its colonies. Sir, that policy was from the beginning purely commercial, and the commercial system was wholly restrictive. It was the system of a monopoly. No trade was let loose from that constraint, but merely to enable the colonists to dispose of what in the course of your trade you could not take, or to enable them to dispose of such articles as we forced upon them, and for which, without some degree of liberty, they could not pay This principle of commercial monopoly runs through no less than twenty-nine acts of Parliament, from the year 1660 to the unfortunate period of 1764.”).

The British monopoly of trade allowed the mother country to develop some large and substantial domestic industries. See PAUL LANGFORD, ‘A POLITE AND COMMERCIAL PEOPLE:’ ENGLAND, 1727-1783 168-70 (1989) (providing documentation for the assertion that “[c]olonial demand extended to a range of British manufactures, but provided a special boost to some of the newer ones.”).

188. *Id.* at 77.

189. *Id.* at 78.

The scheme of a colony revenue by British authority appeared . . . to the Americans in the light of a great innovation. The words of Governor Bernard’s ninth letter, written in November, 1765, state this idea very strongly. ‘It must,’ says he, ‘have been supposed *such an innovation as a parliamentary taxation* would cause a great *alarm*, and meet with much *opposition* in most parts of America; it was quite new to the people and had no *visible bounds* set to it.’ After stating the weakness of government there, he says, ‘Was this a time to introduce *so great a novelty* as a parliamentary inland taxation in America?’

Id.

190. *Id.* at 78.

“Experience,” not “invention” should be the guide Britain adopts for resolving the conflict over taxation.¹⁹¹ Experience, Burke demonstrates through involved historical argument, teaches that the colonists were loyal and obedient subjects until long-standing arrangements were disrupted. It is reasonable to assume that they would return to the fold if the old arrangements were restored.¹⁹²

Burke acknowledged that much energy had been expended over whether Britain had the constitutional authority to tax the colonies, but he had no desire to open the door to this controversy.¹⁹³ He wished to keep the argument focused entirely on the time-honored and the practicable: “Consult and follow your experience. Let not the long story with which I have exercised your patience prove fruitless to your interests.”¹⁹⁴

But recollection of the amicability colonials and Britons shared under the Navigation Acts is not the only reason Burke gave for returning to the status quo before 1764. It also made sense for reasons of public policy to take this course of action. The tea tax was imposed upon commercial principles, and it should be repealed for the same reason.¹⁹⁵ A return to the old principles would allow the colonies to continue on their path of astonishing economic prosperity,¹⁹⁶ and this

191. *Id.* at 58.

192. *Id.* at 114.

I have shown . . . that in time of peace you flourished in commerce, and when war required it had sufficient aid from the colonies, while you pursued your ancient policy; that you threw everything into confusion when you made the Stamp Act; and that you restored everything to peace and order when you repealed it. I have shown that the revival of the system of taxation has produced the very worst effects, and that the partial repeal has produced not partial good but universal evil. Let these considerations, founded on facts not one of which can be denied, bring us back to our reason by the road of our experience.

Id.

193. *See id.* at 67 (asserting that it is not “declaratory of a right . . . [but] is only a recital of the expediency of a right supposed already to have been asserted . . .”). And again, on the question of the right to tax: “I am not here going into the distinctions of rights nor attempting to mark their boundaries. I do not enter into these metaphysical distinctions; I hate the very sound of them. Leave the Americans as they anciently stood . . . They and we, and their and our ancestors, have been happy under that system.” *Id.* at 110.

194. *Id.* at 109. Russell Kirk has observed: “Custom and usage, in fine, are firm ground for justice and for voluntary acceptance of necessary authority Accustomed to a high degree of liberty, the Americans must be indulged in their old ways; and the whole empire would prosper by this prudent avoidance of extreme doctrines.” *See KIRK, supra* note 185, at 67.

195. “It has been said again and again that the five taxes were repealed on commercial principles Repeal this tax, too, upon commercial principles, if you please.” *Id.* at 62-63.

196. *Id.* at 78-79.

Nothing in the history of mankind is like their progress. For my part, I never cast an eye on their flourishing commerce and their cultivated and commodious life but they seem to me rather ancient nations grown to perfection through a long series of fortunate events and a train of successful industry, accumulating wealth in many centuries, than the colonies of yesterday—than a set of miserable outcasts, not so much sent as thrown out on the bleak and barren shore of a desolate wilderness three thousand miles from all civilized intercourse.

Id.

would benefit the motherland much more than the paltry revenues they might collect from the tea tax.¹⁹⁷

Burke, furthermore, was afraid that the lawyers and the politicians might continue to press their case against the colonies. Townshend, according to Burke, "conceived . . . that the flourishing trade of this country was greatly owing to law and institution and not quite so much to liberty, for but too many are apt to believe regulation to be commerce and taxes to be revenue."¹⁹⁸ Those who press this point are likely to engage in half-measures which leave matters worse than before. They use "too much logic and too little common sense."¹⁹⁹ "Recover your old ground and your old tranquility; . . . I am persuaded the Americans will compromise with you."²⁰⁰ The alternative to compromise, Burke concluded grimly, was very likely war.²⁰¹

This much, Burke continued, was required by the British Constitution and by what he calls the constitution of the British empire. Burke envisioned a federated structure to the empire, in which Parliament possesses ultimate sovereignty, but in which the constituent members also enjoy autonomy that should not ordinarily be disturbed. Indeed, Parliament is to act only where subordinate legislatures are incapable (or refuse to) fulfill their responsibilities. Burke explains:

The Parliament of Great Britain sits at the head of her extensive empire in two capacities. One, as the local legislature of this island, providing for all things at home, immediately, and by no other instrument than the executive power. The other, and I think her nobler capacity, is what I call her *imperial character*, in which, as from the throne of heaven, she superintends all the several inferior legislatures and guides and controls them all without annihilating any. As all these provincial legislatures are only co-ordinate to each other, they ought all to be subordinate to her, else they can neither preserve mutual peace, nor hope for mutual justice, nor effectually afford mutual assistance. It is necessary to coerce the negligent, to restrain the violent, and to aid the weak and deficient by the overruling plenitude of her power. She is never to intrude into the place of the others, while they are equal to the common ends of their institution.²⁰²

197. "All this was done by England [the astonishing growth of both the colonies and Britain] while England pursued trade and forgot revenue. You not only acquired commerce but you actually created the very objects of trade in America, and by that creation you raised the trade of this kingdom at least fourfold." *Id.* at 79.

198. *Id.* at 83.

199. *Id.* at 109.

200. *Id.*

201. "Incredible as it may seem, you know that you have deliberately thrown away a large duty, which you held secure and quiet in your hands, for the vain hope of getting three-fourths less, through every hazard, through certain litigation, and possibly through war." *Id.* at 65-66.

202. The structure of empire that Burke envisioned, including even the canonistic term of art "plenitude of power," is reminiscent of the relationship of pope and bishops in medieval canon law. See BRIAN TIERNEY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650 (1982); KENNETH PENNINGTON,

While Parliament's powers are theoretically boundless, they must be limited by their proper object: maintaining a peaceful and prosperous empire bound together by the consent of those so governed. The taxation measures of the previous decade violated this basic principle of imperial organization. The American assemblies had their proper authority threatened and the Americans justifiably concluded that "their sole image of freedom" was being "annihilated."²⁰³ The consent on which true governance was based was absent insofar as these measures were concerned.²⁰⁴ By pressing the issue of sovereignty and attempting to coerce the Americans into obedience, the supporters of taxation were in effect provoking rebellion.²⁰⁵ Burke, for his part, would stand on the old system: by limiting central authority over the colonies, "it fixes on the firmest foundations a real, consistent, well-grounded authority in Parliament. Until you come back to that system, there will be no peace for England."²⁰⁶

Britain therefore must govern its empire constitutionally. The representative institutions of the colonies ought to be respected. The Sugar Act and the Stamp Act amounted to a radical repudiation of a century of experience in governing the colonies. The enactment of this legislation led the colonists to conclude that the fundamental relationship they enjoyed with the motherland was being altered. This belief was the ultimate source of their grievances. Governance with a light hand, in accord with tested and true methods, would work best where the Americans were concerned. Rebellion might yet be prevented.

Burke's second major address on American affairs, the Speech on Moving Conciliation with the Colonies, occurred in March, 1775, as the colonies began to mount open rebellion to English authority. The First Continental Congress had

POPE AND BISHOPS: THE PAPAL MONARCHY IN THE TWELFTH AND THIRTEENTH CENTURIES (1984) (discussing twelfth- and thirteenth-century canonistic structure).

It must be stressed that Burke was no legal positivist blind to the possibility that Parliament might abuse its potentially limitless powers. He stressed that its powers must always be conformed to the constitution. In England, furthermore, Parliament, as the local legislature for the island, must respect and follow the particular traditions and legal rights that had developed over time as the people sought to conserve their society in the face of changing circumstances. In the empire, Parliament was bound by the traditions, laws, and needs of the various peoples she governed. In both instances, the final, crucial restriction came from an immutable natural law that required the governors to pursue and respect the interests of the governed.

203. *Speech on American Taxation*, in *SELECTED WRITINGS*, *supra* note 185, at 85.

204. "No man ever doubted that the commodity of tea could bear an imposition of threepence. But no commodity will bear threepence, or will bear a penny when the general feelings of men are irritated and two millions of people are resolved not to pay." *Id.* at 66.

205. *Id.* at 110-11.

But if, intemperately, unwisely, fatally, you sophisticate and poison the very source of government by urging subtle deductions and consequences odious to those you govern from the unlimited and illimitable nature of supreme sovereignty, you will teach them by these means to call that sovereignty itself in question. When you drive him hard, the boar will surely turn upon the hunters. If that sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face. No one will be argued into slavery.

Id.

206. *Id.* at 115.

assembled the previous autumn and had repudiated the Coercive Acts and the whole notion of parliamentary supremacy.²⁰⁷ The Battles of Lexington and Concord lay a month away in the future. War was imminent, but Burke still struggled to stave it off.

In addressing the House of Commons, Burke's avowed intention was to restore "peace," "[n]ot peace through the medium of war; not peace to be hunted through the labyrinth of intricate and endless negotiations; not peace to arise out of universal discord, fomented from principle, in all parts of the empire . . . [but] simple peace, sought in its natural course and its ordinary haunts."²⁰⁸ To achieve this peace, he continued, it was necessary to understand the "cause[s] of [the] disobedient spirit in the colonies."²⁰⁹

Fundamentally, Burke asserted, the root of American intransigence is the same love of liberty that all Englishmen hold dear:

[T]he people of the colonies are descendants of Englishmen. England, sir, is a nation which still, I hope, respects, and formerly adored, her freedom. The colonists emigrated from you when this part of your character was most predominant, and they took this bias and direction the moment they parted from your hands. They are therefore not only devoted to liberty, but to liberty according to English ideas and on English principles.²¹⁰

In the New World this love of liberty had room to grow and to flourish and was now "stronger in the English colonies, probably, than in any other people of the earth"²¹¹ The causes of this flourishing were many and varied. England's benign neglect of colonies gave them room to form popular assemblies, which in turn developed habits of self-government, including self-taxation.²¹² The Puritan faith of the northern colonies also inculcated a love of liberty among the inhabitants there. Differing from one another in many particulars, these factious denominations shared a history of struggle against persecution. And the colonists began leaving England at a time when religious fervor, and dissenting sects in particular, were at their height.²¹³ The many non-English Europeans who were now settling the northern

207. See MORGAN, *supra* note 165, at 61-64; THOMAS, TEA PARTY TO INDEPENDENCE, *supra* note 182, at 143-73.

208. *Speech on Moving Resolutions for Conciliation with the Colonies*, in SELECTED WRITINGS, *supra* note 185, at 119-120.

209. *Id.* at 136.

210. *Id.* at 132.

211. *Id.* at 131-32.

212. *Id.* at 132-33.

213. "All Protestantism, even the most cold and passive, is a sort of dissent. But the religion most prevalent in our northern colonies is a refinement on the principle of resistance; it is the dissidence of dissent, and the protestantism of the Protestant religion." *Id.* at 134.

colonies have only continued this trend.²¹⁴ In the southern colonies, ironically, it was slavery that helped to stimulate a sense of freedom, at least among those not in bondage.²¹⁵

Also contributing to the American love of liberty was their widespread study of the law. "In no country, perhaps, in the world, is the law so general a study."²¹⁶ Burke acknowledges that there are those in Parliament who will assert that knowledge of the law should teach the colonists "more clearly the rights of legislature, their obligations to obedience, and the penalties of rebellion."²¹⁷ But in fact, the Americans have developed a "stubborn and litigious" spirit.²¹⁸ Their study has made them "acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources. In other countries, the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance and snuff the approach to tyranny in every tainted breeze."²¹⁹

If this were not enough, English efforts to govern the colonies must also contend with geography: "Three thousand miles of ocean lie between you and them."²²⁰ How, therefore, must England govern such a liberty-loving and unruly people set at such a great distance from central authority? Burke proposes that England is bound by the "immutable condition, the eternal law, of extensive and detached empire," which requires that authority be lightly asserted.²²¹ But where England and America are concerned, light control was a blessing, not a curse. This was because of the mutual ties of affection and kinship that bind England to her colonies:

214. "[T]hat stream of foreigners which has been constantly flowing into these colonies has for the greatest part been composed of dissenters from the establishments of their several countries, and have brought with them a temper and character far from alien to that of the people with whom they mixed." *Id.*

215. "[I]n Virginia and the Carolinas they have a vast multitude of slaves. Where this is the case in any part of the world, those who are free are by far the most proud and jealous of their freedom. Freedom is to them not only an enjoyment but a kind of rank and privilege . . . I do not mean, sir, to commend the superior morality of this sentiment, which has at least as much pride as virtue in it . . ." *Id.* at 134-35.

216. *Id.* at 135.

217. *Id.* at 136.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 137.

In large bodies, the circulation of power must be less vigorous at the extremities. Nature has said it. The Turk cannot govern Egypt and Arabia and Kurdistan as he governs Thrace; nor has he the same dominion in Crimea and Algiers which he has at Brusa and Smyrna. Despotism itself is obliged to truck and huckster. The sultan gets such obedience as he can. He governs with a loose rein, that he may govern at all, and the whole of the force and vigor of his authority in his center is derived from a prudent relaxation in all his borders. Spain, in her provinces, is perhaps not so well obeyed as you are in yours. She complies, too; she submits; she watches time.

Id.

My hold of the colonies is in the close affection which grows from common names, from kindred blood, from similar privileges and equal protection. These are ties which, though light as air, are as strong as links of iron. Let the colonists always keep the idea of their civil rights associated with your government; they will cling and grapple to you, and no force under heaven will be power to tear them from their allegiance. . . . As long as you have the wisdom to keep the sovereign authority of this country as the sanctuary of liberty, the sacred temple consecrated to our common faith, wherever the chosen race and sons of England worship freedom, they will turn their faces toward you.²²²

What, then, ought Britain to do about the present rebellion? England might try to prosecute the Americans criminally, but this would lead to catastrophe. As Burke observed, "I do not know the method of drawing up an indictment against an whole people."²²³ England might consider force, but that would destroy America and deplete English reserves.²²⁴ England thus had no choice, according to Burke, but to conciliate.²²⁵ America must be allowed to keep its ancient privileges and immunities. After all, what else is an empire but:

[T]he aggregate of many states under one common head, It does, in such constitutions, frequently happen (and nothing but the dismal, cold, dead uniformity of servitude can prevent its happening) that the subordinate parts have many local privileges and immunities. Between these privileges and the supreme common authority the line may be extremely nice. . . . But though

222. *Id.* at 181-82. When Burke, a native Irishman, speaks of England as a "chosen race" it is, of course, a metaphorical choice of words. Burke stresses this theme of affection elsewhere, when he states:

Do you imagine, than, that it is the Land-Tax Act which raises your revenue? That it is the annual vote in the Committee of Supply which give you your army? Or that it is the Mutiny Bill which inspires it with bravery and discipline? No! Surely, no! It is the love of the people; it is their attachment to their government, from the sense of the deep stake they have in such a glorious institution, which gives you your army and your navy, and infuses into both that liberal obedience without which your army would be a base rabble and your navy nothing but rotten timber.

Id. at 182-83.

223. *Id.* at 145.

224. "The thing you fought for is not the thing you recover, but depreciated, sunk, wasted, and consumed in the contest I do not choose to consume its strength along with our own, because in all parts it is the British strength that I consume." *Id.* at 131.

225. "I propose, by removing the ground of the difference and by restoring the *former unsuspecting confidence of the colonies in the mother country*, to give permanent satisfaction to your people . . ." *Id.* at 120. To this end, Burke set out a plan consisting of thirteen resolutions. *Id.* at 161-71. His plan was subsequently rejected by Parliament. See CARL B. CONE, *BURKE AND THE NATURE OF POLITICS: THE AGE OF THE AMERICAN REVOLUTION 17 (1957)* (arguing that these "proposals would not have satisfied the Americans in 1775, if we may accept as statements of their sentiments the documents issued by the second Continental Congress . . ."). Russell Kirk, however, has asserted that "Burke's program, adopted earlier, might possibly have been a basis for compromise and gradual accommodation and reform." See KIRK, *supra* note 185, at 70.

every privilege is an exemption “(in the case)” from the ordinary exercise of the supreme authority, it is no denial of it.²²⁶

Burke was no advocate of appeasement, but in his view American demands were not unreasonable. Americans had not yet called for perfect, abstract freedom. Instead they sought a return to the “happy and liberal condition” short of full freedom that they were accustomed to enjoy. A return to this time-worn arrangement defined by customary practices and chartered rights would restore the affections on which all government rely.²²⁷

Burke feared that bad policies toward America would grievously injure the British Constitution and produce an eternal rent and schism in the British nation.²²⁸ But America could be retained as part of the empire if allowed sufficient free rein to keep her liberties. Empires, after all, consist of many and varied parts, enjoying locally distinctive privileges and immunities. Common interests and affections would bind Americans to England, provided the ties of government policy and taxation were loosened to a traditional and therefore acceptable level.

VI. CONCLUSION: BURKE’S CONSTITUTION OF EMPIRE

The three imperial conflicts with which Burke dealt extensively arose at different times and presented him with many seemingly diverse circumstances. But he faced

226. See *Speech on Conciliation*, in *SELECTED WRITINGS*, *supra* 171, at 145. In November, 1775, after six months of heavy fighting, which included such notable battles as Bunker Hill, Burke still hoped for reconciliation. In that month he delivered a second speech on conciliation, premised on the belief that the colonists were still attempting to vindicate their rights under the English Constitution rather than seeking independence from the empire. See *Summary of the Second Speech on Conciliation*, in *SELECTED WRITINGS*, *supra* note 171, at 200. To that end, Burke proposed a series of legislative initiatives meant to effect a reunification, including the passage of a declaration making clear that Parliament would not tax the colonies and the granting of a general amnesty to those who took up arms on the authority of the Continental Congress or other colonial assemblies. *Id.* at 201-06. Burke’s proposals received a sympathetic hearing and lost by a lesser margin than his other initiatives on America. See Mahoney, *supra* note 173, at xviii. The Government would itself later offer Burke’s proposals to the rebellious colonists only to be rejected. *Id.* at xviii-xix.

227. “Obedience is what makes government, and not the names by which it is called . . .” *Id.* at 139.

228. Writing in 1777, Burke stated:

[The American war is] in my humble opinion productive of many mischiefs, of a kind which distinguish it from all others. Not only our policy is deranged, and our empire distracted, but our laws and our legislative spirit appear to have been totally perverted by it. We have made war on our colonies, not by arms only, but by laws. As hostility and laws are not very concordant ideas, every step we have taken in this business, has been made by trampling on some maxim of justice, or some capital principle of wise government. . . .”

See *Letter to the Sheriffs of Bristol*, I WORKS 255.

War suspends the rules of moral obligation, and what is long suspended is in danger of being totally abrogated. Civil wars strike deepest of all into the manners of the people. They vitiate their politics; they corrupt their morals; they pervert even the natural taste and relish of equity and justice. By teaching us to regard our fellow-citizens in a hostile light, the whole body of our nation becomes gradually less dear to us.

Id.

each with strikingly similar principles, methods, and goals. Chartered rights and traditional ways of doing things are to be respected. Where the East India Company enjoyed privileges and rights under charters granted to it by English and Indian political authorities, it was obliged by correlative responsibilities and duties to observe the moral order and respect the pre-existent culture. The natural law set certain standards below which one must not descend. Efforts to stamp out the native religion of Ireland were based on a “miserable” foundation—the premise that “I am right and you are wrong.” The British Constitution endowed Englishmen everywhere with a love of liberty and a loathing of tyranny. The Americans were doing nothing more than responding as loyal English subjects when they protested the innovations introduced by Grenville and Townshend.

To gain and retain an empire requires skill and good will, as well as military might. No people can be kept enslaved forever. They must either be destroyed—an option Burke recoiled from as unjust—or somehow won over. But the very act of ruling tends to lead the ruler into hubristic opinions and actions. “When any community is subordinately connected with another, the great danger of the connection is the extreme pride and self-complacency of the superiour, which will probably decide in its own favour.”²²⁹ And pride and self-complacency lead to tyranny and revolt.

How, then, to maintain an empire? With a light and liberal hand. By recognizing that other peoples have their own traditions, belief-systems, character, and expectations. By recognizing that the Empire is a combination of various peoples. By recognizing also that all governments, even empires, rest in the end on consent.

The institutional key to empire, as to liberty, was maintenance of countervailing forces. Through a kind of federalism the empire would maintain local legislative governance subject to infrequently applied Parliamentary superintendence and supremacy. The more foreign the possession the less likely English governance would prove beneficial and the less intrusive it should be. Burke sought to apply the same rule to all issues of imperial concern: as loyalties grow from our little platoons outward to more remote and so less familiar and loved persons, so governments must recognize that their proper powers diminish as the group involved becomes more distant or foreign—both culturally and geographically.

In this way, the authentic differences that exist between and among the world’s great cultures might be preserved. Burke realized that all persons share a common pride that leads many to believe that they can force all persons to behave or to think in a uniform manner. But for Burke, men and women of every culture share a right to government that seeks to protect their happiness by maintaining the pre-existing moral order. To destroy moral order in pursuit of any object, be it construction of a perfect political order or the defense of unlimited claims of sovereignty, is to be a

229. *Id.* at 260.

tyrant. It is to undermine the foundations of peace and happiness in pursuit of one's self-centered theorizing.

Reflecting on England's failures in America, Burke observed:

[I]t was our duty . . . to conform our government to the character and circumstances of the several peoples who composed this [empire's] mighty and strangely diversified mass. I never was wild enough to conceive, that one method would serve for the whole; that the natives of Hindostan and those of Virginia could be ordered in the same manner; or that the Cutchery court and the grand jury of Salem could be regulated on a similar plan. I was persuaded that government was a practical thing, made for the happiness of mankind, and not to furnish out a spectacle of uniformity, to gratify the schemes of visionary politicians.²³⁰

230. *Id.* at 263-64.