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Carl T. Bogus

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Rescuing Burke

Carl T. Bogus

I. INTRODUCTION

Edmund Burke needs to be rescued. His legacy is held hostage by the modern conservative movement, which proclaims Burke to be its intellectual progenitor. Conservatives consider Burke the fountainhead of their political philosophy – the great thinker and eloquent eighteenth-century British statesman who provides conservatism with a distinguished heritage and a coherent body of thought. Burke has achieved iconic status; Reaganites wore his silhouette on their neckties. Legal scholars applaud court decisions and jurisprudential philosophies as Burkean, or denounce them as not being genuinely Burkean. But Burke's memory has been wrongfully appropriated. Edmund Burke was a liberal – at least by today's standards – and it is time to restore him to his proper home.

This Article has three objectives. The first is to demonstrate Burke's liberalism. The second is to argue that Burke might also be considered a conservative, but a certain kind of conservative only, namely, a traditional conservative. Edmund Burke’s philosophy is at war with that of the dominant conservatives of today – libertarians, neoconservatives, and social conservatives even though these conservatives seek to associate their thinking with his. Thus, I seek to deny to these groups Burke’s good name. At the same time, I wish to show that Burke offers common ground to some liberals and conservatives. These groups have their differences, to be sure, but by recognizing how much they have in common with Edmund Burke they will discover they have much in common with each other. At a time of bitter partisanship, this

* Professor of Law, Roger Williams University School of Law. I wish to thank Jay M. Feinman, Cynthia Giles, Jonathan Gutoff, Timothy Kuhner, David Kolsky, Peter Margulies, Wesley McDonald, Melvin Tofp, and Robert M.C. Webster, for their comments on an earlier draft of this Article. I am also grateful to my colleagues who persevered through an oral presentation of this project at a faculty workshop, and to Andrew Walter and Michelle Fleming for their valuable research assistance. © Copyright 2007 by Carl T. Bogus. All Rights Reserved.


2. For descriptions of these ideological schools of thought, see infra Part III.B.
will allow some liberals and conservatives to begin a potentially fruitful, dialogue. The third objective of this Article is to stimulate this dialogue.

The argument over Burke's legacy is more of contemporary than historical interest. There is little disagreement about what Burke believed. His thoughts are spread across a large body of writing and speeches, and his thinking has not changed since July 9, 1797, the day he died. The argument about whether Burke is a liberal or a conservative is about us. Who we choose as heroes is a reflection of our values. The people conservatives or liberals hold up as their models reflect what they believe their political philosophy stands for, and what they consider conservatism or liberalism to be today. Exploring contemporary political ideology and jurisprudence with reference to Burke is enlightening because doing so tells us a great deal about how those political philosophies have changed. Moreover, by using Burke as a lodestar, we can see how conservatism and liberalism have changed.

It was just over fifty years ago that Burke was declared to be the intellectual forebear of modern conservatism. The man who did this was Russell Kirk. Kirk was an obscure assistant professor of history at what is now Michigan State University, and in his early thirties, when he wrote The Conservative Mind: From Burke to Eliot in the spring of 1953. That May, Kirk's book received a favorable, half-page review in the New York Times Sunday Book Review, and two months later Time magazine gave it an especially long and praiseworthy review in an issue devoted to America and the

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3. Kirk was the most influential person to connect Burke and conservatism, but not the first to do so. In essays published in 1948, Friedrich A. Hayek rooted what he called "true individualism" in several thinkers, including Burke. GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945, at 15 (1996). In a book originally published in 1949, Peter Viereck declared that Burke deserved "to be the model for modern conservative leadership." PETER VIERECK, CONSERVATISM REVISITED 83 (1962). In a revised edition of that book, Viereck said many conservatives were heretics to Burke's legacy because, instead of honoring America's traditions, they rejected those they did not like, including America's "moderate native liberalism." Id. at 125. Viereck accused Russell Kirk specifically of being guilty of an "unhistorical appeal to history" and a "traditionless worship of tradition." Id. Criticizing conservatives for failing to respect liberal traditions, and later condemning Joseph McCarthy, made Viereck an outcast from conservative camps. See Tom Reiss, The First Conservative: How Peter Viereck Inspired -- And Lost -- A Movement, NEW YORKER, Oct. 24, 2005, at 38.

Others have suggested that Kirk was better at honoring tradition in the abstract than doing so in practice. See, e.g., JEFFREY HART, THE MAKING OF THE AMERICAN CONSERVATIVE MIND 345 (2005) (stating that "Burke was not mystically in awe of the workings of society but sought to understand them, which was not Kirk's strong suit").

Fourth of July. The rest, as they say, was history. The first printing sold out by the end of the month, two subsequent printings sold out by the end of the year, and the book has been in print ever since. Indeed, the book was so successful that Kirk resigned his appointment at Michigan State and made his livelihood thereafter as an independent writer, lecturer, and luminary of the conservative establishment.

The Conservative Mind remains one of the most influential works in the modern conservative movement. It has been called a "landmark study . . . that provided activists on the right with a sense that their movement had inherited a serious intellectual legacy." Kirk's objective was to show that conservatism was not what John Stuart Mill had called "the stupid party," an epithet that had long haunted conservatives. He tackled this by rooting conservative thought in Edmund Burke. For Kirk, Burke was not merely the founder of conservatism; Burke literally defined conservatism. Kirk was "[c]onvinced that Burke’s is the true school of conservative principle" and described The Conservative Mind as "an analysis of thinkers in the line of Burke."

Kirk fought to have traditional conservatism prevail over competing—and what he viewed as wrongheaded—conservative philosophies. When William F. Buckley founded National Review, he gave Kirk a monthly column and wanted to put his name on the editorial masthead. Kirk stunned Buckley by vehemently objecting to having his name "cheek by jowl" on the masthead with libertarians. Buckley tried to assuage Kirk, explaining that National Review was dedicated to reexamining the nature of conservatism by presenting a variety of viewpoints. Kirk would have none of it. He considered libertarianism a threat to the Republic. If libertarians were to be on the masthead, Kirk's name would have to be removed.

7. See, e.g., WILLIAM A. RUSHER, THE RISE OF THE RIGHT 33 (1984) (naming The Conservative Mind as one of the three most powerful philosophic contributions to the early conservative movement).
9. KIRK, CONSERVATIVE MIND, supra note 4, at 5.
11. Id. at 155 (quoting Kirk). See also id. at 83 ("Although many observers have regarded libertarians and traditional conservatives as natural allies because of their common opposition to the growth of the modern . . . state, Kirk vehemently and consistently opposed all attempts to form an alliance.").
12. See id. at 81-82 (stating that Kirk considered three ideologies—liberalism, libertarianism, and behaviorism—as "working the most mischief in our times").
Kirk then hoped that traditional conservatism would become the dominant conservative ideology, but his hope was to be denied. The modern conservative movement is now dominated by three schools of thought: libertarianism, neoconservatism, and social conservatism. Each of these schools has its own elaborate infrastructure of journals, policy institutes, advocacy organizations, and literature. Traditional conservatism, meanwhile, has withered. In a conservative mansion with three large wings, traditional conservatism is now a small back hallway. It lacks an infrastructure of organized advocates; its champions are few and scattered. It is no surprise, therefore, that the most prominent traditional conservative of the day, columnist George F. Will, has lamented that, “[j]ust as the nation is said to be saturated with ‘conservatism’ . . . there are almost no conservatives, properly understood.”

Edmund Burke has not been forgotten however. He is still put forward as the quintessential conservative, even though contemporary conservatism—in all of its prevailing iterations—espouses views that are not merely discordant but in violent disagreement with the philosophy of Edmund Burke. As a result, Burke has come to represent a philosophy he himself would repudiate. Consider, for example, the following passage, written by two quite knowledgeable journalists:

[1] In philosophical terms at least, classical conservatism does mean something. The creed of Edmund Burke, its most eloquent proponent, might be crudely reduced to six principles: a deep suspicion of the power of the state; a preference for liberty over equality; patriotism; a belief in established institutions and hierarchies; skepticism about the idea of progress; and elitism.

This accurately represents the conventional wisdom about Burke’s philosophy, but it is mistaken about Burke’s actual thinking. Burke did not have “a deep suspicion of the power of the state.” He did not favor “limited government,” wish to make government weaker and private parties stronger, or believe that governmental power necessarily threatened individual freedom. On the contrary, Burke believed that a strong government—properly con-

13. See Part III.B infra for descriptions of the different schools of conservatism and their infrastructures.
14. GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES 23 (1983). Will wrote those words more than twenty years ago, when the Reagan Administration had come to power. Traditional conservatism is no stronger today.
15. See, e.g., HART, supra note 3, at 361 (describing Burke as the “political philosopher presiding over” the synthesis of contemporary conservative thought).
16. JOHN MIDDLETHWAIT & ADRIAN WOOLDRIDGE, THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA 13 (2004). The authors are, respectively, United States editor and Washington correspondent for The Economist.
17. Traditional conservative and Burkean George F. Will also expressly favors strong government. WILL, supra note 14, at 12, 23, 125-26.
structed – was the protector of individual freedom. Along with Montesquieu and the American Founders, Burke believed in what eighteenth century British statesmen called “mixed government” and we today call “separation of powers.” Thus, Burke was not against governmental power; rather, he opposed too much power residing in one branch of government, whether the Crown or Parliament. 18 On the other hand, he defended each branch against encroachments by the other. Burke was also concerned about excessive power elsewhere in the body politic, whether in the hands of corporations, the aristocracy, or popular opinion of the moment. 19

The rest of the alleged Burkean principles, set forth above, are equally misleading. Burke did not always prefer liberty over equality; whether one value should prevail over another depended on circumstances, not on a universal axiom. 20 Burke did not always defend hierarchies or institutions against change, and it is misleading to say he was skeptical of progress. While he respected the social structure and institutions, mindful that they evolved as they did for important reasons that may not be readily apparent, Burke did not cling to the status quo. He was, in fact, a reformer. 21 At times, he advocated radical reform, although when doing so he tried his best to predict and ameliorate the deleterious byproducts of changes he advocated. 22 Burke was a patriot in that he loved his country and devoted his professional life to it, but he was not a jingoist who believed in supporting the government, right or wrong. In fact, Burke was so forceful a dissenter, even during war, that the King accused him of being unpatriotic. 23 And anyone who knows about Burke’s personal and family history, or the great crusades of his professional life, could not possibly consider him an elitist.

Burke is even sometimes pressed into service to give vile views respectability. For example, a long-time editor at National Review (and someone who studied and wrote about Burke, no less) describes as Burlean an argu-

18. See infra notes 121-31 and accompanying text.
19. See infra notes 324-41, 376 and accompanying text.
20. See infra notes 255-60 and accompanying text.
21. Ernest Young writes: “Many commentators have tended to assume that Burke’s views on tradition and the social contract lock him into a rigid defense of the existing [social] order. Such criticisms ignore Burke’s profound commitment to social and political reform.” Ernest Young, Rediscovering Conservatism: Burlean Political Theory and Constitutional Interpretation, 72 N.C. L. REV. 619, 653 (1994) (footnote omitted).

In the course of describing the Burlean foundations of Alexander Bickel’s constitutional philosophy, Anthony Kronman explains why Burke and Bickel’s philosophies embrace the idea of an “improving society” and why the common criticism that Burke’s philosophy is “an apology for the status quo” is mistaken. Anthony T. Kronman, Alexander Bickel’s Philosophy of Prudence, 94 YALE L.J. 1567, 1602, 1608-10 (1985).
22. See infra notes 143-53 and accompanying text.
23. See infra note 99 and accompanying text.
ment, published in that magazine in 1959, that the segregationist "way of life" in the American South was "a normal social phenomenon," that it must have metaphysical underpinnings because it had survived so long, and the Supreme Court was wrong to undermine it with Brown v. Board of Education.24 Such a suggestion may have Burke – who devoted his entire professional life to protecting the weak and oppressed,25 and who wished to abolish slavery in the British Caribbean and bring the brightest young former slaves to England so that they could receive the best possible education26 – spinning in his grave.

Not surprisingly, confusion about Burke has infiltrated into the legal academy. Richard Posner, for example, while quite sound at explaining why Burke's philosophy is at odds with libertarianism, associates Burke with social conservatism.27 Not so. Burke found religion a source of inspiration. He believed religion filled people with an appreciation for enduring values and called on them to live for a greater good, thereby making important contributions to society. His views about religion were, however, ecumenical and liberal.28 He did not believe that any of the great, venerable religions offered greater theological or ethical truths than others. He read the Bible but took much of it metaphorically. He insisted on his own right to interpret Scripture as he saw fit, regardless of pronouncements by clerics or the Church. And although he sometimes used religious language to call his audience to a sense of special responsibility, he never gave religious answers to policy questions. Because of these views of religion, he was hardly a social conservative by contemporary standards.

Why believe me? Burke's thinking was nuanced and complex. His political career spanned 56 years, and his collected writings and speeches fill nine, encyclopedic-seized volumes.29 It is easy to pluck quotes from context and make Burke appear liberal or conservative, or as James G. Wilson has written, "any clever lawyer could use the 'If He Were Alive Today' argument

24. The editor is Jeffrey Hart. See HART, supra note 3, at 103 (describing the argument as Burkean) and 165 (regarding Hart's own study of Burke) (2005). The unsigned editorial is Why the South Must Prevail, NAT. REV., Aug. 24, 1957, at 148.

25. From the time he was a boy, Burke's instinct to protect the vulnerable from the powerful was on display. See infra note 72 and accompanying text. Much of Burke's career was devoted to trying to protect the Irish, American colonialists, slaves in British Caribbean, and the people of India from being exploited by more powerful England. See infra Part II.B (Ireland), C, (America), D (India).

26. See infra notes 143-52 and accompanying text.

27. See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 443 (1990) (stating that Burkean attitudes are "more likely to be held by social conservatives than by economic libertarians").

28. Regarding Burke's views about religion, see infra Part II.B, notes 57-72, 153-56, and accompanying text.

to support virtually any policy." An article of that kind would settle nothing. Readers can only be confident they know what Burke meant if they understand who Burke was and what he was speaking about. The heart of this Article, therefore, is a biography of Burke. It is a capsulated biography, to be sure, yet I intend it to be complete enough to give readers a meaningful understanding of Burke's life, personal and professional, as well as the issues he was addressing. Burke's quotations are placed in context with a sufficient explanation of events to truly illuminate them. I mean, therefore, not so much as to argue that Burke was a liberal as to demonstrate that he was.

This approach offers an additional advantage. By furnishing the law literature with a primer on Burke, I hope to make Burke more accessible to legal scholars, judges, and lawyers. Burke offers wisdom to those wrestling with legal questions. Anthony Kronman has persuasively argued, for example, that Burke's philosophy provides strong support for a jurisprudence based on enduring values, prudence, pragmatism, and a keen awareness of history and the other social sciences, in contrast to jurisprudential theories, now in vogue, that seek to replace judgment with some purportedly objective methodology, such as neutral principles, originalism, or economic analysis. A handful of important scholars have drawn upon Burke's teachings, among them Alexander Bickel, Kronman, Michael W. McConnell, James G. Wilson, and Ernest Young. But many who would benefit from Burke have avoided him. Liberals assume that Burke is a conservative who has

31. Kronman, supra note 21, at 1602.
32. See ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 11-25 (1975). See also Kronman, supra note 21, at 1568-69 (arguing that Alexander Bickel's jurisprudential philosophy drew heavily on Burke's thinking).
33. See Kronman, supra note 21, at 1568-69; Anthony T. Kronman, Precedent and Tradition, 99 YALE L.J. 1029 (1990) (arguing that Burke's philosophy provides an important reason to honor precedent for its own sake, independent of utilitarian considerations).
34. See Michael W. McConnell, Establishment and Toleration in Edmund Burke's "Constitution of Freedom," 1995 SUP. CT. REV. 393 (arguing that Burke saw the establishment of religion and the toleration of dissenters, within the British system, not as inconsistent but as compatible and mutually reinforcing, and that Burke considered religion a moral check on power, whether exercised by monarchs, aristocrats, or the people).
35. See Wilson, supra note 30 (arguing that Burke believed in determining legitimacy "by evaluating an institution's historical ability to resist tyranny" and contrasting a Burkean jurisprudence with those of Robert Bork, Richard Posner, Frank Easterbrook, Antonin Scalia, and Ralph Winter, Jr.).
36. See Young, supra note 21 (advocating a jurisprudence of "Burkean conservatism" and applying the principles of such jurisprudence to issues of constitutional interpretation, including originalism, judicial restraint, rules versus standards).
nothing to teach them. Some conservatives turn to Burke with the hope of
reinforcing their belief in libertarianism or social conservatism and are disappoin-
ted. Burke deserves the audience who will find him appealing. And, as
previously suggested, Burke offers a bridge between some conservatives and
liberals; between Burkeans of the left and right, if you will. Russell Kirk im-
plicitly recognized this when he acknowledged that Burke was both a conser-
ervative and a liberal. Burke can help open a dialogue across an ideological
chasm.

Part I of this Article is divided into two sections, the first devoted to
Burke’s personal history and the second to his career. Part II, “Burke’s Five
Great Crusades,” describes Burke’s great political projects and philosophy.
Part III of the Article, “Why Burke Matters,” addresses questions of contem-
porary political ideology. Readers should be forewarned this section makes
an abrupt shift. Everything before is eighteenth century history; Part III leaps
to present, taking up current intellectual debates about political ideology. I
shall argue that ideologies stem from value systems, and I shall describe how
fundamentally different values divide conservatives into separate schools of
thought. My objective is to show that while Burke may be considered a tradi-
tional conservative, libertarians, neoconservatives, and social conservatives –
whose ideologies I shall define and describe – are not Burke’s intellectual
heirs. I also offer my own view about the essence of liberalism and why
Burke is a liberal. Last, but perhaps most important of all, I hope to illuminate
the common ground on which some liberals and conservatives can stand and
talk to one another – whether in the legal realm or the larger public square –
in more productive ways than they may have previously thought possible.

II. BURKE: A THUMBNAIL BIOGRAPHY

A. Personal History

Edmund Burke was born on January 1, 1729, in Dublin, Ireland. His
father, Richard Burke, was born and raised a Catholic, but two years before
marrying Edmund’s mother, Richard “conformed” to the Anglican Church,
meaning he publicly converted to Protestantism and joined the established
Church of Ireland. The reason he conformed is presumed political. Richard

37. KIRK, CONSERVATIVE MIND, supra note 4, at 13 (“Burke the conservative
was also Burke the liberal . . .”) and KIRK, EDMUND BURKE, supra note 6, at 161
(stating “Burke was himself both a conservative and a liberal”).
38. CONOR CRUISE O’BRIEN, THE GREAT MELODY: A THEMATIC BIOGRAPHY
OF EDMUND BURKE 3 (1992) [hereinafter O’BRIEN, GREAT MELODY].
39. Id. at 3-8; KIRK, EDMUND BURKE, supra note 6, at 137.
Burke was a solicitor, and under the Penal Laws it was then at least formally unlawful for Catholics to practice law.40

The Penal Laws – which loomed large in Edmund Burke’s life – were a series of statutes originating during the reign of William III, the Protestant monarch who, in the Glorious Revolution of 1688, invaded England at the invitation of Parliament to dethrone the Catholic King James II.47 After fleeing England, James II went to Ireland, where he was supported by the largely Catholic population.42 An army had already been raised to support him, and upon his arrival the Irish Parliament confiscated almost all property belonging to Protestants. William invaded Ireland, and defeated James’s army. Thereafter, William, and the three monarchs who succeeded him, enacted Penal Laws, designed to allow Protestants, who comprised only a quarter of the Irish population, to politically, economically, and sociologically dominate the much larger Catholic population.43 The objective was to keep the Catholic population, as whole, poor and powerless, and to encourage leading Catholics to convert. The laws prohibited Catholics from sitting in Parliament or holding other public offices, voting in parliamentary elections, practicing law or becoming judges, serving in the navy, operating schools, attending university, or owning significant property.44 One could remove these disabilities by publicly converting, or “conforming” as it was called, to the Church of Ireland, the established Protestant church.

There is some historical dispute about how rigorously the Penal Laws were still being enforced when Richard Burke was called before the bar, and to what extent the ban on Catholics practicing law may have been overlooked.45 It was not until the 1770s – more than half a century after Richard Burke began practicing law – that Parliament formally began to relax the laws.46 However, even if the Penal Laws were not enforced in all cases, it is reasonable to assume that prominent lawyers, or lawyers who had reason to fear they were looked upon with disfavor by the Protestant establishment, had to be concerned about the laws. Richard Burke had special reasons to conform. In 1718, he defended James Cotter, a flamboyant Jacobite whose father

40. See O’BRIEN, THE GREAT MELODY, supra note 38, at 3-14 (meticulously examining the evidence and concluding that Richard Burke conformed because of the Penal Laws at approximately the time when he sought admission to the bar).

41. The Penal Laws were enacted during the reigns of William III and his three successors, Anne, George I, and George II, that is, during the period 1689 to 1760. MAIRE AND CONOR CRUISE O’BRIEN, A CONCISE HISTORY OF IRELAND 77 (1972) [hereinafter A CONCISE HISTORY OF IRELAND]. For a short history of the Glorious Revolution, see Carl T. Bogus, The Hidden History of the Second Amendment, 31 U.C. DAVIS L. REV. 309 (1998).

42. A CONCISE HISTORY OF IRELAND, supra note 41, at 70-76.

43. See id. at 78.

44. Id. at 77.

45. O’BRIEN, GREAT MELODY, supra note 38, at 3-11.

46. A CONCISE HISTORY OF IRELAND, supra note 41, at 86.
had supported James II, from a rape prosecution. Catholics believed the rape charge was trumped-up to take revenge on the Cotter family and to intimidate Irish Catholics generally. Cotter was convicted, and in 1720 he was executed. Representing Cotter had placed Richard Burke’s professional status in jeopardy. He had defended a Papist who was considered an enemy of the establishment, thereby placing his own loyalty in question.

To make matters worse, in 1724 Burke married Mary Nagle, the daughter of a prominent Catholic family. The Penal Laws made it unlawful for a lawyer – even a Protestant lawyer – to practice his profession if he married a Catholic who refused to conform to the established church. Although Mary Nagle did formally conform she nonetheless remained a practicing Catholic all of her life. To compound matters even further, the Penal Laws forbade anyone raising a child as a Catholic to practice law, and Richard and Mary openly raised Edmund’s sister, Juliana, as a Catholic. We do not know whether, when he conformed in 1722, Richard Burke knew that he would later take a Catholic wife and raise a Catholic daughter, but to the extent he may have believed such things were in his future he had even more reasons to conform and profess his loyalty to the established church. In any event, Richard did conform, and historians tell us that most conversions at the time were shams designed to protect one’s professional status.

The Oath of Conformity was obnoxious to Catholic sensibilities, requiring that, before God, converts explicitly renounce a fundamental tenet of their heritage and prior faith and denounce their ancestors as superstitious pagans. The Oath read:

I [Richard Burke] do solemnly and sincerely, in the presence of God, testify and declare, that I do believe, that in the sacrament of the Lord’s Supper, there is not transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever, and that the adoration or invocation of the Virgin Mary, or any other saint, and the sacrifice of the Mass, as they are now used in the Church of Rome, are superstitious and idolatrous.

In his grand biography of Edmund Burke, Conor Cruise O’Brien meticulously builds a persuasive, if not conclusive, case that Edmund was deeply affected by his father’s public conversion. O’Brien believes that Burke

47. O’BRIEN, GREAT MELODY, supra note 38, at 6-7.
48. Id. at 7.
49. Id. at 15-18.
50. Id. at 16.
51. Id. at 10.
52. See id. at 3-6.
53. See id. at 84-85 (alteration in original) (quoting the Oath from the 1704 Act to Prevent the Further Growth of Popery).
felt guilt that his father – who has been described as a “fashionable lawyer”,\textsuperscript{54} – achieved his professional and social status by renouncing his family’s religious heritage.\textsuperscript{55} Moreover, Burke followed in his father’s footsteps both by becoming a lawyer (and, in Edmund’s case, an English statesman and member of Parliament) and by protecting his own career by choosing to be an Anglican himself. O’Brien demonstrates that throughout his career, Burke was secretive about his family’s Catholic connections, and argues that religion is one subject about which we should not accept everything Burke said – especially statements about his affinity for Protestantism – at face value. Even more importantly, O’Brien argues that this sense of shame profoundly influenced Edmund Burke, shaping this thinking and causing him to become a life-long champion for the downtrodden, the exploited, and the oppressed and an implacable foe of abuses of power.\textsuperscript{56}

O’Brien also suggests that Edmund and his father were closet Catholics and that their Protestantism was a public facade.\textsuperscript{57} Russell Kirk says that Burke was a sincere Anglican.\textsuperscript{58} However, there is insufficient evidence to support either claim conclusively.\textsuperscript{59} At this juncture, it is important to observe two things. First, Burke’s family history and dynamics surely influenced his views about religious tolerance, for even if Burke himself did not love Catholicism he loved Catholics; a mother, sister, and wife among them. Second, religion was difficult for the Burke family. During the course of their careers, both Edmund and his father were plagued by rumors and suspicions that they were secretly Papists. Moreover, there must have been tension in the extended family, if not within the immediate family, about religion, for even if husband and wife were content to subscribe to different faiths, the question would arise as to how the children were raised.

The family’s religious conundrum is evident in Edmund’s early education. At the tender age of six, Edmund was sent to live with his maternal uncle in Ballyduff, in County Cork, Ireland. Edmund’s maternal family, the Nagels, were so prominent that the region is called “Nagle country,” and Ballyduff is at the foot of the “Nagle Mountains.”\textsuperscript{60} The professed reason for sending Edmund away was that he was sickly and needed country air. But O’Brien is convinced that of equal importance was the family’s desire that

\begin{itemize}
  \item \textsuperscript{54} Id. at 6 (quoting Irish genealogist Basil O’Connell).
  \item \textsuperscript{55} This theme runs throughout O’Brien’s biography of Burke; for a concise summary of O’Brien’s argument, see id. at 272.
  \item \textsuperscript{56} This theme also runs throughout O’Brien’s work; for short statements of the thesis, see id. at 13-14, 84-85.
  \item \textsuperscript{57} See, e.g., id. at 83 (arguing that Burke and his family had to “dissimulate” about their true religious beliefs).
  \item \textsuperscript{58} KIRK, EDMUND BURKE, supra note 6, at 133.
  \item \textsuperscript{59} Some things can be said about Burke’s religious beliefs, and I shall take those up in Part III of this Article. See infra notes 461-76 and accompanying text.
  \item \textsuperscript{60} See KIRK, EDMUND BURKE, supra note 6, at 10; O’BRIEN, GREAT MELODY, supra note 38, at 19.
\end{itemize}
Edmund receive an early education in Catholicism. Ballyduff was Catholic and rural, and people practiced their Catholicism openly. As O'Brien puts it, "there was never any danger that a party of red-coats would be sent down to Ballyduff to stop little Edmund from attending Mass, with his uncle." During the six years he was there, Edmund attended a "hedge school." Though we know little about this particular school, other than it was operated by a man named O'Halloran, O'Brien tells us that hedge schools were Catholic and unlawful under the Penal Laws. They were apparently called "hedge" schools because, in earlier years when the Penal Laws had been more rigorously enforced, classes met outdoors so that pupils and teacher could easily disperse should authorities arrive. At the time Edmund attended, students in hedge schools often received instruction from itinerant Dominican or Franciscan friars.

When he was twelve, Burke was transferred to a boarding school in Ballitore, which was closer to Dublin in the more "settled," that is, Protestant county of Kildare. This school was operated by a Quaker named Abraham Shackleton. Although Quakers were considered Dissenters — who, along with other non-Anglicans, were prohibited by law from holding governmental office or attending Oxford or Cambridge universities — Quakers were more acceptable to the Protestant establishment than Catholics. In fact, Edmund Burke himself once remarked that Catholics were looked upon as "a race of bigoted savages." And, much like today, Quaker education stressed moral values, social justice, and religious tolerance, and families from different denominations felt comfortable sending their children to Quaker schools. We know more about Shackleton's school than we do about O'Halloran's hedge school. We know that Shackleton was considered a man of integrity and conscience, and that he took his Quaker beliefs seriously. Advertisements for his school stated that instruction would avoid things "injurious to morals and subversive of sound principles, particularly those authors who recommend in seducing language the illusions of love and the abominable trade of war." Edmund and Abraham Shackleton's son, Richard, became close friends, and

61. See O'BRIEN, GREAT MELODY, supra note 38, at 20 (opining that "Mary Burke must have wanted her son to get the basics of a Catholic education").
62. Id.
63. Id. at 21.
64. Id. Kirk agrees that Burke attended a hedge school but says nothing about its Catholic affiliation, noting instead that such schools emphasized classical and medieval literature. KIRK, EDMUND BURKE, supra note 6, at 11.
67. O'BRIEN, GREAT MELODY, supra note 38, at 480 (quoting Burke).
68. Id. at 24.
69. Id. (quoting school advertisement).
their friendship endured for many years. Russell Kirk writes: "Burke’s liking for the members of the Society of Friends also endured, probably influencing his later political activity on behalf of Dissenters." One story from this period presages what was to become Burke’s most famous attribute: his hatred for abuse of power and his insistence that people from all quarters be afforded the same rights and dignity. Richard Shackleton’s daughter wrote:

A poor man having been compelled to pull down his cabin, because the surveyor of roads declared it stood too near the highway, Burke, who saw the reluctant owner perform this melancholy task, observed with great indignation, that if he were in authority such tyranny should never be exercised with impunity over defenseless; and he urged his schoolfellows to join in rebuilding the cottage.

Abraham Shackleton must have been pleased. Burke’s reaction is a magnificent reflection of Quaker values. Shackleton’s training was successful in other ways too. In 1744 when Burke sat for the entrance examinations to Trinity College, Dublin, the don who tested him told Burke that he found him to be a good scholar who understood and clearly enjoyed the authors on whose works he had been examined (Horace, Virgil, and Homer), and that he was exceptionally well prepared for college.

Burke excelled at Trinity. Not only did he achieve academic distinction, he co-founded a debating club and a magazine called The Reformer, for which he was the principal writer. It says something both about Burke and the times that — against Burke’s opposition — the debating club adopted a rule prohibiting debates what might “possibly affect our loyalty” to the King or his ministers.

Shortly after taking his Bachelor of Arts degree from Trinity College in January 1748, Edmund followed his father’s wishes and became an English barrister. Although Burke entered the Middle Temple of the Inns of Court in

70. In 1774, when Edmund Burke was standing for election to the House of Commons representing Bristol, and rumors were circulating that Burke was a closet Catholic, Richard Shackleton rushed to Burke’s defense by asserting that he knew Burke to be a “firm and staunch” Protestant. Id. at 147-48.
71. KIRK, EDMUND BURKE, supra note 6, at 11.
72. Id. at 12 (quoting Shackleton’s daughter).
73. O’BRIEN, GREAT MELODY, supra note 38, at 24.
74. See id. at 31. But see T.E. Utley, EDMUND BURKE, in III BRITISH WRITERS 193, 193 (Ian Scott-Kilvert ed., 1980) (stating that Burke “alienated his father by neglecting his studies” at Trinity). Utley presents an unremittingly disparaging portrait of Burke. For a rebuttal of this line of scholarly interpretation, see O’BRIEN, GREAT MELODY, supra note 38, at xli.
75. O’BRIEN, GREAT MELODY, supra note 38, at 32-33.
London, the next nine years are something of a mystery. Historians have located only nine letters, letter fragments, or poems written by Burke during this period, and they are not informative. We know of a rumor, recorded in the memoirs of an anti-Catholic, that word reached Richard Burke in Dublin that Edmund either intended to or had already converted to Catholicism. Upon hearing this rumor, Richard "became furious, lamenting that the rising hope of his family was blasted" and that the monies spent on Edmund's education were "now thrown away." 76 We do not know how much weight to give this rumor because some dismiss it entirely. Conor Cruise O'Brien wonders whether the unusual opacity of this period might result from Edmund's deliberately destroying his own correspondence to conceal this youthful indiscretion. 77 But regardless of whether they were true, rumors that he was secretly a Catholic plagued Burke throughout his life.

Burke surely read a great deal of law at Middle Temple but he apparently was put off by the rigid formalism and doctrinal proximity that characterized the law at the time. His first steps down a different career path were those of the writer or perhaps even the philosopher. He wrote two books, *A Vindication of Natural Society,* which was published anonymously in 1756, and an extended essay titled *A Philosophical Enquiry into the Origin of our Ideas of the Sublime and Beautiful,* which appeared the following year. 78 The first, using irony as its weapon, was an attack upon Lord Bolingbroke's belief in a "natural" religion. 79 The second, which Burke wrote while at Trinity, argued against too stringent a reliance on rationality and *a priori* reasoning and for greater appreciation for the roles of emotion, imagination, passion, and beauty. 80 Both works were well received. The *Sublime and Beautiful* is considered an influential work within the Romanticism movement, and won praise from the likes of Thomas Hardy, William Wordsworth, Immanuel Kant, and Samuel Johnson, who met Burke the year after *Sublime and Beautiful* was published and invited Burke to join his famous "Club," a small circle devoted to companionship, good food, and "a free and unrestrained interchange" of ideas. 81 Burke had made a mark for himself early.

76. *Id.* at 37-38 (quoting Musgrave's *Memoirs*). For further identification of the recorder of this rumor, Sir Richard Musgrave, see *Id.* at 12. 77. *Id.* at 38.
78. See generally *Id.* at 39; KIRK, EDMUND BURKE, *supra* note 6, at 18-24; Edmund Burke, *A Vindication of Natural Society,* in PORTABLE EDMUND BURKE, supra note 66, at 29, 63-64.
79. See KIRK, EDMUND BURKE, supra note 6, at 18-20; O'BRIEN, GREAT MELODY, supra note 38, at 448-50.
80. See KIRK, EDMUND BURKE, supra note 6, at 20-21.
In 1757, Edmund married Jane Nugent, the daughter of a prominent Irish Catholic physician living in Bath, England. They had been married, and Conor Cruise O’Brien speculates that perhaps Jane insisted upon a Catholic marriage, which could not have been openly performed in England or Ireland and may therefore have taken place in France (the Paris marriage registers no longer survive). We do know that Jane conformed to the established church but nevertheless remained a practicing Catholic during her entire life. The marriage was an exceedingly happy one, produced a son, and lasted for more than forty years, when, on July 9, 1797, at age 68, Burke died with Jane by his side. From 1768 on, they often lived with William Burke—a man of dubious reputation whom historians have only been able to identify as a close friend and “kinsman” of Edmund—and with Edmund and Jane’s son, Richard, even during his adulthood. They stayed in a grand country home near Beaconsfield that Edmund purchased even though it was beyond his means and which he could never properly afford and kept him in perpetual debt.

B. Political History

Burke’s political career began in 1761. His first position was as a Parliamentarian and subsequently private secretary to William Gerald Hamilton, who became Chief Secretary of Ireland. This took Burke back to Dublin when the Irish Parliament was in session. In May of 1765, Burke and Hamilton quarreled, probably because Burke believed Hamilton was not sufficiently sensitive to the plight of Irish Catholics, and Burke left Hamilton’s employment. In July of that year, Burke accepted a new position that would determine the trajectory of the rest of his career. Burke became the private secretary of the Marquess of Rockingham, a man of great wealth and integrity but somewhat more modest intellectual gifts, who was the leader of a wing of the Whigs known as “the Rockinghams.” Though it is an oversimplification, it

82. Id. Russell Kirk writes that Jane was “like Burke, the child of a ‘mixed marriage.’” Kirk, Edmund Burke, supra note 6, at 16.
83. O’Brien, Great Melody, supra note 38, at 38.
84. Id.
85. Id. at 589.
86. Id.
87. Kirk, Edmund Burke, supra note 6, at 50-51. For a little more about William Burke, see O’Brien, Great Melody, supra note 38, at 63 n.4, 116, 306-07.
88. This was Charles Watson Wentworth, the second Marquess of Rockingham. Regarding both the Rockinghams and Whigs generally, see O’Brien, Great Melody, supra note 38, at xxxii-xlii, 48-49; Kirk, Edmund Burke, supra note 6, at 32-40. See also Barbara W. Tuchman, The March of Folly 134 (1984) (regarding Rockingham’s wealth); id. at 137 (stating that Rockingham, “perhaps conscious of his shortcomings, had the wit to select the brilliant young Irish lawyer Edmund Burke as his private secretary”).
is nevertheless fair to say that the Whigs were the liberals of the day.\(^9\) In the main, they were devoted to preserving constitutional government, parliamentary supremacy, and tolerance for religious and political dissent.\(^0\) The “new Whigs,” which is how the Rockinghams characterized themselves, were also generally pro-American and pro-free trade, because free trade offered less fortunate parts of the Empire, including Ireland, greater commercial participation and the possibility of greater wealth. This cost them the support of powerful British merchants, who sought special protections. In the nineteenth century, the Whig Party became the Liberal Party.

Those who seek to make Burke into a conservative icon often deny that he was a true Whig. Russell Kirk, for example, concedes Whigs were disciples of John Locke but argues that Burke did not share many of Locke’s views.\(^1\) And in his poem Seven Sages, W.B. Yeats concedes the undeniable fact that “Burke was a Whig,” but opines that Burke nonetheless “hated Whiggery,” which Yeats defines as a “leveling, rancorous, rational sort of mind.” Conor Cruise O’Brien disagrees. “Burke was a sound Whig, in most ways,” he writes. “It was only the anti-Catholic element in Whiggery that made him uncomfortable.”\(^2\) In any event, it is difficult to draw too great a distinction between Burke and the Whigs, and the Rockinghams particularly, because Burke became enormously influential within that party and his passions became the party’s passions. At first his influence was largely behind the scenes; that of the person who provided the group with its intellectual substance and power and was a principal architect of its policies. But over time Burke came to represent the Whigs more directly as a principal expounder of their philosophy and their most eloquent orator.

Rockingham’s selection of Burke as his secretary represented an island of meritocracy in a sea of aristocracy. Most high-ranking British officials were drawn from two hundred families, almost all of which were headed by a peer, and had been schooled at either Eton or Westminster and then Oxford or

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89. See, e.g., Young, supra note 21, at 662 (describing the Whigs as “the party of liberal reform which traced its origins back to the Glorious Revolution and John Locke\(^e\)).

90. England’s two original political parties, Whigs and Tories, began during the reign of Queen Anne. The Whigs stood for parliamentary supremacy, adherence to constitutional government and the principles of 1688, and toleration for religious and political dissent. The Tories favored traditional authority of the Crown and the Anglican Church and were adverse to dissent. R.W. HARRIS, ENGLAND IN THE EIGHTEENTH CENTURY 66 (1963). See also O’BRIEN, GREAT MELODY, supra note 38, at xxxiii; TUCHMAN, supra note 88, at 161. Although historians formerly believed that, during Burke’s time, the parties were only loose coalitions, historian Geoffrey S. Holmes has shown that they were in fact cohesive groups as early as 1702. GEOFFREY S. HOLMES, BRITISH POLITICS IN THE AGE OF ANNE 20-21, 418 (1987).

91. KIRK, EDMUND BURKE, supra note 6, at 33 (regarding Whigs); id. at 208 (regarding Burke).

Cambridge. Burke's situation was not unique however. Other political leaders also picked brilliant intellectuals for their personal advisors. Lord Shelburne selected the renowned scientist Joseph Priestley; and during his tenure as Secretary of State, General Henry Seymour Conway was advised by the philosophers David Hume and Jean Jacques Rousseau.

Burke would remain personally loyal to Rockingham until the Marquess' death in 1782, and a stalwart of the same wing of the party (later to become known as "the Portland Whigs") until Burke retired in 1794. Political parties were not the formal institutions they are today; they were looser and more informal. As such, the Whigs were not a cohesive group. Rockingham was the leader of the largest faction of Whigs; during much of Burke's time, Lord William Shelburne led a smaller, competing faction. The Rockingham faction was the more liberal, especially as Burke's influence within it grew. After the battle of Saratoga, Burke and the Rockinghams favored granting America independence; Shelburne did not. The Rockinghams stood their ground over this issue despite having to suffer the kind of attack that liberals still endure today: being accused, in this case by King George III, of a lack of patriotism. The Rockinghams fought unremittingly to preserve Parliamentary authority against encroachments by the Crown, even when doing so was against their own political interests, while Shelburne was willing to

93. TUCHMAN, supra note 88, at 134.
94. Id. at 135.
95. Id. at 137.
96. For brevity's sake, I pass over many complexities. For example, in 1793 Burke broke with Charles Fox, who was then the leader of the Whigs in the House of Commons, in which Burke sat, and resigned from the Whig Club. However, the Duke of Portland, the leader of the Whigs in the House of Lords and the titular head of the Whig party as a whole, continued to accept Burke as a Whig and loyal member of his faction. See O'BRIEN, GREAT MELODY, supra note 38, at 501-03.
97. Shelburne and Burke had much in common. See id. at 234-42. They were talented, close in age, both from Ireland and therefore often derogatorily called Jesuits. See id. But Burke detested Shelburne, whom he believed placed personal ambition above the national interest. See id. Indeed, Burke uncharacteristically degraded Shelburne on the floor of the Commons, stating that "[i]f Lord Shelburne was not a Cataline or a Borgia in morals, it must not be ascribed to anything but his understanding," that is, that if Shelburne were not truly evil it was because he was ignorant. Id. at 204, 234-42 (regarding Shelburne generally); id. at 239 (quoting Burke's speech of July 9, 1782, comparing Shelburne to a Cataline or a Borgia); id. at 456 (stating that, with the exception of Shelburne, Burke was rarely unpleasant to political opponents). See also TUCHMAN, supra note 78, at 153 (describing Shelburne as very able).
98. O'BRIEN, GREAT MELODY, supra note 38, at 204-06.
99. See id. at 207-18.
accommodate the King, especially when he could improve his own political position by doing so.\textsuperscript{100} Furthermore, Burke and the Rockinghams stood for religious tolerance while Shelburne was a discreet but nonetheless virulent anti-Papist.\textsuperscript{101}

When Burke first joined Rockingham, the Marquess had just been asked to form a government. During the course of Burke’s career, there were two Rockingham Administrations, both extremely brief. In the first, which lasted from July of 1765 to July of 1766, Burke served as Rockingham’s Secretary. In the second, which lasted only from March until July of 1782 when Rockingham unexpectedly died, Burke was Paymaster of the Forces, a lucrative post that he may have been given to help alleviate his persistent financial problems.\textsuperscript{102} Burke resigned that office when Rockingham died but, after a brief hiatus, resumed it again under the coalition between Charles Fox and Lord Frederick North. The coalition came to power with Burke’s assistance in March of 1783 and controlled the government until King George dismissed Fox and North in December of 1778.\textsuperscript{103} Those were the extent of Burke’s administrative positions.

It is, of course, not for these minor administrative positions for which Burke is best known. In addition to his last book, Burke’s enduring fame rests upon his work as a member of the House of Commons. He was first elected to the House of Commons in 1765, representing the small Borough of Wendover.\textsuperscript{104} This was a “pocket borough,” a Parliamentary constituency in which the nomination process, and sometimes the election as well, was controlled by a wealthy patron, in this case by Lord Verney, an Irish peer and ally of Rockingham’s.\textsuperscript{105} About nine years later, Verney fell upon financial

\textsuperscript{100} See id. at 232 (discussing Shelburne’s “subservience to the King”); id. at 234-35, 237, 240 (discussing the alliance between Shelburne and King George III during the second Rockingham administration); id. at 258 (stating the a fundamental principle of the Rockinghams was to keep patronage, and thus power, away from the King’s court).

\textsuperscript{101} See id. at 235-36. Indeed, many believed Shelburne helped instigate the Gordon Riots. Id. at 236, 240. These riots were several days of rioting by a large mob in London, in June 1780, precipitated by Parliament’s refusal to repeal the Catholic Relief Act, legislation that ameliorated restrictions on property ownership by Catholics. See id. at 76-78. Burke wrote, lobbied for, and publicly supported the legislation but, for tactical reasons, had others formally sponsor it. Id. at 75-76. Regarding the Gordon Riots, see O’BRIEN, GREAT MELODY, supra note 38, at 77-81; KIRK, EDMUND BURKE, supra note 6, at 129-32.

\textsuperscript{102} See id. at 48-57 (regarding First Rockingham Administration) and 234-38 (regarding Second Rockingham Administration); KIRK, EDMUND BURKE, supra note 6, at 87-88 (regarding Paymaster position).

\textsuperscript{103} See O’BRIEN, GREAT MELODY, supra note 38, at 240, 314, 318, 330.

\textsuperscript{104} Id. at 50.

\textsuperscript{105} See id. at 105; TUCHMAN, supra note 88, at 140-41 (using the term “rotten borough”); KIRK, EDMUND BURKE, supra note 6, at 37-38.
hard times and had to sell the borough, which cost Burke his seat.\textsuperscript{106} Rockingham found another pocket borough for Burke, but before he accepted it political good fortune struck and Burke was invited to stand for election from Bristol. This great seaport was England’s second largest city, and by virtue of its size and commercial importance, whoever represented Bristol was automatically a prominent and influential member of Parliament. But one had to win the Bristol seat in a genuinely contested election. Burke decided to take the gamble.

The campaign for Bristol seat was fierce. Burke’s opponents spread a rumor that Burke was not merely a Papist but a secret Jesuit educated at St. Omer, and a spy.\textsuperscript{107} Burke’s boyhood friend, Richard Shackleton, came to the rescue. In a letter to a Quaker preacher who was prominent in Bristol, Shackleton declared Burke to be “a man of the strictest honour and integrity” and “a firm and staunch protestant.”\textsuperscript{108} This helped in at least the Quaker community, but the rumor was clearly hurting him, and near the end of the campaign Burke was disheartened. Yet on November 2, 1774, he won this important seat, and was thereby propelled into the upper echelon of Parliament and his party.

Although he lost the seat six years later, the reasons for his loss reveal much about both his character and his political philosophy. In 1778, Burke supported the Irish Trade Bills, legislation relaxing barriers to free trade with Ireland.\textsuperscript{109} Specifically, they eliminated duties on importing Irish cotton yarn, sailcloth, and cordage and permitted free trade in most products between Ireland and the British colonies.\textsuperscript{110} Realizing that the merchants of Bristol were not going to like the increased competition, Burke did his best to persuade them of the merits of the legislation. He made two arguments. The first was that England was about to lose her American colonies – the decisive American victory at Saratoga had just occurred in October – because she had insisted upon harsh trade and taxation policies, and that it should not repeat this mistake with Ireland. Moreover, things were especially dicey regarding Ireland at this juncture because of a danger that France, now at war with England and an ally of the American colonies, might invade Ireland, with the

\textsuperscript{106} See O’BRIEN, GREAT MELODY, supra note 38, at 145-47; KIRK, EDMUND BURKE, supra note 6, at 51.

\textsuperscript{107} See O’BRIEN, GREAT MELODY, supra note 38, at 147-49 (regarding Bristol election); \textit{id.} at 48-49 (regarding earlier manifestations of the same rumors); \textit{id.} at 50 (regarding cartoon caricatures of Burke).

\textsuperscript{108} Id. at 147-48 (quoting Shackleton). Because truth is so important to Quaker principles, I agree with O’Brien that Shackleton would not have made this statement unless he believed it true. And as one of Burke’s closest friends – and a boyhood friend – Shackleton knew Burke especially well. This is, therefore, an important piece of evidence that Burke was not, in fact, a closet Catholic.

\textsuperscript{109} Id. at 71-76, 184-85.

\textsuperscript{110} Id. at 72.
hope that Irish Catholics would support the invaders.\textsuperscript{111} Burke wrote to the merchants' trade association that "[o]ur late misfortunes have taught us the danger and mischief of a restrictive coercive and partial policy."\textsuperscript{112} Relaxing the trade restrictions with Ireland was wise, he argued, "not so much for any benefit thereby derived to Ireland as to satisfy and unite the minds of men at this juncture by the sense of a common interest in the common defence."\textsuperscript{113}

Burke's second argument was the usual one for free traders: more robust trade would create a larger pie for all. As he put it: "[t]he prosperity arising from an enlarged and liberal system improves all its objects: and the participation of a trade with flourishing Countries is much better than the monopoly of want and penury."\textsuperscript{114}

The merchants were unmoved by Burke's arguments. Their reply stated that Burke's letter was read at the association's meeting, that Bristol remained opposed to the Irish Trade Bills and the city would do everything it could to oppose them. Their reply also warned that, "We are sorry that We are likely to be deprived of so able an Advocate as Mr. Burke."\textsuperscript{115} The double entende is clear: advocate for what your constituents want or be their advocate no longer.

A mere politician would have relented. But Burke was a statesman. He was willing to give up this seat – a great personal sacrifice – to do what he believed to be the right thing on what he considered an important matter. Burke replied to the merchants' letter:

"You obligingly lament, that you are not to have me for your advocate; but if I had been capable of acting as an advocate in opposition to a plan so perfectly consonant to my known principles, and to the opinions I had publicly declared on a hundred occasions, I should only disgrace myself, without supporting, with the smallest degree of credit or effect, the cause you wished me to undertake. I should have lost the only thing which can make such abilities as mine of any use to the world now or hereafter; I mean that authority which is derived from an opinion, that a member speaks the language of truth and sincerity; and that he is not ready to take up or lay down a great political system for the convenience of the hour; that he is in parliament to support his opinion of the public good, and does not form his opinion in order to get into parliament, or to continue in it. . . . Your representative owes you, not his in-

\textsuperscript{111} Id. at 182-84.
\textsuperscript{112} Id. at 72.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 73 (quoting a letter to Burke from Samuel Span, a prominent member of the Society of Merchant Adventurers).
dusty only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."^{116}

Burke’s commitment to principle, despite the consequences, was not that of a callow or naïve politician; Burke was a seasoned statesman of 49 when he made this stand on principle. Nor would arrows that later came his way change his view. Twelve years later, he would again write: “when leaders choose to make themselves bidders at an auction of popularity, their talents, in the construction of the state, will be of no service. They will become flatterers instead of legislators; the instruments, not the guides, of the people.”^{117}

One of Burke’s great strengths, however, is that he could appreciate multiple sides of an issue, even in situations where a personal agenda often blinds other men to any point of view other than their own. Moreover, he could not only recognize the merits of another position but acknowledge that it was appropriate for others – with perspectives different from his own – to take the other side. Yet despite this grasp of political relativism, he would hold fast to the position he considered right for himself, despite great personal cost. Lesser men would either deny the merits of the opposing view or seize upon them as an excuse to do the personally convenient thing. This capacity is evident in what Burke thought about his constituents, who he knew were displeased by his supporting the Irish Trade Bills.^{118} Notes of proceedings in the House of Commons record that Burke acknowledged that his position might result in his being “deprived of his seat” but said that he “‘should not blame [his constituents] if they did reject him’” as the episode afforded an example:

“on the one hand of a senator inflexibly adhering to his opinion against interest and against popularity; and, on the other, of constituents exercising their undoubted right of rejection; not on corrupt [grounds], but from their persuasion that he whom they had

116. Id. at 74-75. Burke had, in fact, told his constituents much the same when he was first elected. In his election speech, he told the people of Bristol that while the opinions of constituents should have great weight with their representatives, a member of Parliament should not sacrifice “his unbiased opinion, his mature judgment, his enlightened conscience” to his constituents and that Parliament was properly thought of not as “a congress of ambassadors from different and hostile interests . . . [but as] a deliberative assembly of one nation, with one interest, that of the whole – where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reasons of the whole.” Edmund Burke, Speech at Mr. Burke’s Arrival in Bristol, in Portable Edmund Burke, supra note 66, at 155, 155-56.


118. Compounding Burke’s problems was his support of the Catholic Relief Act. See O’BRIEN, GREAT MELODY, supra note 38, at 185.
chosen had acted against the judgment and interest of those he represented.” 119

The expected happened. In September of 1780, Burke lost the prestigious Bristol seat. Thereafter, he represented Malton, another pocket borough. 120

III. BURKE’S FIVE GREAT CRUSADES

I now take up what I call Burke’s five crusades; that is, major themes or political projects that represent Burke’s most important contributions. I present them in the very rough chronological order in which Burke began them, but each effort was broad in scope and continued for many years. In some instances, they spanned the full duration of Burke’s political career, and in terms of both time and substance, there is a great deal of overlap among them. All five projects, moreover, are manifestations of Burke’s one great passion. In Seven Sages, W.B. Yeats ties together four of Burke’s crusades, as follows:

American colonies, Ireland, France and India
Harried, and Burke’s great melody against it.

The “it,” as we shall see, is the abuse of power – whether by government, corporations, dominant social or religious groups, or even the people as a whole. 121

A. Strengthening Constitutional Democracy

When he joined the Rockingham Whigs, Burke allied himself with a group that opposed the expansion of the Crown’s powers and favored strengthening Parliamentary prerogatives, particularly those of the House of Commons. The Rockingham Whigs were especially worried about the Crown gaining influence over members of Parliament through corrupting devices. They accused King George III of buying the subservience of members of Parliament with patronage, pensions, and sinecures. 122 In a pamphlet he wrote for the Rockingham Whigs, Burke complained that the Crown was distributing “honors, offices, emoluments [and] every sort of personal gratification to

119. Id. at 184-85 (alterations in original) (quoting Burke’s remarks to the House of Commons).
120. KIRK, EDMUND BURKE, supra note 6, at 86-87.
121. Burke’s great opposition to abuse of power is what Conor Cruise O’Brien calls “the great melody” running through all of his work. See O’BRIEN, GREAT MELODY, supra note 38, at xxiii, 96 (referring to Yeats).
122. See id. at 71; See the introductory note by Isaac Kramnick and Burke’s Speech on Economical Reform, in PORTABLE EDMUND BURKE, supra note 66, at 158.
avariice or vanity,” including civic, military, and ecclesiastical offices, not only to the individuals they sought to control but also to their children, brothers, and kindred.123

The Rockingham Whigs also opposed the Crown’s practice of having a double cabinet, in which the King ignored the actual ministers and ruled through private advisers.124 In 1770, Burke and the Rockinghams sought to extinguish the House of Commons’ practice of periodically authorizing a lump-sum payment of the Crown’s accumulated debts, a mechanism that allowed the Crown to spend money without previously submitting itemized appropriation requests to House of Commons.125 And in 1780, Burke proposed “A Plan of Reform in the Constitution of Several Parts of the Public Economy” to correct, what he said the people perceived to be “gross abuses in the expenditure of public money.”126 This was not only about preventing governmental waste; it was designed to shrink the monies that the Crown used to purchase influence.

Burke believed in the development of political parties or “factions,” as he sometimes called them. Parties provided a means of organized resistance to the power of the Crown. Without parties, the Crown or other corrupting forces could more easily bend individual members to their will, whether through coercion or with favors and emoluments. Parties provided an alternative means of political support. “When bad men combine, the good must associate,” he explained.127 Parties were a natural mechanism for working together to develop and implement a common vision. As Burke put it, a “[p]arty is a body of men united for promoting by their joint endeavors the

123. Edmund Burke, Thoughts on the Present Discontents, in PORTABLE EDMUND BURKE, supra note 66, at 131, 136. Whether Burke was right about this, is a matter of hot debate among historians. Sir Lewis Namier and some other historians claim that Burke deliberately created a myth that George III was corrupting members of Parliament in this way, as well as a myth of the double cabinet. See O’BRIEN, GREAT MELODY, supra note 38, at IV; KIRK, EDMUND BURKE, supra note 6, at 71; Isaac Kramnick, Introduction, in PORTABLE EDMUND BURKE, supra note 66, at ix, xxviii-xxxiv.

124. See O’BRIEN, GREAT MELODY, supra note 38, at li-llii, 330-36; KIRK, EDMUND BURKE, supra note 6, at 71.

125. See Edmund Burke, Thoughts on the Present Discontents, in PORTABLE EDMUND BURKE, supra note 66, at 131, 138.

126. See the introductory note by Isaac Kramnick and Burke’s Speech on Economical Reform, in PORTABLE EDMUND BURKE, supra note 66, at 158, 158-59.

127. Edmund Burke, Thoughts on the Present Discontents, in PORTABLE EDMUND BURKE, supra note 66, at 131, 144. It is perhaps this sentence that is responsible for the most famous quotation attributed to Burke – “[t]he only thing necessary for the triumph of evil is for good men to do nothing” – for diligent searches by historians have failed to verify that Burke, in fact, ever said that now famous phrase. See JOHN BARTLETT, FAMILIAR QUOTATIONS 30 n.3 (Justin Kaplan ed., 16th ed. 1992) (1875). But do not weep for Edmund Burke; Bartlett’s Familiar Quotations contains no less than sixty other quotes of Burke’s.
national interest upon some particular principle in which they are all agreed."

One of Burke’s major objectives, which he articulated repeatedly during his career, was to incorporate the doctrine of separation of powers into the working understanding of the English constitution. He argued that a “constitution made up of balanced powers must ever be a critical thing,” and he was not merely interested in confining the Crown to its proper functions but also argued that Parliament should not directly undertake executive functions. Like political parties, separation of powers was a nascent concept at the time, and Burke saw both of them as mechanisms for preventing too great a concentration of power in any one place.

Burke also fought against government secrecy. During his effort to force witnesses to testify in a Parliamentary investigation of the East India Company, Burke told the House of Commons:

“Secrets of inefficacy, of treachery, or of corruption were the bane of governments. He never knew of a state that had been ruined by the openness of its system; by its readiness to search into its distempers, and to lay bare its wounds; but he had heard and read of many that had been ruined by the timorous secrecy of their proceedings...”

Burke understood that a constitutional democracy was government under the rule of law, and therefore lawyers had a special role in such a system. Because of their special training, they understood better than most the English constitution and the rule of law. Their powers of analysis gave them special

128. Edmund Burke, Thoughts on the Present Discontents, in PORTABLE EDMUND BURKE, supra note 66, at 131, 146.
129. O’BRIEN, GREAT MELODY, supra note 38, at 444 (quoting a pamphlet anonymously written for the Rockinghams by Burke in 1791 titled An Appeal from the New to the Old Whigs).
130. Edmund Burke, Thoughts on the Present Discontents, in PORTABLE EDMUND BURKE, supra note 66, at 131, 134. He went on to add: “Our constitution stands on a nice equipoise, with steep precipices and deep waters upon all sides of it. In removing it from dangerous leaning towards one side, there may be risk of oversetting it on the other.” Id. at 141.
131. For a brief history of the separation of powers and how central the doctrine is to contemporary American ideology, for both liberals and conservatives, see Carl T. Bogus, The Battle for Separation of Powers in Rhode Island, 56 ADMIN. L. REV. 77 (2004). See also PAUL STARR, FREEDOM’S POWER: THE TRUE FORCE OF LIBERALISM 3, 58-61, 158 (2007) (describing the importance of separation of power to liberal ideology).
132. O’BRIEN, GREAT MELODY, supra note 38, at 309 (quoting Burke’s speech in April 1781 with respect to Burke’s efforts to acquire information for the Select Committee of the House of Representatives that was trying to investigate the East India Company).
abilities to think through matters of public policy. In Burke’s mind, the law was “one of the first and noblest of the human sciences; a science which does more to quicken and invigorate the understanding, than all the other kinds of learning put together.”133 Burke was a pragmatist, but he was interested not merely in what worked but what worked in service of justice. “It is with the greatest difficulty that I am able to separate policy from justice. Justice itself is the great standing policy of civil society,” he wrote.134

Because their study and professional experience taught them something about jurisprudence, lawyers were a repository of essential knowledge about what served justice and what did not. Burke called jurisprudence “the pride of the human intellect” and believed that despite “all of its defects, redundancies, and errors” jurisprudence nevertheless represented “the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns.”135 As did Oliver Wendell Holmes a century later,136 Burke believed that the wisdom of law came not from logic or abstract theory but from experience, or as Burke put it, from the “heap of old exploded errors.”137

Not all lawyers offer these gifts. Burke was not impressed by lawyers who had been trained to think formally or perform functionary tasks. In one of his most famous passages, Burke explains how he was able to foresee so early that the French Revolution would fail and that instead of fulfilling its promise of “equality, justice, and fraternity” it would devolve into chaos and injustice. One of his insights, Burke writes, came

when I found that a very great proportion of the assembly (a majority, I believe, of the members who attended) was composed of practitioners in the law. It was composed, not of distinguished magistrates, who had given pledges to their country of their science, prudence, and integrity; not of leading advocates, the glory of the bar; not of renowned professors in universities; – but for the greater part, as it must in such a number, of the inferior, unlearned, mechanical, merely instrumental members of the profession. There were distinguished exceptions; but the general composition was of obscure provincial advocates, of stewards of petty local jurisdictions, country attorneys, notaries, and the whole train of the ministers of municipal litigation, the fomenters and conductors of the petty war of village vexation. From the moment I read the list, I

133. Id. at 109 (quoting that portion of Burke’s Speech on American Taxation in which Burke honored George Grenville for devoting his legal training, including his “thorough knowledge of [the] constitution,” to public service and to Parliament).
134. BURKE, REFLECTIONS, supra note 117, at 132.
135. Id. at 81.
137. Id.
saw distinctly, and very nearly as it happened, all that was to fol-
low. 138

One of the more confusing aspects of Burke’s philosophy concerns what
Burke called “the natural aristocracy.” Burke thought a natural aristocracy
was important to society. He believed that the natural aristocracy provides
the body politic with ballast that prevents it from being blown hither and yon by
the passions of the moment. Or as Ernest Young put it, Burke thought the
natural aristocracy “provides the structure that holds society together” for
“without it, a people collapses into a mob.” 139 Ernest Young observes that
Burke is ambiguous as to whether he considered the natural aristocracy to be
a hereditary or meritocratic institution. As we shall see, Burke considered
each nation unique — a product of its own history and culture — and it there-
fore reasonable to infer that Burke would believe the composition of the natu-
ral aristocracy might differ society to society. 140

It is possible that, along with Tocqueville, Burke would consider the le-
gal profession to comprise at least part of America’s natural aristocracy.
Lawyers are an educated elite, but true to the American tradition they are a
meritocratic class. They have been selected, in significant part, by their apti-
tude for deductive reasoning. They are more than technocrats; their combined
undergraduate and graduate training imbues them with both a broad liberal
education and a special knowledge and appreciation for the American canon:
namely, the Constitution. And they are specialists in the common law, which
Burke considered the best method of developing rules of law because experi-
ence precedes and transcends theory.

Conservatives sometimes portray Burke as a defender of the status quo,
but in all of these initiatives Burke and the Rockinghams were not merely
seeking to preserve government as they found it, they were advocating
changes, if not so much in what they considered the proper interpretation of
the English constitution quite certainly in existing practices.

Burke believed in improving government, not radically altering it. He
wished to both “preserve and reform,” and often repeated the adage Spartam
nactus es; hanc exorna (Sparta is your lot; now adorn it). 141 It is not sur-
prising, therefore, that one historian has written: “It is clear that [Burke] was not
an arch-conservative or a reactionary. Rather, he was a classic figure of the
moderate reformer.” 142

But it may be more accurate to call Burke prudent than moderate. While
he understood that the social fabric is woven from many interlocking threads

138. BURKE, REFLECTIONS, supra note 117, at 36.
139. See, e.g., Young, supra note 21, at 656-57.
140. See infra notes 364, 374-75, 385 and accompanying text.
141. See Young supra note 21, at 143 (regarding the admonition to preserve and
reform); id. at 133 (regarding the adage of Sparta).
142. KIRK, EDMUND BURKE, supra note 6, at 93-94 (quoting Francis Canavan).
and had a healthy respect for the problem of unintended consequences, Burke was capable of proposing far-reaching reforms when he thought them necessary, especially to protect the weak from oppression by the strong. One illuminating example occurred in 1792, when Burke sent a proposed code for black slaves in the West Indies to one of the King's ministers.  

Apprently, the minister was considering whether and how to regulate the African slave trade—rather than slavery itself—on the British islands of Jamaica, Barbados, Antigua, and Grenada.

Burke despised slavery. Years earlier, when the Americans had cried, "No taxation without representation," Burke rejected the option of solving the problem by giving the colonies seats in Parliament because he believed it abhorrent to bring slaveholders into the great law-making body responsible for protecting liberty. Now in his covering letter to the King's minister, he called the slave trade "an incurable evil" and said that if he were to consider it in isolation he would have recommended it abolishing it. "Rather than suffer it to continue as it is, I heartily wish it at an end," he wrote.

However, Burke did not consider issues in isolation; he was always worried about cascading results. Burke raised two concerns here. First, he said

143. Edmund Burke, Sketch of a Negro Code, in PORTABLE EDMUND BURKE, supra note 66, at 183.

144. This was then an important distinction in the British mind, stemming from political and economic realities and from the landmark case of Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.). For a succinct discussion of Somerset and the commercial context in which that case had been decided, see Carl T. Bogus, TRIAL 66 (2005) (book review). For more extensive discussions, see STEVEN M. WISE, THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY (2005); LEON A. HIGGINBOTHAM, IN THE MATTER OF COLOR 313-68 (1987); William Wiecek, Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World, 42 U. CHI. L. REV. 86 (1974).

145. This does not mean that Burke was unaffected by the racism of his time. He apologized to the colonies for England's participation in the slave trade which let "loose upon you...these fierce tribes of savages and cannibals, in whom the traces of human nature are effaced by ignorance and barbarity" and spoke of their "evil habits" and "natural ferocity." Edmund Burke, Address to the British Colonies in North America, in PORTABLE EDMUND BURKE, supra note 66, at 274, 278. At the same time, however, he argued that England and America should have worked together to gradually bring "that unhappy part of mankind into civility, order, piety, and virtuous discipline." ID. Burke, therefore, did not believe that the African slaves were innately unfit to become citizens.

146. See KIRK, EDMUND BURKE, supra note 6, at 47-48 (quoting Burke as having written in 1765 that "common 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").

147. Edmund Burke, Sketch of a Negro Code, in PORTABLE EDMUND BURKE, supra note 66, at 183.

148. ID. at 183.
that he was “very apprehensive that so long as the slavery continues some
means for its supply will be found.” 149 Apparently abolishing slavery itself in
the West Indies was not on the table, and Burke suggested that it would be
ineffective to enact laws abolishing the slave trade because either the African
traders would continue under other flags or traders from other nations would
take their place. He understood that passing laws had its limits. Second,
Burke was concerned about the effect of immediate abolition on the former
slaves. How would they survive? “The minds of men being crippled [by hav-
ing been slaves] can do nothing for themselves; everything must be done for
them,” he wrote. 150 Thus, “we must precede the donation of freedom by dis-
posing the minds of the objects to a disposition to receive it without danger to
themselves or to us.” 151

Those who might suspect that these were rationalizations designed to
give Burke cover for protecting the slave system would be mistaken. What
Burke proposed was a comprehensive 42 point program that would immedi-
ately and dramatically improve the lot of the slaves, prepare them for eman-
cipation, and emancipate them. Under Burke’s program, the King’s attorney
general would have immediately been charged with being “protector of ne-
groes within the island” and empowered to investigate, and to prosecute any
violations of the act or “any misdemeanours or wrongs” committed against
the negroes. 152 He was to be assisted by inspectors and physicians. Abuses
include cruel or inhumane treatment or acting with malice or a desire to in-
flict suffering on a slave. Families were not to be split for purposes of sale.
Slaves were to be given substantial huts and land for their own use, and they
were given the right to bequeath their property as they pleased.

These measures themselves, if implemented, would radically change the
fundamental nature of the slave system, but they were to be merely the tip of
the iceberg. Burke also proposed that an elaborate social welfare and educa-
tion system, operated by the Church of England, be established to assist
blacks in making the transition from slavery to freedom. Under Burke’s plan,
a church would be built in each district and staffed with a minister who would
record the births, marriages, and deaths of all blacks in his district, and who
would conduct Sunday services. Each minister was to be assisted by a paid
clerk, who wherever possible would be a free black. Ministers would be su-
ervised by a bishop, and the ministers and bishop would meet annually in a
synod to create regulations for their work. A school, staffed by schoolmaster,
would be constructed for every two districts, and children (or at least boys)
would attend school four hours a day, three days a week. The brightest boys

149. Id. at 184.
150. Id. at 185.
151. Id.
152. Id. at 186. This investigation could be initiated either on the attorney’s own
initiative or on complaints from any Negroes of wrongs committed by either captains
of the slave ships, planters, or other plantation owners.
would be sent to England, where the bishop of London would ensure that they received a high quality education until the age of twenty-four. Every man who has reached the age of thirty and received a certificate from his minister attesting that he regularly fulfilled his religious obligations and maintained good behavior could purchase freedom for himself and his family at rates fixed by two justices of the peace.

There are, to be sure, aspects of Burke’s proposal that grate on modern, liberal sensibilities. Burke wanted not merely to make religion compulsory but to essentially condition slaves’ emancipation upon their Christianization. And because he believed that “a state of matrimony, and the government of a family, is a principal means of forming men to fitness for freedom, and becoming good citizens,” Burke also would have required slaves to marry and procreate as a condition of gaining freedom, for only married men who have fathered at least “three children born to him in lawful matrimony” can purchase their own freedom, along with that of their family.153 Some conservatives may argue this demonstrates Burke’s commitment to Christianity, “faith based initiatives,” and “family values,” and thus to claim him as their own. However, it is a mistake to read Burke as if he lived in the twenty-first century.

Burke lived in a different country, a difficult culture, and a different time. He did consider families and Christianity of great importance to culture and government (more about Burke and religion later)154 but within the context of his place and time Burke’s proposal was infused with a liberal spirit. The Church of England was the established church. It was, in fact, part and parcel of the government itself, almost in the same way as, say, the Royal Navy, and therefore it was only natural that Burke should deploy it as the social welfare agency. But Burke took care to provide that planters or owners who did not belong to the Church of England – dissenters whose political rights were then controversial – could establish their own church instead.155 He also gave slaves the right to choose their spouses.156

Burke explicitly argued that reform was too slow in reaction to the Gordon Riots. These riots – several days of rioting by a large mob in London, in June 1780 – had been precipitated by Parliament’s refusal to repeal the Catholic Relief Act, legislation that gave Catholics greater rights to own property. Burke had written, lobbied for, and publicly supported the legisla-

153. Id. at 190-91.
154. See infra Part II.
155. Edmund Burke, Sketch of a Negro Code, in PORTABLE EDMUND BURKE, supra note 66, at 183, 190.
156. See id. at 191 (giving males the right to choose their own wives but stating that if, failing to do so, a male refused a marriage tendered to him, he could be penalized by workload and allowance, and he would not have a route to freedom available to him).
tion, but for tactical reasons, others had formally sponsored it. After it was enacted there were demands to repeal it, and when Parliament refused, riots ensued. This is a telling incident because *Reflections in the Revolution of in France* might lead some to believe that Burke would have considered a social convulsion such as a riot to be a symptom of overly precipitous change. But Burke was not impressed with that argument. He responded to it as follows:

“Parliament,” they assert, “was too hasty, and they ought, in so essential and alarming a change, to have proceeded with a far greater degree of deliberation.” The direct contrary. Parliament was too slow. They took fourscore years to deliberate on the repeal of an act which ought not to have survived a second session. . . .

Burke, therefore, was neither a Pavlovian defender of the status quo nor a knee jerk champion of change. He thought there were reasons why things have come to be as they are — reasons that are not always obvious — and that change always carries the risk of unintended consequences. He did not, therefore, sweep things aside lightly. But Burke also understood that things are often as they are because the existing conditions permit the powerful to maintain their privileges at the expense of the less fortunate. The greater the social injustice, the more ready Burke was to make the correction decisively.

**B. Ireland and Religious Tolerance**

Burke’s Irish Catholic roots were a handicap to his political career. Conor Cruise O’Brien writes: “[a] lesser person, circumscribed as he was, would have turned his back on Ireland altogether, and this would have been wholly to the advantage of his political career in Britain.” This Burke did not do. As previously discussed, Burke worked for more equal commercial participation by Ireland in the British Empire and, more emphatically, more equal political and social participation by Irish Catholics in the affairs of their own nation. This was a persistent campaign that spanned Burke’s professional lifetime. Lamentably, notwithstanding the removal of some small impediments to Catholic equality, Burke’s efforts were generally unsuccessful.

As Burke saw it, the Protestants who settled in Ireland as part of England’s plantation policy in the early seventeenth century “considered themselves in no other light than that of a sort of a colonial garrison, to keep the natives in subjection to the other state of Great Britain.” This was not “a

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157. Regarding the Gordon Riots, see O’BRIEN, GREAT MELODY, supra note 38, at 77-81; KIRK, EDMUND BURKE, supra note 6, at 129-32.
159. O’BRIEN, GREAT MELODY, supra note 38, at 83.
160. Edmund Burke, *Letter to Sir Hercules Langrishe*, in PORTABLE EDMUND BURKE, supra note 66, at 330, 341. The quotes in the main body of this section are
contest between two religious factions, but between two adverse nations."

But the oppressors profited. They confiscated property from the subjugated Catholics on the pretext that the policy was necessary to suppress simpering Catholic plots. This was supplemented by "hostile statutes" and "special commissions and inquisitions" in order to effect "the total extirpation of the interest of the natives in their own soil." It was this cruel oppression that sparked the Irish rebellion of 1641, in which Protestant settlers were driven from their lands and in some instances murdered, at times with the encouragement of Catholic priests. The uprising in turn gave rise to wild conspiracy theories in London. Fanning the flames of these fears for their own political purposes, some English politicians suggested the Irish uprising was the spear's point of an international Papist plot, in which the English Crown might itself be implicated. Parliament decided to raise its own army, and enacted the Adventurers Act, which promised Irish land to speculators who helped finance Parliament's army.

This cycle never ceased, notwithstanding periodic attempts to increase Irish Catholic loyalty to the British nation through half-hearted reforms. What particularly worried England was the possibility of Irish Catholics allying themselves with a Catholic invading force. During Burke's professional lifetime, this was a stark possibility at least three times. In 1666, when England and France were at war, disturbances by impoverished Catholic "Whiteboys" broke out in Ireland. Would France invade Ireland, hoping to be joined by a fifth column of Whiteboys? There was an invasion attempt in July 1779, when England was at war with both France and Spain and English forces were tied down by the American revolution. Combined French and Spanish fleets set out to seize a port in southern England, although they had first considered invading Ireland. They were forced to abort the invasion when disease swept through the armada. And in 1796, during the Directory period of the French revolution, a French invasion fleet - supported by Theobald Wolfe Tone, the founder of the Society of United Irishman, composed of both Protestants and Catholics - set sail for Ireland, but storms disrupted the landing and subsequently disbursed the fleet.

These three periods were all complex and have many differences, but in one fashion or another they all aggravated English schizophrenia about how to treat Irish Catholics - whether to keep the Protestant foot on Catholic necks or ease up with the hope of reducing resentment - and therefore they all presented Burke with opportunities and challenges in his crusade for more

Burke's, but for the reader's understanding I have furnished some general Irish history that Burke's audience knew well and Burke did not need to explain.

161. Id.
162. Id.
163. See O'BRIEN, GREAT MELODY, supra note 38, at 44.
164. See id. at 186-87.
165. See id. at 178.
166. See id. at 469 (regarding Tome); id. at 566 (regarding invasion).
political equality for Catholics. The second period mentioned above, when England’s forces were engaged in North America and England felt vulnerable to a French invasion of Ireland, provides one interesting example.

During this time, a paramilitary organization known as the Irish Volunteers was formed to repel French invaders. This armed group, ultimately 28,000 strong, was composed exclusively of Protestants and under private control. It had all the attributes of a potential vigilante group. And, in fact, the Volunteers did not disband when the threat of invasion subsided; rather, they turned into an armed political organization. O’Brien describes this period as “the dark side of the Burkean moon” because Burke was publicly silent about the Volunteers. It was a rare time that he put political expediency first.

Things became even more complicated as the Irish Volunteers took up the cudgels for free trade for Ireland. This was one of Burke’s favorite causes, but the Volunteers agitated for free trade by subtly threatening the Irish Parliament with violence if it did not do as the Volunteers were demanding. The powerful orator, Henry Grattan, emerged as a principal leader of the Volunteers, giving speeches designed to fathom the passions of Volunteers and Dublin mobs, ballyhooing the right of constituents “to associate against” any member of Parliament who deviated from the proper path in order “to reprehende his proceedings.” This was truly riding the tiger.

Burke negotiated these treacherous waters by maintaining public silence about the Volunteers, privately persuading Rockingham not to publicly approve of the Volunteers, and stepping up his and Rockingham Whig support for Irish free trade and for repeal of the Penal Laws. His objective was to make English Parliament and the Whigs, rather than Irish Parliament or the Volunteers, the real champions and ultimate benefactors of free trade and Catholic emancipation.

In 1780, Grattan took up the cause of Irish legislative independence. This was a clearer issue, and Burke opposed it directly. Catholics were excluded from serving in Parliament and from voting in parliamentary elections. Legislative independence for the Irish Parliament meant Catholic political servitude. Fortunately, many Protestants were also less than enthusiastic about Grattan’s campaign. Protestants who could not meet the property qualifications were also excluded from voting. Perhaps more importantly, wealthy, Protestant landowners were worried about a legislature too influenced by the

167. See id. at 178.
168. See id. at 187 (noting that Charles James Fox said that the Volunteers “had been called illegal” but approving of them nonetheless).
169. Id. at 178.
170. Id. at 192-93.
171. Id. at 192 (quoting Grattan).
172. See id. at 188.
Volunteers. The Irish House of Commons ultimately voted against its own legislative independence.\(^{173}\)

In 1778, under the looming threat of a French invasion, the English Parliament enacted legislation that became known as the Catholic Relief Act, which repealed some provisions of the Penal Laws that restricted property ownership by Catholics.\(^{174}\) In 1782 – under Grattan’s leadership – the Irish Parliament enacted some additional reforms.\(^{175}\) Burke did not like the substance of the reforms, their sponsor, or the patronizing way in which they were presented. A resolution calling for the reforms was enacted first by a Convention of Volunteers, with a preamble stating that “as men and Irishmen, as Christians and as Protestants, we rejoice in the relaxation of the Penal Laws against our Roman Catholic fellow-subjects.”\(^{176}\) Burke found the reforms milquetoast. He was also disturbed that while the legislation repealed some provisions of the Penal Laws – most of which in practice were then largely ignored – it reaffirmed other, more severe provisions. He attacked the legislation in a letter to an Irish peer. Noting that the Penal Laws, “menacing as they were in language, were every day fading into disuse,” Burke asked what sense it was, while expunging some provisions, “to reaffirm the principles and to re-enact the provisions of a code of statutes by which you are totally excluded from [the privileges of the commonwealth].”\(^{177}\) Then he proceeded to describe the legislation. The Act, he said, stated

that Catholics ought to be considered as good and loyal subjects to his Majesty, his crown and government. Then follows a universal exclusion of those GOOD and LOYAL subjects from every (even the lowest) office of trust and profit – from any vote at an election – from any privilege in a town corporate – from being even a freeman of such a corporation – from serving on grand juries – from a vote a vestry – from having a gun in his house – from being a barrister, attorney, or solicitor, &c., &c., &c.\(^{178}\)

The low regard that the establishment had for Irish Catholics was a powerful force in shaping Burke’s political philosophy. For him, this cut to the bone. His ancestry was a constant liability for his career. But it was not only religion that was the problem; it was the gentry’s stereotype of the Irish Catholic as poor, uneducated, superstitious, coarse, brutal, and inebriated. John Wilkes, a member of English Parliament who himself was an irreverent

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173. See id. at 197 (detailing how the initiative passed by a vote of 136 to 97).
174. See id. at 75-76.
175. See id. at 243.
176. Id. at 243 (quoting preamble of resolution enacted by the Convention of Volunteers at Dungannon).
177. Edmund Burke, A Letter to a Peer of Ireland on the Penal Laws Against Irish Catholics, in PORTABLE EDMUND BURKE, supra note 66, at 326, 326.
178. Id. at 327.
dissident disdained by the establishment, evidenced the pervasive prejudice when he said that Burke’s oratory “stank of whiskey and potatoes.” As Burke’s oratory ranks among the most eloquent and sophisticated – not only of his day, but of all time – Wilkes’s remark illustrates how durable ethnic stereotypes are, even in the face of countervailing evidence.

Burke understood the many ways that anti-Irish Catholic prejudice affected his native land. Ireland was impoverished. It suffered from deficiencies in commerce and education, which perpetuated poverty, which in turn impeded progress in commerce and education. Societal disdain worked its corrosive effects on self-esteem, and alcohol provided a ready, self-destructive, escape from the miseries of poverty and lack of opportunity. Burke worked assiduously for the repeal of the Penal Laws even when he recognized that these laws were no longer enforced or were easily evaded, for even more pernicious than the law’s formal operation was its effect on attitudes and culture. For example, some people argued that the Penal Laws were not insurmountable obstacles to practicing a profession, attending Cambridge or Oxford, or holding public office because all one had to do was publicly take the Oath of Conformity to free himself from these disabilities. Burke, however, spoke about the violence to self-esteem:

Let three millions of people but abandon all that they and their ancestors have been taught to believe sacred, and to forswear it publicly in terms the most degrading, scurrilous, and indecent for men of integrity and virtue, and to abuse the whole of their former lives, and to slander the education they have received, and nothing more is required of them.

In those days, perhaps the greatest mechanism of meritocracy in the Catholic community was the clergy. The priesthood was the widest route open to young men from lower social strata who were bright, talented, and thought to possess high integrity and leadership qualities. What happened to this group was therefore of enormous importance to the welfare of the community. Burke believed that the Penal Laws were the most destructive to the clergy. He wrote to an Irish peer,

179. Id. at 50 (quoting Wilkes). For a brief description of John Wilkes, see CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 73-76 (2001).
181. See supra notes 45-46 and accompanying text.
Besides your laity, you have the succession of about four thousand clergymen to provide for. These, having no lucrative objects in prospect, are taken very much out of the lower orders of the people. At home they have no means whatsoever provided for their attaining a clerical education, or indeed any education at all... 183

The custom, therefore, has been for them - notwithstanding "the general discouragements" of the law and "occasional pursuits of magistracy" - to learn as much Latin as possible at home and then be sent abroad for a clerical education. 184

But the success of this system requires that, upon their return to the community, the newly minted clerics will be accepted by the community and thus able to pursue their calling. This requires that the clerics be respected. Burke wrote:

Through such difficulties and discouragements, many of them arrived at considerable proficiency, so as to be marked and distinguished abroad. These persons afterwards, by being sunk in the most abject poverty, despised and ill-treated by the higher orders among Protestants, and not much better esteemed or treated even by the few persons of fortune of their own persuasion, and contracting the habits and ways of thinking of the poor and uneducated, among whom they were obliged to live, in a few years retained little or no traces of the talents and acquirements which distinguished them in the early periods of their lives. 185

Because it was so personal, the lessons Burke drew from the plight of the Irish in general and Irish Catholics in particular, radiated throughout all of his beliefs and profoundly affected his entire career. All of his crusades flow from his understanding of this issue. And what lay at the heart of his understanding was the sociological perspective. He knew that the plight of Irish Catholics was not the result of inherent character flaws. The stereotypes notwithstanding, they were not innately indolent, dim witted, violent, prone to alcoholism, or otherwise deficient. Their plight was the result of contemporary and historical circumstances. One's circumstances were affected by one's upbringing. Upbringing was the result of one's parent's circumstances, which in turn was affected by their parents' circumstances, and so on. Two centuries before Brown v. Board of Education, Burke understood that economic circumstances were but one of an interrelated set of factors, and that

183. Edmund Burke, A Letter to a Peer of Ireland on the Penal Laws Against Irish Catholics, in PORTABLE EDMUND BURKE, supra note 66, at 326, 329 (omission in original).
184. Id. at 329-30.
185. Id. at 330.
among these factors were the self-perpetuating forces of stereotypes and – perhaps even more perniciously – self-image, both by individuals and the community as a whole.

A lesser man have may understood all of this regarding his own people and native land but still might not have applied these lessons to other peoples, other groups, and other nations. But Burke did. He successfully applied the insights gained from his personal situation to other issues of his time. The painful lessons about religious and nationalistic prejudice were powerful because they were so personal. Those lessons created an antipathy to the arrogance of power that affected every aspect of Burke’s political philosophy and career and was the driving force behind each of his five crusades.

C. America and the Limits of Force

Edmund Burke’s policy toward the American colonies has always made him popular on this side of the Atlantic. Burke passionately urged Britain to desist from what the Americans considered Britain’s oppressive taxation of the colonies, opposed dispatching British forces to extinguish the American rebellion, and was early in urging Britain to grant the colonies independence. It has been observed, however, that Burke did not hold these views because he loved America. One American historian has written that Burke’s speeches and writings on America do not reflect even “a trace of sentimental pro-Americanism” and that what animated Burke was “his indignation at ministerial mismanagement of the colonies.” 186 In short, Burke wanted to preserve the British Empire, not dismember it, and he thought Britain’s policies were counterproductive to preserving her dominion over the American colonies. 187

But there is more to Burke’s views on America. First, as Conor Cruise O’Brien has written: “Burke was not interested just in ‘preserving’ the British Empire; he was interested in seeing that it was run for the benefit of its inhabitants generally” and not just those in England. 188 As proud as he was of England, Burke was a pluralist. He respected other peoples, other heritages, and other cultures. He strove to understand them as few others did, and believed in granting them equal dignity. He did not believe it was possible over the long run for one nation or people to exploit another; he believed that relationships had to be built upon mutual advantage. “All government,” he wrote, “indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter.” 189

186. O’BRIEN, GREAT MELODY, supra note 38, at 89 (quoting Ross Hoffman).
187. As Hoffman also wrote, “[c]onciliation of the colonies was to Burke a means rather than an end – a means of preserving the British Empire in North America.” Id. (quoting Hoffman).
188. Id. at 89-90.
189. Edmund Burke, Speech on Conciliation with the Colonies, in PORTABLE EDMUND BURKE, supra note 66, at 259, 273.
History has taught us that victories often sow the seeds of later calamities.\textsuperscript{190} So it was with Britain’s loss of her American colonies. The chain of events that culminated with Britain’s defeat in the American Revolution began in 1763 with Britain’s victory in the Seven Years’ War.\textsuperscript{191} Britain, with the aid of American colonists, defeated France and her Indian allies, and France ceded Canada and some contiguous territories to Britain. But Britain’s new territories encompassed hostile Indian tribes and more than 8,000 Catholic French-Canadians. Moreover, France still held Louisiana, which at the base of the Mississippi River, could provide a platform for projecting a future attacking force anywhere along thousands of miles of western territories. To protect its interests, Britain would have to keep a considerable military force, estimated at 10,000 men, in North America.\textsuperscript{192} That would have been expensive, and England decided that the American colonies – the prime beneficiaries of England’s protection – should help shoulder the cost. The Americans, however, were suspicious. As they saw it, the war was over and the need for a large standing army had been brought to an end. The need for protection, they feared, was pretext; England wanted to keep a large army in North America not to protect the colonies but to control them.\textsuperscript{193}

American suspicions intensified in 1763, when the King, without benefit of a statute enacted by Parliament, issued the Boundaries Proclamation, prohibiting whites from settling west of the Allegheny Mountains. England hoped that by keeping whites and Indians apart, and by assuring the Indians that there would not be further encroachments on their hunting lands, conflicts with the Indians could be avoided. Suspicious settlers speculated that this was a plot to reserve choice lands for friends of the Crown.\textsuperscript{194}

But revenue was England’s prime objective. It enacted the Stamp Act in 1765, the same year in which Burke was first elected to Parliament. To England, the Act was hardly radical; it merely extended to the colonies a revenue device that was already in force in the mother country, namely, that stamps purchased from the Crown had to be affixed to all legal documents.\textsuperscript{195} The Act passed the House of Commons by a vote of 249 to 49.\textsuperscript{196} To America, however, the Stamp Act was radical indeed, for this was the first time Parliament enacted a direct tax upon the colonies. Previously, Parliament had relied on the indirect taxation from customs and duties or had permitted the colonial assemblies to raise revenue in the manner they deemed fit. Adopting the slogan “[n]o taxation without representation,” Americans erupted in indigna-

\textsuperscript{190} The classic example is the oppressive peace terms that the Allies forced upon Germany at the end of World War I. These bred economic ruin, national humiliation, hatred and anger that eventually erupted in the rise of the Third Reich.

\textsuperscript{191} See TUCHMAN, supra note 88, at 128-29.

\textsuperscript{192} Id. at 129.

\textsuperscript{193} Id.

\textsuperscript{194} Id. at 144.

\textsuperscript{195} See O’Brien, GREAT MELODY, supra note 38, at 97.

\textsuperscript{196} TUCHMAN, supra note 88, at 154.
Especially worrisome was a boycott on the importation of British goods that became immediately popular in the colonies. The Stamp Act looked like it could be counterproductive, costing England more in revenues than it would raise, and English politicians divided over the question of whether the Act should be repealed.

On January 12, 1766, three weeks after his election, Burke made the Stamp Act the subject of his maiden speech to Parliament. Although in his capacity as Rockingham’s adviser Burke had previously acted in the background, historians agree Burke was the principal architect of Rockingham policy opposing the Stamp Act. The Stamp Act was the first subject a freshly elected Burke addressed in the Commons. Unfortunately, no transcript of the speech survives. In recounting the experience in a letter to a friend, however, Burke wrote that a senior Rockingham asked him to perform the simple task of presenting to the Commons a petition against the Stamp Act by merchants in Manchester. Burke rose to do so when, without forethought, he suddenly found himself plunging in and addressing the Act on his own. Burke was so nervous, he told his friend, that he remembered little of what he said. But Burke must have made an impression because George Grenville, who had only recently stepped down as First Minister and who was the author of the Stamp Act, saw fit to reply. Normally, so senior a Member would not deign to rebut a junior’s maiden remarks. Burke, not to be cowed, engaged in a rebuttal.

Two days later a great debate over the Stamp Act took place between two of the most renowned orators of the day: William Pitt the Elder, who argued for repealing the Stamp Act, and George Grenville, who defended his legislation. Pitt boldly declared that he rejoiced that America had resisted the Act for if they had meekly acquiesced they would have been “so dead to all feelings of liberty as voluntarily to submit to be slaves.” He urged Parliament to simultaneously repeal the Act “absolutely, totally, immediately” and reaffirm its sovereignty over the colonies and its right to exercise any power whatsoever over them “except that of taking their money out of their pockets without their consent.”

Three weeks later, on February 3rd, Burke again addressed Parliament. Although he was not yet the equal of William Pitt as an orator, his speech was impressive enough to establish him, at this very early date, as someone to be

197. O’BRIEN, GREAT MELODY, supra note 38, at 98.
198. TUCHMAN, supra note 88, at 155.
199. Id. at 162.
200. See O’BRIEN, GREAT MELODY, supra note 38, at 97 (stating that Burke made his mind up about the Stamp Act before the party did); TUCHMAN, supra note 78, at 162 (stating that Rockingham “acquired a policy [on the Stamp Act] by transfusion from his secretary, Edmund Burke”).
201. TUCHMAN, supra note 88, at 154.
202. Id. at 163.
203. Id.
reckoned with in the Commons. A major theme of Burke’s speech, which Burke would repeat throughout his career, was the importance of appreciating differences of history, culture, and circumstances of other peoples. Americans, who he described as “a great and growing people spread over a vast quarter of the Globe, almost from the Polar Circle to the Equator, separated from us by a mighty Ocean,” could not be treated just the same as if they were Englishmen, said Burke. “The rule of their Constitution must be taken from their Circumstances,” he continued, adding that the “eternal Barriers of Nature forbid that the Colonies should be blended or coalesce into the mass of the particular constitution of this Kingdom.”

The Stamp Act was officially repealed on March 18, 1766. But incongruously, after repealing the Stamp Act in order to improve relations with her American colonies, England enacted the Quartering Act only months later. The Quartering Act required the colonies to provide billet and provision for English forces in America. The following year, England imposed the notorious Townshend Duties on paper, glass, paint, lead, and, of course, tea. American polemists, especially the Pennsylvanian lawyer John Dickinson and Samuel Adams in Boston, whipped public sentiment into a lather, and merchants in Boston and New York agreed to boycott British goods.

In March 1769, Parliament began debating whether the Townshend Duties should be repealed. Burke supported repeal. In a pamphlet he wrote, he sounded two themes that he would continue to advance throughout the intensifying conflict. The first is the importance of understanding the other’s point of view. Much later, Burke would write, “I think I know America – if I do not, my ignorance is incurable, for I have spared no pains to understand it.”

It is quite understandable, therefore, that Burke began his analysis by assessing American history, beliefs, and desires. Burke observed that before the Stamp Act, England never imposed direct taxes on the colonies, and therefore the colonies never considered whether the mother country possessed this right. Over time, two ideas took hold – “superiority in the presiding state, and freedom in the subordinate” – that, notwithstanding the theoretical inconsistency between the two, had successfully been reconciled in practice. At

204. See O’BRIEN, GREAT MELODY, supra note 38, at 113 (quoting historian Paul Langford as stating that Burke established himself as a major figure).
205. Id. at 114.
206. Id. at 115.
207. TUCHMAN, supra note 88, at 167 (regarding Quartering Act); id. at 171 (regarding Townshend Duties).
208. See id. at 178 (regarding boycott); id. at 175 (regarding Dickinson and Adams).
209. Id. at 182.
this point, as Americans perceived it, England was acting like a "general monopolist" and asserting its superiority at the expense of their freedom. "By this measure was let loose that dangerous spirit of disquisition, not in the coolness of philosophical inquiry, but inflamed with the passions of a haughty, resentful people, who thought themselves deeply injured, and that they were contending for everything that was valuable in the world."  

Because Burke realized that the Americans believed they were fighting for "everything that was valuable in the world," he understood what it would take to prevail. The Americans would not relent as long as they still possessed some power to resist. Therefore, Burke believed, England could not prevail without destroying the colonies. Burke wrote:

[N]othing, it was evident, but the sending [of] a very strong military, backed by a very strong naval force, would reduce the seditious to obedience. To send it to one town would not be sufficient; every province of America must be traversed, and must be subdued. I do not entertain the least doubt this could be done. We might, I think, without much difficulty, have destroyed our colonies. This destruction might be effected probably in a year, or in two at the utmost.  

And then what? This was not a war against a hostile nation "where every successful stroke adds to your own power and takes from that of a rival."  How would subduing the colonies militarily benefit England? If England's object was to derive revenue from the colonies, and that revenue was based on trade and commerce between England and the colonies, how would England achieve her objective by destroying the colonies' commerce? Following their defeat, how would the colonies repay whatever England calculated to be their debts? Burke argued that these were questions England needed to weigh with great care "before that sword was drawn which even by its victories must produce all the evil effects of the greatest national defeat."  

The Townshend duties were repealed on all products except one: tea. In May 1770, several members of Parliament sought to repeal the duty on tea as well. Burke almost certainly favored repeal, but because there was, at this time, a political alliance between Rockingham and Grenville, who favored maintaining the duty on tea in order to save face and preserve the "dignity of

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212. Id.
213. Id. at 250.
214. Id.
215. Id.
216. TUCHMAN, supra note 88, at 186.

https://scholarship.law.missouri.edu/mlr/vol72/iss2/1
the nation,” Burke had to avoid that issue in the parliamentary debate.\textsuperscript{217} He restricted himself to ridiculing the administration for taking inconsistent positions, a task his party assigned to him and which he accomplished effectively.\textsuperscript{218} Unbeknownst to Parliament, the Boston Massacre – in which British Redcoats fired on a mob of youngsters who were pelting them with snow-balls, killing five – had already occurred, but news of the incident did not reach London after the vote.\textsuperscript{219} The effort to repeal the duty on tea failed by wide margin, yet for a while animosities between England and colonies seemed to subside.

In June of 1772, both sides were provoked by a new incident. Britain was aggressively pursuing smugglers, a policy that was particularly irksome to Rhode Islanders, who considered smuggling an integral part of the local economy.\textsuperscript{220} Hide and seek games throughout the islands and coves of Narragansett Bay became increasingly intense between British customs ships and Rhode Island smugglers. In 1772, a Rhode Island ship lured the pursuing British schooner 	extit{Gaspee} into shallow waters, where she ran aground.\textsuperscript{221} Since high tide would not come till morning, the 	extit{Gaspee} was marooned for the night. In the darkness, men in eight longboats, – with oars muffled – snuck up upon and attacked the 	extit{Gaspee}. They were led by John Brown, one of Rhode Island’s wealthiest men and a controversial slave trader who later endowed Brown University.\textsuperscript{222} Brown’s party shot the 	extit{Gaspee}’s captain, but they had him attended by a doctor who they had brought with them. The attackers rounded up the sleeping crew, put captain and crew ashore, and set the ship afire. The 	extit{Gaspee}’s captain recovered, but British “dignity” did not and England proclaimed the attack an act of war.

England established a Commission of Inquiry composed of high officials from Rhode Island, Massachusetts, New York, and New Jersey, and

\textsuperscript{217} In a speech before the Commons, George Grenville said that if it were to repeal all of the taxes Parliament would not “have sufficiently provided for the dignity of the nation.” O’BRIEN, GREAT MELODY, supra note 38, at 131 (quoting Grenville). This must have made the hair stand up on Burke’s neck; two years earlier he had spoken passionately against letting worries about national dignity interfere with a sound decision to repeal the Stamp Act. \textit{Id.} As a loyal Rockingham, however, Burke could not contradict Grenville. Moreover, there would have been little to gain as political support did not exist for repealing the tea tax. The Rockingham-Grenville alliance ended with Grenville’s death in November 1770. See \textit{id.} at 132-35.

\textsuperscript{218} TUCHMAN, supra note 88, at 187-88.

\textsuperscript{219} Id. at 187.

\textsuperscript{220} See generally TUCHMAN, \textit{supra} note 88, at 191-92; WILLIAM G. MCLoughlin, RHODE ISLAND: A BICENTENNIAL HISTORY 66-68 (1978) (regarding the history of smuggling in Narragansett Bay); \textit{id.} at 90-92 (regarding the Gaspee incident).

\textsuperscript{221} See TUCHMAN, \textit{supra} note 88, at 191-92.

\textsuperscript{222} See MCLoughlin, \textit{supra} note 221, at 64-65, 79, 106-07 (regarding John Brown).
King George III offered a pardon and a large reward to informants.\footnote{223} Alarmed that these patriots would be identified, taken to England, and hanged, the Virginia House of Burgess proposed establishing Committees of Correspondence in the colonies to confer about resistance. The immediate fears were never realized. Although the identities of the attackers were well-known among Rhode Islanders, no one claimed the reward, and the Commission ultimately dissolved without making any arrests. But the Committees of Correspondence were set in motion, and revolution loomed closer.

Meanwhile, the East India Company was in financial distress, and to assist it England enacted legislation that permitted the company to sell tea directly to the colonies at reduced prices.\footnote{224} England undoubtedly considered this a “win-win” arrangement; the East India Company would get a sorely needed flow of revenue, and the colonists, who dearly loved tea, would delight in cheaper tea prices. But American merchants – some of whom earned part of their livelihood smuggling tea and were already disgruntled with the more aggressive British efforts to suppress smuggling – were far from delighted. Moreover, American consumers did not see the reduced tea prices as English benevolence; they saw it as predatory pricing by a monopolist. Accordingly, on December 16, 1773, the recently formed Boston Committee of Correspondence instigated the event known to history as the Boston Tea Party.\footnote{225}

A new administration in England led by Lord North wished to respond punitively. Unwilling to try to find the perpetrators, which had proved so futile and embarrassing in the Gaspee incident, North asked Parliament for legislation closing the Port of Boston to commerce until reparations had been paid to the East India Company and adequate assurances were given that trade would be carried on with full obedience to the law, including the collection of custom duties.\footnote{226} Burke opposed this approach. In a speech to the House of Commons he asked Parliament to consider “what to do if this Example does not operate as you wish?”\footnote{227} What if Virginia followed through on its threat not to pay the taxes England was demanding? Would trade be suspended there too? If so, England would lose £300,000 in trade. Burke predicted that wholesale punishment for the acts of some individuals would increase animosity. “If punishment is not just but rigorous it is a double Cause of Complaint,” he warned.\footnote{228} And Burke’s legal training was evident in his

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\item \footnote{223} See Tuchman, supra note 88, at 191.
\item \footnote{224} See generally id. at 191-92; PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 141-43 (1997).
\item \footnote{225} See HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 67 (1980) (regarding the Boston Committee of Correspondence’s instigation of the Boston Tea Party).
\item \footnote{226} See generally Tuchman, supra note 88, at 196.
\item \footnote{227} O’BRIEN, GREAT MELODY, supra note 38, at 137 (quoting Burke’s speech in the Commons in March 1774).
\item \footnote{228} Id. (quoting Burke).
\end{itemize}
declaring "[e]very punishment is unjust that is inflicted on a party un-heard." 229

Not only did Parliament close the Port of Boston to commerce, it enacted a series of other measures known collectively as the Coercive Acts. The legislation repealed the right of the Massachusetts Bay Colony to select its own government officials, representatives, and judges or to convene town meetings. It also provided that English subjects accused of committing crimes in Massachusetts could, at their request, be tried in England rather than in the colony, and it strengthened the Quartering Act by providing if the colony failed to provide adequate barracks, English troops could be billeted in homes or other buildings. Burke contended the Coercive Acts robbed Massachusetts of "the sole disposal of her own internal government." 230

On April 19, 1774, Burke rose again in support of a proposal to repeal the tea tax and gave what has become one of his most famous speeches. 231 Following his usual methodology, Burke first reviewed the relevant chronology of events, expressly explaining that it was necessary to understand history in order to avoid "the unpitied calamity of being repeatedly caught in the same snare." 232 Burke argued that events showed that the Americans were not spoiling for a fight. They had been content when England repealed the Stamp Act; it was not until England revived the taxation scheme that Americans became jealous of the mother country's prerogatives and apprehensive about being exploited. It was then that Americans quarreled not only with the new taxes but also with old taxes as well, questioning all aspects of Parliament's power over them. 233

Another hallmark of Burkean methodology is putting oneself in the other's shoes. "Reflect how you are to govern a people who think they ought to be free, and think they are not," he asked Parliament. 234 For Burke, answering this question led to same conclusion as did the empirical evidence, namely, that Americans would not accept being taxed by England rather than taxing themselves. Many years later, Burke would explain that he had always been convinced that the Americans had not started down the path to revolution because of a desire for independence but instead from their objection to being taxed without their consent. 235

229. Id. (quoting Burke).
230. See Tuchman, supra note 88, at 197-98 (regarding the Coercive Acts); id. at 198 (quoting Burke).
232. O'BRIEN, GREAT MELODY, supra note 38, at 139.
233. Id. at 140 (quoting Burke).
234. Edmund Burke, Speech on American Taxation, in PORTABLE EDMUND BURKE, supra note 66, at 254, 257.
235. Edmund Burke, An Appeal from the New to the Old Whigs, in PORTABLE EDMUND BURKE, supra note 66, at 474, 481-82.
As the quintessential pragmatist, Burke urged Parliament to think clearly about its objectives and whether particular policies would achieve those objectives. Burke argued that the Administration was leading Parliament astray by suggesting that continuing the tea tax was a matter of principle rather than a question of political expediency. "They tell you, Sir, that your dignity is tied to it,” Burke said.236 "I know not how it happens, but this dignity of yours is a terrible incumbrance to you; for it has of late been ever at war with your interest, your equity, and every idea of your policy.”237

It is sometimes suggested that pragmatists have no values and are simply about technique. This was not so for Burke. Principles were his starting point and wanted Parliament’s actions to reflect England’s highest principles. Moreover, Burke understood the difference between the emptiness of principle for principle’s sake and the substance of the nation’s highest values. “Again, and again, revert to your old principles – seek peace and ensue it – leave America, if she has taxable matter in her, to tax herself,” he implored Parliament.238 Parliament, however, did not heed Burke, and the effort to repeal the tea tax failed by a vote of 182 to 49.239

In May of 1774, Rhode Island called for a congress of the colonies, and by the end of the summer the other twelve colonies agreed to that proposal.240 In September, the Continental Congress convened for the first time in Philadelphia.241 That assemblage declared that Parliament was violating American rights, and the colonies pledged to adhere to a non-importation policy until Parliament gave adequate redress to their grievances. Moreover, the colonies agreed that if satisfactory redress was not forthcoming within a year, they would cease all trade with England. The colonies affirmed their allegiance to the Crown but simultaneously declared that they enjoyed the right of self-government, including the right to tax themselves, and were not subject to legislation by Parliament. And, ominously, the Congress called upon citizens to form militia for defense.

England might have seized upon the colonies reaffirmation of the allegiance to the Crown and looked for some way of reaching an accommodation. Instead, it responded as if America had thrown down the gauntlet. King George declared that “blows must decide” whether the colonies were to be subjects of the Crown or independent, and the Cabinet dispatched three warships filled with army reinforcements to America.242 On February 5, 1775, notwithstanding significant opposition, Parliament declared Massachusetts to

236. O’BRIEN, supra note 38, at 141 (quoting Burke).
237. Id.
238. Id. at 143 (quoting Burke).
239. Id. at 144.
240. TUCHMAN, supra note 88, at 200.
241. See id. at 201.
242. Id. at 202.
be in rebellion. This was tantamount to a declaration of war. Three additional regiments were dispatched to America, and the Cabinet designated several generals to lead the forces.

Still, it was not too late to pull back from the brink, and apparently Lord North had second thoughts. Seizing upon this last opportunity, on March 22, 1775, Burke rose in the House of Commons and made one last powerful appeal that England reverse direction and pursue conciliation rather than war. It is perhaps his most famous speech.

Once again, Burke stressed the limits of force. "America, Gentlemen say, is a noble object – it is an object well worth fighting for," he began. "Certainly it is, if fighting a people be the best way of gaining them." He continued:

First, Sir, permit me to observe, that the use of force alone is but temporary. It may subdue for a moment; but it does not remove the necessity of subduing again; and a nation is not governed which is perpetually to be conquered.

My next objection is its uncertainty. Terror is not always the effect of force, and an armament is not a victory. If you do not succeed, you are without resource: for conciliation failing, force remains; but force failing, no further hope of reconciliation is left. . . .

A further objection to force is that you impair the object by your very endeavors to preserve it. The thing you fought for is not the thing which you recover, but depreciated, sunk, wasted, and consumed in the contest.

Burke reviewed the English conquest of Ireland, Wales, Chester, and Durham, arguing that it was not through force of arms that they were successfully subdued, civilized, and incorporated into the British realm but by providing them with the advantages of the English system of constitutional government. "It was not English arms, but the English constitution that con-

243. One hundred and six members of the House of Commons voted nay. See id. at 205 (giving number of nays); JOHNSON, supra note 224, at 148 (giving date of vote).
244. See TUCHMAN, supra note 88, at 205.
245. See id. (stating that suddenly, at this juncture, Lord North "seemed to vacillate").
246. Edmund Burke, Speech on Conciliation with the Colonies, in PORTABLE EDMUND BURKE, supra note 66, at 259, 259.
247. Id. at 260.
248. Id. at 267.
quered Ireland,” he said.\(^{249}\) This was not a lesson that England had learned quickly, for “[t]he march of the human mind is slow.”\(^{250}\) For two centuries, for example, England dealt harshly with the unruly Welsh. Parliament enacted statutes seeking to deprive the Welsh of arms, to punish them with restrictions on trade and commerce, and to drag offenders off to trial in England. All of these measures were to no avail. It was Henry the Eighth who finally took a new tack by granting the Welsh the rights and privileges of English citizens. The result? “A political order was established” and “military power gave way to the civil.”\(^{251}\) These lessons “demonstrated that freedom, and not servitude, is the cure of anarchy.”\(^{252}\)

Another of Burke’s themes was that England should not find American demands for liberty to be repugnant because the America’s conception of “liberty” was essentially the same as England’s. “[T]he people of the colonies are descendants of Englishman. England, Sir, is a nation which still, I hope, respects, and formerly adored, her freedom. The colonists . . . took this bias and direction the moment they parted from your hands,” he declared.\(^{253}\) Burke reminded the Commons that throughout English history the great contests for freedom were fought over taxation, and one of the fundamental principles of English “liberty” was the right of the people to be taxed only with the consent of their representatives. Whether or not one believed the Americans were correctly applying this principle to the circumstances of their own case, one had to recognize that the Americans believed they were doing so. Taxation was the origin of the quarrel, even if points of disagreement were growing, and thus the quarrel could still be resolved.\(^{254}\)

“Abstract liberty, like other abstractions, is not to be found,” Burke said.\(^{255}\) He delivered that famous line to emphasize that the argument between England and America was not over abstract notions of liberty but specific principles. But the line also importantly reflects some more general aspects of Burke’s thinking. First, it demonstrates Burke’s rejection of natural law. For him, there are no transcendent rights that God has conveyed to mankind or political philosophers can divine through use of pure reason. Rights develop organically through the histories of particular nations and cultures, and are therefore specific to those nations and cultures. Burke has appropriately been called a teleologist.\(^{256}\)

Burke’s rejection of natural law flows from his general antipathy to theory. This is a prominent feature of his thinking that his biographers quickly

\(^{249}\) Id.

\(^{250}\) Id. at 268.

\(^{251}\) Id.

\(^{252}\) Id.

\(^{253}\) Id. at 261.

\(^{254}\) Id. at 262.

\(^{255}\) Id.

\(^{256}\) MCDONALD, supra note 10, at 71.
Burke reasoned from the bottom up, from the specific to the
general and believed that experience should govern public policy. Indeed,
as he was concluding his remarks to the Commons on this particular occa-
sion, he asked, "The question now, on all this accumulated matter, is whether
you will chose to abide by a profitable experience or a mischievous the-
ory?"

It was very shortly after Burke’s speech that things reached the point of
no return. On April 19, 1775, the Lexington Militia intercepted six companies
of British troops marching from Boston to seize patriot arms and munitions in
Concord, and the "shot heard around the world" was fired. Following the
Battle of Bunker Hill on June 17th King George III declared the colonies to
be in open rebellion. On November 16, 1776, Burke tried once again to
persuade the Commons of the futility of the war. He argued that a military
victory over a people determined to be independent would only create an
untenable situation. They might sign a treaty, but they would not relent. How
long would England keep a standing army of 26,000 and seventy warships in
America? Or, as he put it in a private letter to Rockingham, "[o]ur Victories
can only complete our ruin." Despite his appeals, Burke got nowhere. Dis-
mayed by events and their inability to effectively oppose them, the Rocking-
hams fell into a period of confusion and resignation. The Rockinghams
adopted a policy of absenting themselves from both houses of Parliament
whenever American affairs were discussed.

During this period Burke wrote two famous tracts. An Address to the
British Colonies in North America was a plea to the colonies to reconsider
separating from the mother country, and A Letter to the Sheriffs of Bristol on

257. See, e.g., O’Brien, Great Melody, supra note 38, at lxv (stating that "one
recurrent theme in Burke’s letters, speeches, and writings . . . is his emphasis on the
moral and political evils that follow upon the intrusion of theory into political prac-
tice. It is theory as such that he rejects . . . . Sound theory, to him, would seem to be
self-denying theory"); Kirk, Edmund Burke, supra note 6, at 153 (stating that Burke
"detested 'abstractions' - that is, speculative notions with no secure foundation in
history or knowledge of the world").

258. See Kirk, Edmund Burke, supra note 6, at 29 (agreeing with Walter D.
Love that "Burke usually reasoned from circumstance to principle").

259. Edmund Burke, Speech on Conciliation with the Colonies, in Portable
Edmund Burke, supra note 66, at 259, 272.

260. See David Hackett Fischer, Paul Revere’s Ride (1994) (providing a
superb description of the battle and the events leading up to it). See also Tuchman,
supra note 88, at 207.

261. Tuchman, supra note 88, at 209.


263. Id. at 155.

264. See id. at 156, 166; Tuchman, supra note 88, at 214.

265. Edmund Burke, Address to the British Colonies in North America, in
Portable Edmund Burke, supra note 66, at 274.
The Affairs of America was an attempt to explain his views about America to his constituents. These pieces make quite clear, as had been clear throughout, that Burke was an English patriot and not an American champion; that is, his interest was in trying to preserve the British Empire, not dismember it. Burke tried to get each side to see that passions were inflamed by chest-thumping rhetoric that was largely devoid of meaning. As he saw it, both sides were appealing to abstractions without concretely specifying—or truly understanding—what they meant. To Burke, theories meant little. What had meaning were specific policies. Both sides were waging war over political theory when what truly was at issue was public policy.

Burke told his constituents that England needed to define its objectives and adopt common sense policies to achieve them. Instead, it was diverted by empty arguments over the meaning of such phrases as “free government” and “tyranny.” America complained England was depriving it of a free government, and England claimed that was not so—as if this term had universal meaning. Arguing over the meaning of such terms was futile. After all, Americans “are a people who have split and anatomized the doctrine of free government, as if it were an abstract question concerning metaphysical liberty and necessity” and have labored over such questions as “whether liberty is a positive or negative idea” and “whether man has any rights by nature.”

These debates were not merely a distraction. They were hardening both sides and turning everyone into extremists, and extremist views about concepts such as liberty were dangerous. Burke believed in ordered liberty: that freedom to live life as one wants is possible only in a society that protects individuals from the destructive activities of others. Burke wrote: “[t]he extreme of liberty (which is its abstract perfection, but its real fault) obtains nowhere, nor ought to obtain anywhere” because extremes “are destructive to both virtue and enjoyment.” “Liberty,” he declared, “must be limited in order to be possessed.”

These were among Burke’s last remarks about America. After it became impossible to meaningfully alter British policy toward the American colonies, he turned his attention to other matters.

267. Id. at 288.
268. Id.
269. Rick Perlstein, Before the Storm: Barry Goldwater and the Unmaking of the American Consensus 391 (2001) (quoting Goldwater). One cannot help but contrast Burke’s statement with Barry Goldwater’s lines, delivered during his speech accepting the 1964 Republican presidential nomination, that “extremism in the defense of liberty is no vice” and that “moderation in the pursuit of justice is no virtue.” Id.
D. The East India Company and Corporate Regulation

Burke’s efforts to bring the East India Company to heel constituted both his longest crusade and the one for which he most wanted to be remembered. When he was dying, Burke wrote in a letter to a friend: “[l]et my endeavors to save the nation from that Shame and guilt, be my monument.”\(^{270}\) The shame Burke referred to was England’s brutal exploitation of India. The English government did not abuse India directly. It was England’s first major corporation, the East India Company, that did so, by amassing great fortunes through terror, robbery, and murder, and it was England’s failure to regulate this company that soiled the name of the nation. It was Burke who put an end to the nation’s shame and guilt, even though his long and tireless crusade was, as we shall see, formally a failure.

The East India Company was established in 1600 when Queen Elizabeth I granted a corporate charter to a group of London merchants, and gave the new firm a monopoly on all trade between England and the East Indies.\(^{271}\) For a long time, the fate of the company and British foreign policy were closely tied. The company competed for trading opportunities with Dutch, Portuguese, and French firms, rivalries that were settled not through price competition but by naval warfare.\(^{272}\) By 1761, when the British East India Company vanquished its French competitor, it was the sole European force in India.\(^{273}\) The East India Company was interested in acquiring silk, calico, cotton, carpet, porcelain, sugar, tea, and saltpeter (for making gun powder) from India.\(^{274}\) It also sought an Indian market for English commodities—tin, lead, broadcloth, and other goods manufactured in England—but with limited success. In part, it addressed the balance of payments problem by obtaining opium in India and selling it in China, often in exchange for tea, for which the English (and American colonists) had developed a nearly insatiable taste. The company established itself in India not merely as a trading partner but as an imperial power. By Burke’s time, it had an army of 60,000 and controlled an area on the Indian subcontinent totaling more than 281,412 square miles,

\(^{270}\) O’BRIEN, GREAT MELODY, supra note 38, at 581 (quoting Burke’s letter of July 28, 1796 to French Laurence).

\(^{271}\) Strictly speaking, the original charter granted the Company a monopoly on all trade between England and the entire world beyond the Atlantic. The charter defined the Company’s territory as all lands “beyond the Cape of Bona Esperanza to the Straits of Magellan.” JEAN SUTTON, LORDS OF THE EAST: THE EAST INDIA COMPANY AND ITS SHIPS (1600-1874) 7 (2000). The Cape of Bona Esperanza is what we today call the Cape of Good Hope; thus the Company’s territory began at the tip of Africa and ran eastward, around the world, to the tip of South America.

\(^{272}\) Id. at 7-8, 11-12.

\(^{273}\) HARRIS, supra note 90, at 162.

\(^{274}\) Id. at 153.
larger than England, Germany, or France, and administered a population more than four times that of England.\textsuperscript{275}

Following the disintegration of the Mohammedan Empire, which began in earnest in 1707, areas fell under the control of regional princes or viceroyes, known as Nabobs (or Nawabs).\textsuperscript{276} At first, the Nabobs had considerable say as to whether they would accept the British East India Company or its French competitor into their areas, but eventually the East India Company turned Nabobs into pawns.\textsuperscript{277} Nabobs remained the ostensible rulers but eventually they were little more than prisoners.

However, a bloody act of defiance occurred in 1756. Realizing that if he did not drive the English out of Bengal he would become subservient to them, the Nabob of Bengal attacked an English garrison and threw 146 Englishmen into the notorious “Black Hole of Calcutta,” a tiny room where most perished by morning.\textsuperscript{278} The following year an English force led by Robert Clive, and supported by native troops from other Nabobs, resumed control of the area, executed the Nabob of Bengal, and installed a new Nabob.\textsuperscript{279} The episode turned Clive into a military hero in England. The new Nabob appointed the East India Company the tax collector for 800 square miles of territory, and in addition gave Clive, personally, a gift of £240,000. Later, the Nabob gave Clive a jagir – an annuity paid to a government official for land and rent – equal to the sum that the East India Company paid Bengal for its rights to be there. In effect, therefore, Robert Clive, an official of the East India Company, personally became the landlord of his employer. R.W. Harris writes that at the tender age of thirty-two Clive became one of the wealthiest men in the British Empire, and the “idea spread among the company’s servants that India was a vast continent of unimaginable wealth, theirs for the taking.”\textsuperscript{280}

Over time, the exploitation of the natives – both for corporate and personal gain – became increasingly ruthless. As Conor Cruse O’Brien puts it,

\begin{itemize}
  \item 275. These are Burke’s figures. Edmund Burke, \textit{Speech on Mr. Fox’s East India Bill, in PORTABLE EDMUND BURKE, supra note 66, at 363, 365, 369 (size of army and populations); id. at 368-69 (size of territories).}
  \item 276. HARRIS, supra note 90, at 155-58. One dictionary defines “nabob” as follows: “1. A governor of India under the Mogul empire. 2. In the 18th and 19th centuries, an Englishman who returned from India having acquired a fortune. 3. A man of wealth and prominence.” \textit{THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE} 870 (William Morris ed., 1969). The 2000 edition of this dictionary has eliminated the second definition. The word “nabob” acquired secondary and tertiary meanings that persist to this day. Not only did the word identify princes in India; it also came to be applied to people who returned from India with great wealth. It has a pejorative tone, suggesting someone whose wealth, power, and standing exceeds his wisdom and integrity. But it does not mean someone whose sense of self-importance exceeds his real importance, for the English nabobs were indeed powerful.
  \item 277. HARRIS, supra note 90, at 157-58.
  \item 278. Id. at 159.
  \item 279. Id. at 160.
  \item 280. Id. at 160-61.
\end{itemize}
"[i]n short, the Company’s government of Bengal, under the Nawab’s nominal authority, became a gigantic extortion racket, practised at the expense of the Indians."\textsuperscript{281} Sometimes extortion was carried out through outright torture. Undoubtedly, the men of the East India Company rationalized their behavior by telling themselves that if they were not exploiting the Indians, the Indians would be exploiting one another, much as white slave owners in the colonies rationalized enslaving Africans on the grounds that blacks enslaved each other in Africa.

The East India Company had originally operated under a royal charter, but after the Glorious Revolution Parliament refashioned the firm into a modern stock company.\textsuperscript{282} Nevertheless, complaints continued that the company’s shareholders remained limited to a small clique surrounding the King.\textsuperscript{283} These debates were still ongoing when Burke entered Parliament. The original Rockingham policy opposed governmental regulation of the company. The Rockinghams feared the regulators would be the King’s ministers, and thus regulatory powers would give the King and his Court even greater control over the East India Company, furthering their abilities to exploit the company for their personal profit.\textsuperscript{284}

In fact, throughout most of its history the East India Company was not profitable. It was continually perceived as having an asset—an absolute monopoly on trade with the East—that was certain to yield large profits, even though it had not become profitable quite yet. As one Whig observed, "[o]ur Indian prosperity is always in the future tense."\textsuperscript{285} There were two intertwined problems. One was the company had enormous expenses, such as that army of 60,000. The other (and here Enron is a modern analog) is that company officials were more interested in amassing great personal fortunes than in making money for stockholders. The two problems coalesced in how the company and its employees went about making their money. The company was established to make money through trade but it concentrated more of its energies on generating "revenue" instead.\textsuperscript{286} It acquired a huge territory and then in one fashion or another taxed the natives for administering the government. During the company’s especially dire financial situation in the 1770s, an often-heard cry of its critics was, "[t]rade not conquest."\textsuperscript{287}

\textsuperscript{281} O’BRIEN, GREAT MELODY, supra note 38, at 281 (referring specifically to the rule under Warren Hastings but also making it clear the scheme predated him).
\textsuperscript{282} HARRIS, supra note 90, at 154; SUTTON, supra note 271, at 9.
\textsuperscript{283} SUTTON, supra note 271, at 10.
\textsuperscript{284} O’BRIEN, GREAT MELODY, supra note 38, at 258-59; KIRK, EDMUND BURKE, supra note 6, at 98-99.
\textsuperscript{286} Id. at 535.
\textsuperscript{287} Id. at 534.
In 1772, a man named Warren Hastings was appointed Governor of Bengal.\textsuperscript{288} Hastings had an interesting history. At about age seventeen, he had gone to India as an employee on the lowest rung of the ladder for the East India Company.\textsuperscript{289} Almost immediately, Robert Clive recognized that Hastings possessed special talent and elevated him to a position of importance within the company.\textsuperscript{290} Hastings developed a great knowledge and respect for Indian and Hindu culture and history, and at first he sought to be something of a reformer.\textsuperscript{291} Among other things, Hastings opposed a proposal to exempt company personnel from Indian law. Doing so, said Hastings, would give East India Company officials “a full license of oppressing others.” How would it be possible, he asked, for the Nabob, “whilst he hears the cries of his people which he cannot redress, not to wish to free himself from an alliance” with the East India Company?\textsuperscript{292} This is not what Clive wanted to hear. In fact, it ran directly counter to advice that Clive had specifically given Hastings: that the Indians should be treated harshly because they “will do nothing, through inclination.”\textsuperscript{293} Hastings fell into disfavor and returned to England. But after four years back home, Hastings resolved to adopt a more go along, get along attitude. He informed Clive he would take “your counsel and follow your example” and was brought back to India as Governor of Bengal.\textsuperscript{294}

Ironically, at this juncture Clive – now Lord Robert Clive and a member of Parliament – argued that the East India Company needed radical reform, and he proposed legislation that would have made the company’s directors responsible to Parliament rather than the company’s shareholders.\textsuperscript{295} This was not inspired by a change of heart; it was a political maneuver designed to deflect criticism, obtain governmental loans, and maintain corporate power.\textsuperscript{296} The debate may have been a seminal moment in Burke’s thinking even though it did not immediately affect his or his party’s policy prescriptions. Burke spoke in opposition to Clive’s proposals; it was however a nuanced – and as Burke himself surely recognized, a somewhat tortured – opposition. Burke acknowledged abuses and the need for strong medicine. But instead of blaming the company or its governors in India for the abuses,

\textsuperscript{288} HARRIS, supra note 90, at 165. Pursuant to the East India Regulating Act of 1773, legislation supported by Lord North and opposed by Burke opposed, Hastings became Governor-General of Bengal the following year. O’BRIEN, GREAT MELODY, supra note 38, at 273.

\textsuperscript{289} O’BRIEN, GREAT MELODY, supra note 38, at 280-81; HARRIS, supra note 90, at 165.

\textsuperscript{290} O’BRIEN, GREAT MELODY, supra note 38, at 281.

\textsuperscript{291} Id. at 284; HARRIS, supra note 90, at 165.

\textsuperscript{292} O’BRIEN, GREAT MELODY, supra note 38, at 282.

\textsuperscript{293} Id. (quoting Clive).

\textsuperscript{294} Id. at 282-83.

\textsuperscript{295} O’BRIEN, GREAT MELODY, supra note 38, at 261.

\textsuperscript{296} HARRIS, supra note 90, at 162-65.
Burke blamed the Crown for not giving the governors authority to make regulations with the force of law.

Thus, he argued that subordinates were not deterred from committing abuses in order to enrich themselves; they might be subject to Company discipline or fired but faced no legal exposure for their misdeeds. If the governors were too harsh in their discipline, that was understandable. “Where no laws exist, men must be arbitrary,” Burke explained.297 Sounding like Lord Acton,298 Burke expressed his fear in a solution that would further consolidate the Crown’s power over the company. “When discretionary power is lodged in the hands of any man, or class of men, experience proves, that it will always be abused,” he said.299 Burke argued that parliamentary vengeance should be directed at the Crown, not the company, and he even advocated giving the company and its servants a general amnesty.

Even if one accepts why Burke rejected Clive’s suggested medicine – the Rockingham’s believed that, under the political environment of the times, giving Parliament regulatory control meant effectively giving the Crown and its chief minister control – Burke’s defense of the company was not among his most shining hours. The Company’s directors, however, were so pleased that Burke argued against giving Parliament regulatory authority that they offered to make him head of a commission that would travel to India and investigate the alleged abuses. Burke declined.

In April 1773, one year after his defense of the Company, Burke rose again to address the Commons on the East India Company. This time his remarks were not music to the company’s ears. A newspaper report said that Burke spoke with vehemence uncommon among modern orators. He declared that unless its abuses were checked “this cursed Company would at last, viper, be the destruction of the country which fostered it in her bosom.”300 Burke was not alone in decrying events in India. Lord Chatham, for example, said that, “India teems with iniquities so rank as to smell earth and heaven.”301

At Lord North’s request, Parliament enacted the East India Regulating Act of 1773.302 This was a compromise between those advocating real reform and those who wanted only cosmetic reform. The legislation promoted Hastings to the even greater title of Governor-General of Bengal and also gave

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297. O’BRIEN, GREAT MELODY, supra note 38, at 263.
299. O’BRIEN, GREAT MELODY, supra note 38, at 262 (quoting Burke’s speech to Parliament on April 13, 1772).
300. Id. at 264 (quoting Burke).
301. HARRIS, supra note 90, at 168 (quoting Chatham).
302. O’BRIEN, GREAT MELODY, supra note 38, at 273; HARRIS, supra note 90, at 168.
him authority over Bombay and Madras.\textsuperscript{303} But it also created a four member Council to which Hastings had to account, and gave the Council the responsibility to investigate past abuses. Struggles ensued between Hastings and members of the Council. It is a complicated history, but it need not concern us here except in two respects. The first is that Hastings generally prevailed. The second involves a member of the Council named Philip Frances. Frances was a colorful character, and someone who became the prime whistleblower in Burke's investigation of the East India Company. Indeed, Frances played so important a role that one cannot understand Burke's work on India without knowing something of Frances's history.

Before going to India, Frances was the author of a newspaper column, written under the pseudonym "Junius," that combined biting political analysis with malicious revelations and personal attacks. Conor Cruise O'Brien argues that King George III — a prime target of Junius — appointed Frances to the plum position of member of Council of the East India Company in order to, in effect, buy his silence.\textsuperscript{304} Once in India, O'Brien believes, Frances began criticizing Hastings in the hope of having his silence profitably purchased once again.\textsuperscript{305} However, regardless of whether he was an honest critic or a devious extortionist, once in India Frances became an aggressive investigator of Hastings.

An Indian businessman known as Nuncomar approached Frances with evidence that Hastings was engaged in bribery.\textsuperscript{306} Frances arranged to hold hearings before the Council on the matter, but Hastings refused to submit to the proceedings. Six weeks later, Nuncomar was suddenly arrested on charges of forgery. He was told that he would be tried before a jury of Englishmen under British law, under which forgery was a capital crime. O'Brien writes that "it was then, and still is, the opinion of everybody — idiots and biographers excepted" that Hastings had Nuncomar's arrested on trumped up charges to make it clear that accusing Hastings of misdeeds could be fatal.\textsuperscript{307} Nuncomar appealed to Frances and the Council for help, but Frances — now

\textsuperscript{303} Modern linguistic tests have convincingly established that Frances was Junius. In November 1771, King George III learned that Frances and Junius were the same person. See O'BRIEN, GREAT MELODY, supra note 38, at 274 (regarding the modern linguistic evidence), 277 (regarding King George III learning Junius's identity).

\textsuperscript{304} O'BRIEN, GREAT MELODY, supra note 38, at 274-80. Historians have otherwise considered the appointment of Frances, who had never been more than a minor official, a mystery. See HARRIS, supra note 80, at 169 (stating "no one knows why Philip Frances was appointed").

\textsuperscript{305} O'Brien's evidence is circumstantial but persuasive. See O'BRIEN, GREAT MELODY, supra note 38, at 280-96.

\textsuperscript{306} Although the man's name was Maharaja Nandakumar, he was widely known as "Nuncomar." Id. at 289.

\textsuperscript{307} Id. at 291.
worried about his own neck – publicly repudiated Nuncomar.\textsuperscript{308} Nuncomar was found guilty and hanged, and all of the witnesses who appeared at trial on his behalf were prosecuted for perjury.

For a number of years, Frances sensibly desisted from criticizing Hastings. But eventually Francis again became a burr under Hastings’s saddle by repeatedly opposing Hastings’s wishes on the Council.\textsuperscript{309} Hastings ultimately managed to get Frances out of the way the old fashioned way: by shooting him in a duel. Frances survived but and returned to England with two wounds. One was a permanent physical weakness from being shot. The other, which caused him even greater suffering, was a psychic injury, for Frances believed he was being haunted by Nuncomar’s ghost.\textsuperscript{310}

Frances was intimately familiar with the East India Company’s system of extortion and exploitation, and to assuage Nuncomar’s ghost he decided to provide the relevant information to the person he believed would use it most effectively, namely, Burke. By this time, Burke was motivated to take on the company. What galvanized him and his fellow Rockinghams was the dramatic death of Lord Pigot, who in 1775 had been sent to India as Governor of Madras with instructions to curb the company’s worst abuses. But things were so corrupt and out-of-control in India that the newly appointed Governor of Madras was arrested and thrown into a Madras jail by powerful subordinates in the company.\textsuperscript{311} Pigot had been a political ally of the Rockinghams, who sought to come to his aid. Edmund’s friend and relative, William Burke, was dispatched to India to see what could be done. Meanwhile, Burke personally acquired sufficient East India Company stock to give him standing to raise matters before the Court of Proprietors, the company’s supreme governing body.\textsuperscript{312} And on May 22, 1777, Burke took to the floor of the Commons and delivered a “Speech on Restoring Lord Pigot.”\textsuperscript{313}

These efforts came to naught, and Pigot died in prison before William Burke reached Madras. In January 1781, Burke tried to have the East India Company...

\textsuperscript{308} Frances had the petition burned by the common hangman, \textit{Id.} at 293.


\textsuperscript{310} Imprisoned and facing a kangaroo trial and execution, Nuncomar threatened to curse Frances if Frances failed to help him. The threat was contained in his letter to Frances letter transmitting the petition that Frances burned. \textit{Id.} at 293.

\textsuperscript{311} A man named Paul Benfield led the group that arrested and jailed Lord Pigot. Burke’s efforts to have the Company investigate the death centered on Benfield. \textit{See generally} O’BRIEN, GREAT MELODY, supra note 38, at 304-07; KIRK, EDMUND BURKE, supra note 6, at 99-100.

\textsuperscript{312} The Court of Proprietors was empowered to overrule the Board of Directors, which was considered an executive body. O’BRIEN, GREAT MELODY, supra note 38, at 307.

\textsuperscript{313} \textit{See id.} at 305.
Company's governing board investigate the death of Lord Pigot, but the board declined to hear witnesses.

Thus began Burke's greatest campaign: a sustained fourteen year fight to have Parliament assert greater control and end the abuses of the East India Company. It is impossible not to compare Burke's campaign to Winston Churchill's relentless fight to awaken Parliament and Britain as a whole to the growing threat of the Third Reich. Churchill first warned that the rise of Hitler made war with Germany inevitable on March 31, 1931. From that date forward to September 2, 1939 — the day that England declared war on Germany and Churchill was invited back into the Cabinet, a period of eight and a half years — Churchill waged a relentless campaign to awaken England and make it prepare to defend itself. Time and again Churchill rose in the House of Commons to warn of the growing Nazi threat. At first he was ignored. When he became impossible to ignore he was jeered, ridiculed, denounced, and vilified. Churchill persisted nonetheless. He detailed for Parliament the growing armament of Germany; information that the Administration wished to keep from Parliament. However, Churchill got his information from Ralph Wigram, an officer in the Foreign Office who was alarmed that the Administration was concealing Germany's rearment and who was willing to put himself at great risk to secretly pass this intelligence onto Churchill. Indeed, the pressure ultimately overwhelmed Wigram, and he committed suicide.

The parallels with Burke's India campaign are striking. Burke, too, was armed with inside information. His not-so-secret source was Philip Frances, who learned of Burke's effort to have Parliament investigate the death of Lord Pigot Just as Wigram knew that Churchill would make the most effective use of information concerning German militarization, Frances realized Burke would make the best use of information about the abuses in India. This enabled Burke to speak with special knowledge and authority. But like Churchill, Burke was in for a very long haul.

315. Id. at 519-30. See also MARTIN GILBERT, CHURCHILL 623 (1991).
316. See MANCHESTER, supra note 314, at 83 (describing how Churchill was ignored, and comparing this to Burke's speeches on America, also an apt comparison); id. at 110 (describing Churchill as a "pariah" in the House of Commons); id. at 85, 97-98, 127, 231-32, 374, 538 (describing how Churchill was booed, mocked, denounced, and scorned).
317. Id. at 90, 113-15, 137-38.
318. Id. at 190-91.
319. There is some dispute as to whether Frances returned to England just before or some months after Burke's legislative effort (known as the Bengal Judicature Bill) to restrict the application of English law in India. See O'BRIEN, GREAT MELODY, supra note 38, at 311 (stating Frances returned in October 1781); KIRK, EDMUND BURKE, supra note 6, at 107 (stating Frances returned in late 1780).
One of Burke’s first initiatives was to restrict the use of English law in India. English law was sometimes used as a tool of oppression, as it had been with Nuncomar, but Burke also saw its use in India as a form of British imperialism, projecting English culture into place with its own culture. Burke was, for his day and time, a multiculturist. He had enormous respect for English culture, but he had great respect for other cultures as well. Burke was also a pragmatist. His own familial experience with British policy toward Ireland taught him the futility of cultural imperialism, and what he already knew was confirmed by his careful study of British history in India.

On June 27, 1781, Burke told the Commons that the consequences of extending English law to India were:

arbitrary in the extreme. The incroachments which they made on the most sacred privileges of the people, the violation of their dearest rights, particularly in forcing the ladies before their courts; the contempt that was shown for their religious ceremonies and mysteries; and the cruel punishments inflicted upon them in case of their disobedience; new, strange, and obnoxious to them; all these things contributed in fact, to compel the British legislature to restore peace, order, and unanimity to the extensive territories of India, by giving them laws which they approved. 320

Lord North had created a Select Committee of the House of Commons to consider a number of matters involving Bengal. 321 Burke, who was a member of the committee, persuaded it to hold investigatory hearings about abuses by the East India Company. Philip Frances became the star witness. The hearings were a powerful instrument of parliamentary and public education, cataloguing the malfeasances of the company and its employees for all to see. Burke’s next step was to try to persuade the House of Commons to recall Hastings; he was successful, and in 1782 the House adopted a resolution recalling both Hastings and Sir Elijah Impey, who was Chief Justice of the Bengal Supreme Court and had presided over the trial of Nuncomar. 322 Dramatically, the company’s Court of Proprietors refused to bring Hastings

320. O’BRIEN, GREAT MELODY, supra note 38, at 310 (quoting Burke’s speech).
321. For a description of the Select Committee, see O’BRIEN, GREAT MELODY, supra note 38, at 308; KIRK, EDMUND BURKE, supra note 6, at 101. While Burke’s Select Committee conducted its proceedings publicly, a second Secret Committee, chaired by Henry Dundas, was also producing reports about the East India Company, which further enhanced the Commons’ knowledge about what was occurring in India. Bowen, supra note 285, at 537-38, 541, 543. Early on Burke and Dundas’ work reinforced each another, but later they had bitter disagreements. See O’BRIEN, GREAT MELODY, supra note 38, at 311, 341-42 (regarding Burke and Dundas’ work regarding the East India Company).
322. See O’BRIEN, GREAT MELODY, supra note 38, at 291 (regarding Impey); id. at 312 (regarding recall of Hastings and Impey).
home, maintaining that it was bound only by measures enacted by both houses of Parliament. It was a showdown of constitutional proportions, but the company – which enjoyed great political support in the House of Lords and with the Crown – prevailed.323

Burke was not to be deterred. The committee continued its work and issued an extensive series of reports, a number of which were written by Burke, including reports dealing with the economic exploitation of India and alleged acceptance of bribes by Warren Hastings. With this body of evidence behind him, on December 1, 1783, Burke took to the floor of the Commons and argued that the East India Company should be placed under parliamentary control.324 Burke advanced four major themes. First, he sought to neutralize the objection that as a private company the East India Company should be free of governmental regulation. The company existed because Parliament had granted it a charter, and what exactly was this charter? By contrasting the company’s charter with what the English people call the Great Charter, namely the Magna Carta or Magna Charter, Burke demolished any notion that the company’s charter was somehow sacrosanct. Said Burke: “Magna Charta is a charter to restrain power and to destroy monopoly. The East India charter is a charter to establish monopoly and to create power.”325

Second, Burke described the shame of British imperialism in England. England did not think of itself as dominating India; it thought of itself as a partner with Indian Nabobs and princes – a friend and protector, not an occupying power. Burke shattered the illusion. This was not paternalistic governance but gross pillage – shameful even by the standards of invasions and tyrannies throughout the ages. “The Tartar invasion was mischievous,” he told the Commons, “but it is our protection that destroys India.”326 He continued:

England has erected no churches, no hospitals, no palaces, no schools; England has built no bridges, made no highroads, cut no navigation, dug out no reservoirs. Every other conqueror of every 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 has been possessed, during the inglorious period of our domination, by anything better than the orang-outang or the tiger.327

Third, Burke addressed the systemic evils of the system. Who comprised the bureaucracies of the East India Company? Who was administering this

323. See id. at 312.
324. O’BRIEN, GREAT MELODY, supra note 38, at 313; KIRK, EDMUND BURKE, supra note 6, at 102.
325. Edmund Burke, Speech on Mr. Fox’s East India Bill, in PORTABLE EDMUND BURKE, supra note 66, at 363, 365.
326. Id. at 376.
327. Id. at 372.
vast empire? Just boys really. Many of England's young men went to India to make their fortunes. They were immature, lacked compassion and wisdom, and were easily corrupted by avarice. "There is nothing in the boys we send to India worse than in the boys we are whipping in school, or that we see trailing a pike or bending over a desk at home," Burke said. The boys sent to India, however, "drink the intoxicating draught of authority and dominion before their heads are able to bear it" and "are full grown in fortune long before they are ripe in principle." They roll in wave after wave, said Burke, like "new flights of birds of prey and passage, with appetites continually renewing for a food that is constantly wasting." For this and other reasons, the evils of the system were "utterly incurable in the body as it now stands constituted." The system, by its nature, was difficult to reform. When these young men returned to the England, they married into great families, entered Parliament, loaned monies to the powerful, and became benefactors of causes and institutions dear to the hearts of the ruling class, all of which made it personally and politically difficult to support reforms in the East India Company. Burke himself conceded that, "it is an arduous thing to plead against abuses of power which originates from your own country, and affects those to whom we are used to consider strangers."

Burke's final theme was accountability. He sought to lay abuses at the feet of the man in charge, Warren Hastings. For fourteen years Hastings had governed in India "with an absolute sway." "[T]he fortunes of hundreds have depended on his smiles and frowns." Hastings apparently had sought to deflect blame for abuses by himself complaining about the young men he was forced to employ. Burke sought to cut through this claim, revealing the system for what it truly was.

He himself tells you he is incumbered with two hundred and fifty young gentlemen, some of them of the best families in England, all of whom aim at returning with vast fortunes to Europe in the prime of life. He has, then, two hundred and fifty of your children as his hostages for your good behavior,

Burke observed.

Burke's greatest obstacle ultimately turned out to be the problem of either pinning the abuses on Hastings personally or holding him responsible for

328. Id.
329. Id.
330. Id.
331. Id. at 368.
332. Id. at 373.
333. Id. at 378.
334. Id.
335. Id.
abuses conducted on his watch.336 It was not easy to prove that abuses were committed at Hastings’s direction, or at least with his prior knowledge and consent. Hastings did not need to directly order the use of violence. His underlings simply knew that Hastings was interested only in the ends, and that he accepted whatever means they employed.337 Complicating problems of evidence was another dynamic: many members of the ruling class found it personally inconvenient to conclude that Hastings was guilty. Burke boldly laid this on the table when he talked about Hastings holding boys in East India Company hostage to the good behavior of their families.

There were other reasons why many did not want to be persuaded of Hastings’s guilt. One scheme involving the East India Company and the Nabob of Arcot – which Burke described in detail to the House of Commons in February 1785338 – provides an illustration. The company encouraged (or perhaps forced) the Nabob to borrow large amounts of money from the company at no interest. When it became impossible for him to repay the loans, company officials made him borrow other funds from private parties at ob- scenely usurious rates of 25% to 36% so that he could service his debt to the East India Company. At least thirteen members of Parliament participated as lenders and personally benefited from the scheme.339 This was typical of East India Company affairs. Hastings and the other officials were not principally concerned with making money for the company or its stockholders but with finding ways to allow individuals to amass personal fortunes. Members of the ruling class were on the take, and had incentives to persuade themselves that nothing was truly amiss.

This was hard going. Burke’s speech to the Commons about this perni- cious scheme was met with stony silence. Burke delivered his speech in sup-

336. Two different views of Hastings prevailed then and continue to this day. One view is that Hastings was an admirable man who was placed in an impossible situation and should not be blamed for plunder and viciousness practiced by others whom he could not control. Russell Kirk seems to lean toward this view. See KIRK, EDMUND BURKE, supra note 6, at 100 (writing that “Warren Hastings was a better man – and an abler – than his subordinates; but in time Burke’s indignation fastened upon Hastings as the nominal superior of all the East India Company’s holdings’’); id. at 110 (stating that Hastings’s “best biographer,” Keith Feiling, defends Hastings from the criminal charges though conceding that at least one of his policies may come close to a “political crime’’); id. at 119-20 (describing historian Carl B. Cove’s conclusion that while Burke showed that Hastings violated natural law he did not establish that he violated British statutory or common law). The other view, held by Conor Cruise O’Brien, is that Hastings was a sincere reformer in his first tour in India, but after concluding that one could not both do good and do well, he chose the latter path and returned to India committed to ruthlessly protecting the system that allowed his subordinates and investors to make their fortunes.

337. O’BRIEN, GREAT MELODY, supra note 38, at 285.


339. KIRK, EDMUND BURKE, supra note 6, at 114.
port of a bill to allow a committee investigating the East India Company to obtain papers relating to the extortionate loan transactions, but the bill failed by a vote of 164-69.\textsuperscript{340} Other speeches during this period were greeted with laughter and derision.\textsuperscript{341} But, with the same spirit that Churchill exhibited two centuries later, Burke refused to back down. On one occasion, when William Pitt the Younger, then Chief Minister, joined in mocking laughter, Burke seized upon the opportunity to drive his point home still harder. It would better become "the Minister of a great and generous nation, instead of laughing at the miseries, of his fellow-creatures, to regard these important calls with all his attention," scolded Burke.\textsuperscript{342}

Gradually Burke's arguments won more and more respect, both in and out of doors (as members refer to the world beyond Parliament). Defending Hastings and the East India Company came at an increasingly steep political price, and eventually the price was more than William Pitt and others were willing to pay.\textsuperscript{343} In 1785, Warren Hastings returned to England. Whether he did so expecting a hero's welcome or because he believed it necessary to shore up his defenses is unclear.\textsuperscript{344} In February 1786, Burke announced his intention to ask the House to impeach Hastings, and he demanded the Administration produce papers relevant to an impeachment inquiry.\textsuperscript{345} Pitt declared himself neutral in the debate. He agreed to produce the papers, however, and declared that if it were proved that Hastings were guilty of atrocious crimes that had been alleged, he (Pitt) "would wish to bring down upon him the most exemplary punishment."\textsuperscript{346}

Burke presented articles of impeachment so effectively that the clerk of the House remarked in a letter to a friend, "I don't see how they will get rid of Mr. Burke."\textsuperscript{347} Hastings personally appeared in the House of Commons in his own defense but the consensus at the time was that his presentation was ineffective. Although the first article of impeachment was defeated overwhelmingly, the tide turned when William Pitt declared himself convinced by one of the charges in the second article. This was taken as a signal that Tories were released from adhering to the party line and were free to vote their con-

\textsuperscript{340} O'BRIEN, GREAT MELODY, supra note 38, at 350.

\textsuperscript{341} See O'BRIEN, GREAT MELODY, supra note 38, at 285 ("Hastings would tell the House of Lords that he didn't use torture, and he probably didn't in most cases. He just told them to get the money.").

\textsuperscript{342} Id. (quoting Burke).

\textsuperscript{343} See id. at 351 (speculating that Pitt realized that it may not be wise "from the point of view of his own reputation, to go on standing between Edmund Burke and the abuses of India").

\textsuperscript{344} Id. (suggesting Hastings returned because he had received troublesome reports of parliamentary proceedings); KIRK, EDMUND BURKE, supra note 6, at 108 (stating Hastings returned expecting "a triumphal entry into London").

\textsuperscript{345} O'BRIEN, GREAT MELODY, supra note 38, at 353-54.

\textsuperscript{346} Id. (quoting Pitt).

\textsuperscript{347} Id. at 354 (quoting letter by John Hatsell, Clerk of the House).
Further articles were adopted with overwhelming margins. Ultimately, the Commons adopted a total of forty-five articles of impeachment. Richard Sheridan, a powerful Whig, remarked during the debates that the votes vindicated Burke from the slanderous accusations that had been leveled at him over the past several years. Even King George III declared himself shocked by the “enormities in India that disgrace human nature.” The House named Burke as Manager to present the prosecution on its behalf before the House of Lords. He was at the apogee of his career.

The opening of the impeachment trial of Warren Hastings on February 13, 1788 was a major political and cultural event. It was held in Westminster Hall amidst great pomp and circumstance. The Lords, wearing ermine robes trimmed with gold, walked in solemn procession to their places to hear the evidence. Judges were present to provide guidance on points of law. The galleries were full. The audience included the Queen, ambassadors from other nations, and other celebrities. Burke’s opening argument lasted four days. A lady-in-waiting to the Queen recorded her observations in a diary. She describes Burke’s delivery as “easy, flowing, . . . energetic, warm, and brilliant.” She came to the proceedings with sympathy for Warren Hastings. “Yet,” she wrote, “at times I confess, with all that I felt, and wished, and thought concerning Mr. Hastings, the whirlwind of [Burke’s] eloquence nearly drew me into its vortex.”

The trial was enormously complex and it is impossible to deal with it in detail here. Mainly, Burke prosecuted Hastings for three types of crimes: bribery, both giving and receiving bribes; inflicting terrible cruelties upon the Indian people; and pillaging their wealth. Hastings had two main lines of defense, one procedural and the other substantive. His procedural line was to insist that Burke be required to strictly adhere to the law of evidence. Burke told the Lords that ninety percent of what he wished to proffer would satisfy the “narrow precision” required by the law of evidence, but he urged the Lords to consider other information as well. Burke lost this battle at the

348. Id. at 353-55.
350. The House formally impeached Warren Hastings of high crimes and misdemeanors on May 10, 1787. O’BRIEN, GREAT MELODY, supra note 38, at 358 (giving date of impeachment); id. at 356 (quoting Sheridan); id. at 357 (quoting George III).
351. Id. at 361.
352. Id. at 359-61 (quoting Macaulay).
353. Id. at 364 (quoting Fanny Burney).
354. Id. (quoting Fanny Burney).
355. Edmund Burke, Speeches on the Impeachment of Warren Hastings, in PORTABLE EDMUND BURKE, supra note 66, at 388, 398 (regarding bribery); id. at 404 (regarding such cruelties as confining people to open cages in scorching heat and requiring parents to sell their children).
356. Id. at 389.
outset. As soon as Burke completed his opening speech, the Lord Chancellor declared, "[a]fter this, I shall hold Mr. Burke to the proof of all he has as-

The main substantive line of Hastings's defense was to argue that his conduct in India should not be judged by the same standards that apply in England. He was given the responsibility of governing a foreign province in a much more lawless part of the world, and he was forced to employ harsher measures than would be appropriate in England. Burke both ridiculed this line of defense and rebutted it with arguments of political philosophy. Burke remarked that, "[i]t has been said of an ambassador, that he is a person employed to tell lies for the advantage of the court that sends him. His is pa-

For Burke, law came from legal traditions specific to a particular nation. Burke did not refer to the "eternal laws of justice" and leave it at that; he called such laws "our rule and birthright." Burke was not speaking of universal laws deduced a priori or decreed by God; he was speaking of enduring legal principles of the British nation. This is even clearer when Burke stated:

My Lords, we conceive, that, when a British governor is sent abroad, he is sent to pursue the good of the people as much as possible in the spirit of the laws of this country, which in all respects intend their conservation, their happiness, and their prosperity.

Burke did not argue that Hastings was required to govern Bengal according to the particulars of British of laws. Imposing what Burke calls the "form" of British law upon the people of India would have failed to respect their traditions and culture. Nevertheless, Hastings was not free to discard

357. O'BRIEN, GREAT MELODY, supra note 38, at 377 (quoting the Lord Chancel-

358. See id. at 369.


360. Id. at 399.

361. Id. at 389.

362. See id. (emphasis added).


364. Burke said:

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
the spirit and essence of British law. There are two prongs to Burke's argument. One prong, more implicit than explicit, is that Hastings was bound by British principles because he governed as a representative of the British nation. The second prong was that if Hastings could escape the constraints of British law, he would be free to rule with "arbitrary power." For Burke, that was unacceptable, indeed, unthinkable. Contending against arbitrary power was, of course, the great theme that resounds through all of Burke's great campaigns. "Law and arbitrary power are in eternal enmity," Burke told the Lords. Burke went still further: law and government — and indeed, religion too — are all about protecting the people from arbitrary power. "[I]t is blasphemy in religion, it is wickedness in politics, to say that any man can have arbitrary power," he declared.

Burke attacked Hastings's claim that his rule was consistent with the harsh realities of Indian culture. Hastings argued, among other things, that he found people in slavery, and through their condition was personally disagreeable to him, he was forced to accept things as they were. He maintained that "despotism is the genuine constitution of India." How did he know that? "I know . . . the constitution of Asia only from its practice," Hastings said. Burke argued that cruelty cannot be justified by precedent. Burke told the Lords that they must reject the suggestion that "the corrupt principles of mankind [are to be] made the principles of government." He also rejected Hastings's claim that Indian law condoned cruelty or corruption. "To name a Mahomedan government is to name a government by law," Burke asserted. "I must do justice to the East. I assert that their morality is equal to ours . . . and 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 . . . ." Once again, this is Burke the multiculturalist, the respecter of other cultures and traditions. Here that is combined with Burke's insistence that wherever British government goes — in whatever form, including governance by a private company — its lodestar must be what Britain believes to be the

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! We call for that spirit of equity, that spirit of justice, that spirit of protection, that spirit of leniency, which ought to characterize every British subject in power . . .

Id. (omission in original).
365. Id. at 396.
366. Id.
367. Id.
368. Id. at 394. This is Burke's characterization of Hastings's argument.
369. Id. (emphasis omitted).
370. Id. at 394-95.
371. Id. at 397.
372. Id.
purpose of government, namely, "to pursue the good of the people," including their conservation, happiness, and prosperity.\footnote{373}{See supra text accompanying note 363.} Burke was not so much prosecuting an individual as he was an entire system – one that by virtue of its structure, made corruption, exploitation, and abuse all but inevitable. We should remember that Hastings started out as a reformer. Only after he was frustrated in those efforts did he succumb and become complicit in, and ultimately a leader of, the pillage of India. For our purposes, it is also important to stress that Burke blamed the system not only for inflicting misery upon the people of India but also causing rot in the mother country as well. Riches and greed were causing moral gangrene in England. The tentacles of the East India Company reached throughout the nation’s power centers, into the mercantile and financial classes, the landed gentry, the Crown, and Parliament. Indeed, everyone understood that the House of Lords was not an impartial tribunal. Many peers, as well as their families and friends, benefited from the system. Burke did not leave this unstated. Boldly (or perhaps foolishly) he declared:

It is well known that enormous wealth has poured into this country from India through a thousand channels, public and concealed; and it is no particular derogation from our honor to suppose a possibility of being corrupted by that by which other empires have been corrupted, and assemblies almost as respectable and venerable as your Lordships’ have been directly or indirectly vitiated.\footnote{374}{O’Brien, Great Melody, supra note 38, at 367 (quoting Burke).}

When the trial began, Burke’s eloquence was irresistible. It had an enormous effect on public sentiment. But the Lords employed a venerable stratagem for dealing with an aroused public: delay. They arranged for the trial to drag on. The Lords devoted only a particular number of days per year to the trial, ranging from seven days to thirty-five days. Over time, public attention waned.

On April 29, 1795, more than seven years after the trial began, the House of Lords acquitted Warren Hastings on all counts and by overwhelming majorities.\footnote{375}{Kirk, Edmund Burke, supra note 6, at 117.} Burke lost a long and arduous battle. Yet he had won a war. The evils of the system had been exposed, and sunlight is indeed the best disinfectant. Abuses were curbed. Two years before the Lord’s verdict, Parliament began the process of ending the East India Company’s monopoly on trade with the East, and by 1813 the last remnants of the monopoly were extinguished.\footnote{376}{See Bowen, supra note 285, at 548 (stating that by Act of Parliament in 1793 the East India Company was required to provide space for other traders on its ships); id. at 549 (stating trade was fully opened to competition in 1813).}
E. The French Revolution and Ordered Liberty

In November of 1790 – two years after the Hastings impeachment trial began in the House of Lords, and five years before it would conclude – Burke published *Reflections on the Revolution in France*.377 This work would make Burke an even more controversial figure among his contemporaries. Some greeted it warmly; others thought it went too far. The disagreements often became bitter. Burke himself would choose to sever relationships with those who did not share his views about the French Revolution. For him, this was not a matter of personal spite but of national survival. Burke was afraid that unless the French Revolution was denounced unequivocally, revolutionary fever would spread to England. And to be clear about the gravity of the situation, Burke refused to disagree amiably with those who looked favorably on the French Revolution. This would lead Burke to resign the Whig Club, the formal group of party leaders, spurn a public overture by two party leaders to maintain their personal relationship with Burke despite their differences with him about France, and, quite sadly, even to refuse to allow one of those leaders – a man who in earlier times had been a friend and ally – to visit and reconcile when Burke was on his deathbed.378

But although it caused Burke personal grief during the last years of his life, *Reflections on the Revolution in France* would make him famous in history. *Reflections* has been continually in print for more than two hundred years.379 Many consider it one of the great political treatises of the eighteenth century, ranking with such works as the *Federalist Papers*, Montesquieu’s *The Spirit of the Laws*, and Adam Smith’s *The Wealth of Nations*. Russell Kirk is especially effusive when he calls *Reflections* “one of the most influential political treatises in the history of the world.”380 This work has made Burke the paragon of the modern conservative movement.

What is so special about *Reflections*? The first thing that must be said – indeed, the first thing that is always said – is that it was an astonishing work of prediction. Those who know of it but have not actually read it often assume *Reflections* was written when the French Revolution was in full horror. That is not so. Burke wrote *Reflections* while the French Revolution was in its early stages. The guillotine had not yet chopped off a single head, and Louis XVI was still very much alive. Indeed, he would be reinstated as king in a

378. See O’BRIEN, *Great Melody*, supra note 38, at 398 (describing how, during debate in the Commons, Burke repudiated an overture by Charles Fox and Richard Sheridan); id. at 501 (describing the circumstances of Burke’s resignation from the Whig Club in 1793); id. at 588 (describing, just shortly before his death, Burke’s rejection of an overture by Charles Fox who wished to visit and reconcile).
380. KIRK, EDMUND BURKE, supra note 6, at 154.
The constitutional monarchy after Burke’s book was published. It would be more than two years after Reflections was published before Louis XVI was placed on trial and executed, three years before the execution of Marie-Antoinette, four years before the fall of Robespierre and the Terror, nine years before Napoleon Bonaparte seized power. And yet in general terms Burke predicted it all. Here is Burke’s prediction about the ultimate rise of a Napoleon:

In the weakness of one kind of authority, and in the fluctuation of all, the officers of an army will remain for some time mutinous and full of faction, until some popular general, who understands the art of conciliating the soldiery, and who possesses the true spirit of command, shall draw the eyes of all men upon himself. Armies will obey him on his personal account. There is no other way of securing military obedience in this state of things. But in the moment in which that event shall happen, the person who really commands the army is your master; the master (that is little) of your king, the master of your Assembly, the master of your whole republic.

For many, that Burke was able to foresee the trajectory of the French Revolution at a time when others could not suggests that his insights had merit.

Reflections is a rich and complex work, but its central theme might be summarized this way: civilization depends upon the rule of law. The rule of law is constructed from more than a constitution and statutes. It is interwoven into the very fabric of society. That fabric is comprised of institutions, which have evolved over time and are the produce of our ancestors’ accumulated wisdom and experience. All institutions are imperfect and in need of constant care, improvement, and perhaps even reform, but we cannot precipitously sweep them aside and replace them with what at the moment seems better without ripping the social fabric into shreds and destroying the rule of law. Our brightest minds cannot design entirely new institutions superior to the old. Mortals are unequal to the task. Wisdom is the product of experience –

383. Burke wrote:

The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down the edifice, which has answered in any tolerable degree for ages the common purposes of soci-
not abstract theory - and the wisdom embedded in institutions and law is not always evident to us.

Even more importantly, newly created institutions will lack authority. We grant institutions authority, in significant part, because they were bequeathed to us by our ancestors. We honor them because of their history and traditions. In addition, institutions have particular classes of people who are devoted to them, as the best lawyers are devoted to the law, clerics to the church, scholars to their fields of study and their universities, even monarchs to the monarchy.384 These people see themselves as taking part in a sacred, intergenerational covenant. They are responsible to preserve what their predecessors painstakingly fashioned, for ensuring their institutions serve society in the present day, and for preserving and improving them for future generations. Indeed, society itself is an intergenerational covenant. “Society,” Burke wrote, “becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.”385

When Burke saw the fabric of French society torn asunder - the monarchy discredited, the church destroyed and clerics deprived of any means of sustenance and all in the name of abstract ideals such as Liberty, Equality, Fraternity - he knew the rule of law would be destroyed and would not be easily restored. He knew there would be no counterbalance to powerful rhetoric. He understood that there would be ever-increasing demands for, and claims of, greater purity.386 Burke understood that tyranny is the inevitable consequence of unchecked and unbalanced power, and that the people - acting not through established institutions but simply as a mob - are just as capable of tyranny as is dictator. He realized that once France plunged into the abyss, there would be only one way out. A charismatic military leader would seize control.

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384. Burke was not a royalist. He observed that all of France agreed upon the need for a free constitution. “The absolute monarchy was at an end. It breathed its last, without a groan, without struggle, without convulsion,” he wrote. Id. at 114. The problem was “the preference of a despotic democracy to a government of reciprocal control.” Id. Had members of the National Assembly “never heard of a monarchy directed by laws, controlled and balanced by the great hereditary wealth and hereditary dignity of a nation; and both again controlled by a judicious check from the reason and feeling of a the people at large, acting by a suitable and permanent organ?” Id. at 105.

385. Id. at 82.

386. Burke said that in discussions among the revolutionaries, “every counsel, in proportion as it is daring, and violent, and perfidious, is taken for the mark of superior genius.” Id. at 58. He warned that in this atmosphere, “[m]oderation will be stigmatized as the virtue of cowards; and compromise as the prudence of traitors.” Id. at 208.
What, then, are the overarching themes of Burke’s political philosophy? To understand Burke’s thinking one must, first and foremost, appreciate that he came from a group scorned by the establishment and burdened with social and professional disabilities. Burke may have been a sincere Protestant or a closet Catholic, but either way the people nearest and dearest to him – his mother, sister, wife, grandparents, uncles and aunts – were Catholics. Burke therefore felt the pernicious effects of discrimination in his bones. The great theme running throughout his professional life was his desire to protect the vulnerable, the disadvantaged, and the scorned from abuse by the powerful. He was, by the standards of his day, if not by ours, a multiculturist, as evidenced by his great respect for Eastern religion and culture. Partly out of empathy and partly because it was useful in understanding how to formulate one’s own policy, he expended every effort to attempt to see things from the other’s perspective.

As someone who believed that power corrupts, Burke believed in a constitutional structure with separated powers. He believed it important to maintain a balance of powers among governmental branches, in his day, between the Crown and Parliament.

Burke was a pragmatist who made every effort to understand the potential consequences of policies under consideration. In this endeavor, he eschewed theories of all sorts; his approach was that of a social scientist studying the empirical data. He valued all of what we today call the social sciences – political science, sociology, anthropology, and psychology – but history most of all. He believed one cannot understand a nation or a society without knowing its history. Societies evolve. They have been molded by past events, and to understand what things are, one must understand why and how they came to be that way. He believed history offers the best insight into the consequences of different policies may be, for there may have been times when similar things were tried before. But he believed our crystal balls are cloudy. The world is complex, and we never can be certain about the consequences of change. By no means was Burke a knee-jerk defender of the status quo. His plan for abolishing slavery in the British Caribbean was a plan for radical change.

Burke was skeptical about using military force to achieve policy goals. He believed force has limited utility. The stronger may be able to force the weaker to acquiesce, but only to acquiesce as long as force continues to be applied. Once force is withdrawn, as it must inevitably be, enmity will be even greater. Force, therefore, is often counterproductive in the long run.

387. He did not hold in high regard Jews, atheists, and Native Americans. We must bear in mind, however, that he lived in the eighteenth century; by the standards of that time, he was extremely tolerant. For an explanation of Burke’s views about atheists, see McConnell, supra note 34, at 453-57.
Burke was a communitarian. He understood people live in and depend upon societies. He believed societies are intricate and, indeed, beautiful. Government exists to preserve and enhance the social structure, and thereby to enrich the lives of citizens.

The next portion of this article discusses how these beliefs are relevant to our contemporary ideological debates.

IV. Why Burke Matters

A. Ideology and Values

To talk about why Burke matters for us today, we must explore who we are and what we are debating. I shall return to Edmund Burke, but for the moment I am going to address the present day debates between liberals and conservatives and, equally important, among different types of conservatives.

Considering how pervasively they are used, these terms “liberal” and “conservative” are surprising difficult to define. We generally identify ourselves as liberal or conservative not because we agree with certain political philosophers but because we hold a certain collection of views about public policy issues. And we classify others the same way. If a stranger were to tell us how they stand on a half a dozen “hot button” issues, we may believe we are reasonably able to classify her as a liberal or a conservative and, in turn, predict where she stands on other issues as well. But political scientists and social psychologists find it tough to sort out why liberals and conservatives hold particular constellations of opinions. I remember reading about a study conducted during the cold war. The researchers formed a fake political advocacy group, supposedly composed of women who both opposed legalized abortion and supported nuclear arms control. They invited women who were either pro-life or pro-nuclear arms control to join. Most subjects

388. Social science appears to bear out this observation. See Stanley Feldman, Values, Ideology, and the Structure of Political Attitudes, in OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 477, at 478 (David O. Sears ed., 2003) (stating that research shows that people often place themselves on a liberal-conservative continuum “without a working knowledge of the logic of a political ideology” but that these self-identifications nevertheless “help to predict policy preferences”).

389. I heard about this study during the Cold War but have been unable to locate it. However, research by sociologist Donald Granberg during the same time period produced similar results. Donald Granberg, Pro-Life or Reflection of Conservative Ideology? An Analysis of Opposition to Legalized Abortion, 62 SOC. & SOCIAL RES. 414, 421-22 (1978). Granberg found that people who were anti-abortion were not, despite their own claims, more pro-life on other issues. Id. at 421. He found no relationships between anti-abortion attitudes and attitudes regarding capital punishment or efforts to protect public health. Id. He also found that people who opposed abortion were slightly more likely to favor American military intervention in Vietnam and favor increased military spending. Id. at 421-22.
declined, stating that it was not possible to hold both views. The object of the study was to investigate why people believed these were inconsistent views. After all, the researchers suggested, both positions involved protecting human life. Yet the subjects remained adamant that the positions were inconsistent even though they where unable to explain why they thought so.

A classic explanation of the liberal-conservative dichotomy focuses on views about human nature. The conservative scholar Thomas Sowell offers a reasonably standard account. Sowell argues that the fundamental political question is how to make people conduct themselves in ways that advance the greater good. The answer to that question depends upon one’s view of human nature. He argues that the key difference is between those who hold a “constrained” or an “unconstrained” view of human nature. Those who hold a “constrained” view believe that people are, by nature, selfish and egocentric. According to this view, human beings act altruistically only if they have been acculturated into believing that doing so is moral or virtuous. Their generosity is driven by a desire to enhance their own self-image, not because they sincerely care about others. This by itself, however, is too thin a reed to support society. Generally, people need to be rewarded for acting in socially beneficial ways, and under a free enterprise system that is what occurs. People are rewarded by producing goods or services valued by others, and thus the greater good is served by the collective pursuit of self-interest. Sowell calls this the “constrained” view of human nature because it perceives human beings as having moral limitations or constraints. Those who hold this view accept that human nature is what it is; in their view, it cannot be changed. Sowell offers Adam Smith as his principal spokesperson for the constrained view of human nature, but he also associates the view with, among others, with Thomas Hobbes, Friedrich A. Hayek, and Edmund Burke. Sowell quotes Burke as saying, “We cannot change the Nature of things and of men – but must act upon them the best we can.”

Sowell calls the opposing model the “unconstrained” view of human nature. Those holding this view believe that people are capable of sincere altruism, that is, of acting to benefit others not to make themselves feel more virtuous but of out of genuine compassion or generosity. They also believe that a system that asks people to single-mindedly pursue rewards is counterproductive; it debases people, training them to be less than they can be. There is an as “yet untapped moral potential for human beings.” Indeed, if properly nurtured, human beings have an unlimited potential to become continually

390. THOMAS SOWELL, CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES (2002). Thomas Sowell, a conservative, is a fellow at the Hoover Institution at Stanford University.
391. Id. at 11-14.
392. See id. at 9 (regarding Hayek); id. at 10 (regarding Hobbes); id. at 11-16 (regarding Smith); id. at 13, 16 (regarding Burke).
393. Id. at 16 (quoting from Burke’s correspondence).
394. Id.
more virtuous. Sowell calls this the “unconstrained” view because those who subscribe to it believe there is no limit to the possibility of continuous improvement. Individuals and society can approach, if never quite attain, perfection. He offers as a principal spokesperson for this view the eighteenth century utopian William Godwin, and he suggests other adherents include Thomas Paine, Jean-Jacques Rousseau, and John Kenneth Galbraith. 395

Russell Kirk also sees conservatism as standing against “meliorism,” which he defines as a belief in the “perfectibility of man and the illimitable progress of society.” 396 Kirk, however, associates meliorism not with liberals but with radicals. 397 This is more accurate. There have are always been utopians who believe that it is possible to create near-perfect communities. It is, in fact, quite telling that Sowell selected William Godwin is his principal representative of the unconstrained view. Godwin was not a liberal. He was an anarchist who believed that government is the root of all evil. 398 Other true meliorists are also, as Kirk recognized, radicals and well out of the political mainstream. Another prominent meliorist – prominent, that is, for leaders of small groups – was John Humphrey Noyes. Noyes believed in “Christian Perfectionism” and thought it possible to create better people and a near-perfect society through very rigorous religious devotion. In 1848, he established the Oneida Community, which was to become a perfect community. Oneida reached a peak population of 306 residents before disbanding in 1880. And certainly people have imagined perfect societies, as did Aldous Huxley in his 1962 novel Island. But Sowell sets up a straw man that he can easily demolish when he suggests liberals are meliorists, for beliefs that individuals or society are perfectible have always been fringe views. 399 People in the mainstream of all political persuasions consider perfectibility unrealistic.

Sowell goes on to argue that ideological divisions in American society, whether between left and right or the constrained and unconstrained visions, are about means, not ends. We all share the same values, he believes, but our views about human nature lead us to different conclusions about what methods are the most efficacious. We all “make the common good paramount,” Sowell says. 400 We simply disagree about how to achieve the common good. Thus, we share common views about moral values but hold “different empirical assumptions as to human nature and social cause and effect.” 401

395. See id. at 9 (regarding Paine and Galbraith); id. at 15-18 (regarding Godwin); id. at 10, 21 (regarding Rousseau).
396. Id.
398. A brief biography of Godwin may be found at http://plato.stanford.edu/entries/godwin.
399. According to Sowell, the “Marxian theory of history is essentially the con-strained vision, with constraints lessening over the centuries, ending in the unconstrained world of communism.” Sowell, supra note 390, at 111.
400. Id. at 124.
401. Id. at 124-25.
Russell Kirk adamantly disagreed. For him, politics was all about values, and when he refused to be “cheek by jowl” with libertarians on National Review’s masthead, it was because he vigorously objected to the libertarian vision of the common good. What troubled Kirk so deeply about libertarians was their preoccupation with material wealth. As he saw it, libertarians are individualists and materialists who worship the economic success of the individual and the consumer culture. Kirk believed life and politics should be concerned with more important things than “another piece of pie and another pat of butter.” He wanted to nurture the spiritual and aesthetic sides of life. Libertarians love Ayn Rand, who argued “that man exists for his own sake, that the pursuit of his own happiness is his highest moral purpose, that he must not sacrifice himself to others, nor sacrifice others to himself.” Kirk believed that loss of community is the greatest moral challenge of our age and found Rand’s philosophy detestable. These are hardly instrumentalist debates.

Recent social science also suggests that ideology may represent debates over values, or more precisely, over value systems. Some especially interesting work has been done by Shalom Schwartz, a social psychologist at Hebrew University in Jerusalem. Building on the work of others, Schwartz developed a list of 54 values and asked a large number of subjects in twenty countries to rate how important each of these values were to them. From an analysis of their responses, Schwartz infers ten different “value types.” One value type, for example, which Schwartz labels “power,” is composed of people who place a high premium on authority, wealth, social power, social image, and social recognition. Schwartz has developed a schematic depicting not only how the ten value types are composed of the 54 individual values but also where they stand in relationship to one another.

There are some difficulties with this type of study. One is that people don’t necessarily have the same idea about what particular values mean. “Freedom” is one of Schwartz’s 54 values but some people think freedom means being free of external restraints – one is free as long as she is not imprisoned or actively coerced into doing what she does not want to do – while others think freedom means having at least a reasonable opportunity to pursue her dream. In the latter view, a child who is raised by loving, educated par-

402. MCDONALD, supra note 10, at 178 (quoting Kirk).
403. NASH, supra note 3, at 156 (quoting Rand’s novel, Atlas Shrugged).
404. See MCDONALD, supra note 10, at 146 (stating Kirk considered loss of community – which he attributed to industrialization, urbanization, and social boredom – the “towering moral problem of our time”); NASH, supra note 3, at 157 (stating that Kirk found Rand’s objectivism “false and detestable”).
405. In particular, Schwartz built upon the work of the late social psychologist Milton Rokeach, author of Beliefs, Attitudes, and Values (1968) and The Nature of Human Values (1973).
407. See id. at 486 (reproducing the schematic).
ents in an excellent school district may be free because he has the resources to pursue whatever dreams are reasonable for his innate abilities. On the other hand, a child raised by indifferent, alcoholic, uneducated parents in a terrible school district is not truly free.

Nevertheless, work such as Schwartz’s provides us with some important insights. A key insight is that ideology is not best conceived of on a single left-right continuum. Ideology is more complicated. First, ideological views reflect values. Second, we should not think about values in binary terms, that is, that people have or do not have particular values. Most Americans probably attach some importance to freedom, equality, and national security and would like to achieve wealth and wisdom (five of Schwartz’s 54 values). What divides us not whether we think these are good things but how important different values are to us, how we rank or prioritize them, and what we think should prevail when we must choose between competing values. Third, ideological views are composed of groups of values or value systems. With this in mind, we can now turn to the standard taxonomy of conservatives.

B. Conservative Taxonomy

There are three main contemporary schools of conservative thought. In addition, there is a fourth school – traditional conservatism, or Burkean conservatism – which was once more robust but has become smaller and less organized than its rivals. I turn now to describing these schools. Because few people fit precisely into one school and some people straddle two or more schools of thought, disagreements about whether a particular individual should be placed into one school or another are not uncommon. Nevertheless, there is wide agreement among conservatives that they are divided into these particular camps.

Libertarians comprise what is probably the largest group. They believe in unimpeded individual freedom and the free market. Their mantra is laissez faire. They look with disfavor upon government regulation in all forms, whether by the legislature, administrative agencies, or the courts. There are liberal as well as conservative libertarians; what separates them is that liberals place more emphasis on personal and political freedoms – such as the freedom of speech and religion, and matters of privacy – while conservatives are more concerned with commercial and property rights. Many libertarians are enamored with natural rights theory. Conservative libertarians call for cutting taxes and shrinking government. They want a smaller government because they seek a weaker government; they wish especially to drain strength from

408. The definitions and comments are mine but I draw upon DAVID BOAZ, LIBERTARIANISM: A PRIMER (1997); FRANCIS, FUKUYAMA, AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY (2006); MCDONALD, supra note 10; NASH, supra note 3; Irwin Stelzer, Neoconservatives and Their Critics, in THE NEOCON READER 3 (Irwin Stelzer ed., 2004); Adam Wolfson, Conservatives and Neoconservatives, in THE NEOCON READER, supra, at 213, 215.
the regulatory agencies. Libertarians may have grown up reading Ayn Rand but their more mature intellectual heroes are Adam Smith, Friedrich A. Hayek, and Milton Friedman. Many also like John Stuart Mill and utilitarianism. The law-and-economics and rational choice movements are libertarian at their core because they consider individuals to be rational maximizers who are capable of fending for themselves in an unregulated marketplace. Today libertarian think tanks such as the Cato Institute, the American Enterprise Institute, and the Heritage Foundation provide a steady stream of policy prescriptions and analysis.

The second main conservative group, neoconservatives, has a more recent pedigree. Neoconservatism was established in the 1970s and 1980s by a group of formerly liberal, even socialist, Jewish intellectuals, including Irving Kristol, Norman Podhoretz, and Nathan Glazer. Perhaps partly out of reaction to the turmoil of the 1960s, and partly out of fear that an isolationist or weak foreign policy would put Israel at risk, these men underwent a dramatic political conversion. Some of the most prominent neoconservatives are disciples of Leo Strauss. The central pillar of neoconservatism is a desire “to promote American global leadership” and to use American power to force regime change in hostile governments and to bring democracy to the rest of the world.409 Neoconservatism is principally defined by its foreign policy but neoconservative domestic policy reflects the same tone, namely, the world is a difficult place and people must learn to make their own way. Coddling the weak does them a disservice by teaching them to rely on others rather than on themselves. Neoconservatives are tough on crime and social disorder and skeptical about, if not hostile to, social welfare programs. Daniel Patrick Moynihan’s policy of “benign neglect” for problems of race and poverty, and John Q. Wilson’s policy of deterring major crimes by aggressively enforcing minor criminal laws, such as those involving vandalism or turn-style jumping, were both seminal neoconservative ideas.

Paradoxically, neoconservatism is presently both predominant and under dire threat. A number of influential figures in the administration of George W. Bush – including John Bolton, Paul Wolfowitz, and Richard Perle – have long been committed neoconservatives.410 Invading Iraq was the quintessential neoconservative project. Thus, Francis Fukuyama writes: “[o]n the question of whether George W. Bush is, or ever was, a neoconservative, it seems


to me that by the beginning of his second term he had become one."\textsuperscript{411} Following the central neocorporative policy prescription in Iraq was disastrous. Fukuyama, who was one of the brightest lights in the neocorporative intellectual firmament, has quit. "I have concluded that neocorporatism, as both a political symbol and body of thought, has evolved into something I can no longer support," he writes, though it may be Fukuyama, rather than neocorporatism, who has evolved.\textsuperscript{412}

Social conservatives, or religious conservatives as they are sometimes called, comprise the third group. This is not as unified a group as many believe; it includes a wide array of religious fundamentalists, and is composed mostly of Protestant evangelicals and Pentecostals but also of some Catholics and Jews as well. Social conservatives fear the moral base of our society is dissolving, especially in matters involving sexual mores. They oppose abortion, homosexuality, pornography, and assisted suicide, and they want the schools to include prayer and teach or creationism or, as it now labeled, "intelligent design." Prominent spokespersons include Pat Robertson, Jerry Falwell, Richard Reed, and Gary Bauer. On many issues social conservatives are more diverse than is often assumed. Some social conservatives are environmentalists, for example, and a prominent group of social conservatives recently announced they will work together to support policies to combat global warming. While social conservatives are allied more politically than philosophically with other conservatives, their principal focus on morality and religiosity is so narrow and their strength is so great that they have joined the Republican coalition by being promised that the men and women appointed to the United States Supreme Court and the federal courts of appeal will oppose \textit{Roe v. Wade} and support a more permeable wall of separation between church and state.\textsuperscript{413}

There was a time when traditional conservatives were a major force within the modern intellectual conservative movement. That was certainly the case in the 1950s, when Russell Kirk's \textit{The Conservative Mind: From Burke to Eliot} was the most revered conservative manifesto. Kirk believed that "Burke's is the true school of conservative principle," and he defined conservatism as that school of thought and "thinkers in the line of Burke."\textsuperscript{414} Because traditional conservatives consider themselves Burkeans, a description of traditional conservatism will now sound familiar. First and foremost, traditional conservatives honor the traditions of their culture and nation. They believe things have come to be as they are for good reasons, even though those reasons are not always evident. They are, therefore, almost societal

\textsuperscript{411} Fukuyama, \textit{supra} note 411, at 46.

\textsuperscript{412} Id. at xi.

\textsuperscript{413} While not all white evangelicals and Pentecostals identify themselves as conservative, about two-thirds do and about seventy percent are Republican. \textit{Stanley B. Greenberg, The Two Americas} 98-99 (2004).

\textsuperscript{414} Kirk, \textit{Conservative Mind}, \textit{supra} note 4, at 5.
Darwinists (as opposed to social Darwinists) who believe our institutions, governmental and private, have evolved over time to serve us well. Things that did not do so were rejected; things that worked have been retained and refined.

Traditional conservatives are not opposed to change. They recognize that change is necessary, and a civilization that cannot adapt to new circumstances will expire. Preserving requires change. However, changes should be made cautiously, and changes should never be made for their own sake alone. Traditional conservatives are distinguished from the other groups by a sense of humility. They believe individuals know little. Our lives are too short to acquire great knowledge or wisdom; we must stand on the shoulders of our ancestors and work with contemporaries to assemble a collective wisdom. Hence, the famous statement “the individual is foolish, but the species is wise.” 415 Partly for this reason, traditional conservatives are communitarians. But traditional conservatives are also communitarians because they believe it is community that matters. Kirk argued that the genuine conservative has “always stood for true community, the union of men, through love and common interest, for the common welfare.” 416 As already discussed, the fundamental values of traditional conservatives are not about material wealth. 417 They believe in free enterprise, but do not think it is a perfect system. According to his biographer, Kirk did not believe that capitalism was an absolute good, and he “deplored the ruinous destruction of the environment wrought by corporate greed and commercial excess.” 418 Traditional conservatives tend to believe that religion is an important and valuable social influence, but unlike social conservatives they are seldom fundamentalists and do not argue that religious beliefs should directly inform public policy.

Russell Kirk died in 1994. The most prominent advocate of traditional conservatism today is probably George F. Will. Will is best known for his newspaper column that is nationally syndicated by the Washington Post (and for which he received a Pulitzer Prize in 1977), his bi-weekly column in Newsweek, and his appearances as a political commentator on ABC television. Will, who holds a Ph.D. in political science and began his career as a professor of political philosophy, is more than a journalist and pundit. In 1983, Will published Statecraft as Soulcraft: What Government Does, in which he espouses a classic traditional conservative philosophy, which he expressly links to the Edmund Burke. 419 Will argues that the “primary busi-

415. Id. at 37. See also MCDONALD, supra note 10, at 100 (stating that Kirk adopted this aphorism from Burke).
416. MCDONALD, supra note 10, at 140 (quoting Kirk).
417. See supra notes 404-06 and accompanying text.
418. MCDONALD, supra note 10, at 162, 217.
419. Will traces a philosophical lineage that runs from Aristotle, through Machiavelli and Hobbes, to Burke, whom he calls “the greatest modern philosopher to take the ancients' view of things.” WILL, supra note 14, at 27-29. Will refers to Burke more than any other thinker. See id. at 180 (listing 21 references to Burke).
ness of conservatism is preservation of the social order that has grown in all its richness” and that true conservatives are the “custodians of the claims of continuity against the willfulness of the moment.” He believes in a strong government because government produces the “infrastructure of society — legal, physical, educational” which is essential a healthy community. Will defends the “essentials of the welfare state” as being necessary to support rather than disintegrate families. He attacks libertarians (especially Milton Friedman) for promoting materialism and glorifying individualism and self-interest. True conservatives, he argues, are concerned with the community. In classic Burkanian fashion, Will argues that conservatives should see economics in pragmatic, not ideological, terms. Capitalism is a means to an end — “a marvelous mechanism for allocating resources” — not an intrinsic value. “[W]hen conservatives begin regarding the market less as an expedient than as an ultimate value . . . their conservatism degenerates into the least conservative political impulse, which is populism. After all, the market is the judgment of ‘the people’ at any moment.” It is the responsibility of government not merely to satisfy preferences but to elevate preferences, to call people to their higher and better selves, and to a sense of community. “Politically,” he writes, “we should be led up from individualism.”

George Will is not entirely alone. David Brooks — author, New York Times columnist, and PBS commentator — is an iconoclast with a strong streak of traditional conservatism. Brooks calls himself a “social traditionalist.” Social traditionalists, he says, differ from religious conservatives because “we think it’s both too sectarian and too lofty to try to pattern government policies on God’s law.” And, according to Brooks, social traditionalists differ with libertarians because “[w]e don’t think government can be neutral on values issues. Nations are held together by shared beliefs.” Brooks does not believe that public policy should be founded on economics, “with its image of profit-maximizing individuals,” but rather on an understanding of human nature that recognizes that human beings are social creatures “wired to form attachments with each other.” “In our best moments,” he writes, “we

420. Id. at 78, 118.
421. Id. at 12, 23, 125-26 (regarding strong government); id. at 12, 129-30 (regarding welfare state).
422. Id. at 117-29. Milton Friedman is not identified by name but unmistakable. Id. at 126.
423. Id. at 120.
424. Id.
425. Id. at 149.
428. Brooks, Moral Philosophy, supra note 426.
429. Id.
want to live up to the ideals our society has gradually engraved upon us.”

Thus, writes Brooks – associating this philosophy with Adam Smith’s *The Theory of Moral Sentiments* yet sounding quintessentially Burlean – “traditionalists are interested in how to strengthen institutions that breed responsible people.” Unlike Will, Brooks did not come to political commentary following a systematic study of political philosophy. Moreover, his ideological views may still be evolving. Although Brooks does not identify himself as a traditional conservative, Burlean beliefs quite clearly lie near the center of his thinking.

The popularity of George F. Will and David Brooks suggest that traditional conservatism still has an audience. Indeed, though Russell Kirk died in 1994, he too is still read. *The Conservative Mind*, though more than fifty years old, is still selling at respectable numbers. But traditional conservatism lacks an organized community. Without a membership organization, think tank, journal, or even a national politician promoting its philosophy, traditional conservatism is nearly invisible. Many people who are traditionally conservative by sentiment may not even recognize the term “traditional conservatism” or be aware that they have a philosophical heritage.

Making matters even more confusing for traditional conservatives is Patrick Buchanan. Buchanan is an intelligent, articulate, and knowledgeable ideologue who is consciously attempting to build a particular kind of conservatism. In service of this project, he not only speaks and writes widely but has founded a magazine, *The American Conservative*. Buchanan confuses matters by blending an extreme form of traditional conservatism with social conser-

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430. Id.

431. Id. Like Burke, Brooks believes in the importance of education and social circumstances conducive to learning and personal development. Compare David Brooks, *A Human Capital Agenda*, N.Y. TIMES, May 15, 2007, at A29 (stating that “the U.S. became the richest country because in the 19th and 20th centuries it has the most schooling and the best circumstances to help people develop their own capacities”) with BURKE, REFLECTIONS, supra note 117, at 34 (stating that “no name, no power, no artificial institution whatsoever, can make the men of whom any system of authority is composed, any other than God, and nature, and education, and their habits of life have made them”).

Brooks has advised Republican presidential candidates not to portray themselves as social conservatives, free market libertarians, or neoconservatives. “If you define yourself by those categories, you’re dead,” he has written. David Brooks, *So You Want to be President…*, N.Y. TIMES, Feb. 22, 2007, at A23.

432. On the day I write this (October 13, 2006), the sales rank of *The Conservative Mind* on Amazon.com is 11,130, compared, for example, to 291,599 for God & Man at Yale (Gateway Editions 1978) (1951) and 392,143 for Miles Gone By (2005), William F. Buckley, Jr.’s first and most recent books.

433. See, e.g., Wolfson, supra note 408, at 218 (stating today there are “no real” traditional conservative politicians). Senator Chuck Hagel of Nebraska may come closest to traditional conservatism. For a profile of Hagel, see Joseph Lelyveld, *The Heartland Dissent*, N.Y. TIMES MAG., Feb. 12, 2006, at 48.
Buchanan and his acolytes do not claim the mantle of traditional conservatism. In its inaugural issue, *The American Conservative* said it would promote a "Buchananite" philosophy. Other conservatives classify Buchanan as a "paleoconservative." Adam Wolfson writes: "[u]nlike traditionalists, the paleocons contend that we have become irrevocably cut off from a living, sustainable tradition. In their view, the acids of modernity have left us entirely disinherit from old customs and ways, and conservatism's project of conservation is but a glittering illusion." George H. Nash writes that Buchananite paleoconservatism resembles "the American Right before 1945."

No one who would sweep away the last half century – which includes significant changes in civil rights, the status of women, environmental awareness, and the regulation of business – can properly call herself a traditional conservative. Traditional conservatives respect the traditions of their nation and culture as they are, not merely as they wish them to be. That does not mean all is well, but the approach must be to keep the best and prune the worst, not to return to a different time, perhaps one that never existed at all. The presumption always is that things have evolved as they have for a reason. One of the vulnerabilities of traditional conservatism has always been the difficulty of acknowledging aspects of the tradition with which one disagrees. As Clinton Rossiter said, "[w]hen a conservative decides . . . that the best of all possible worlds was here yesterday and is gone today, he begins the fateful move toward reaction and ratiocination that turns him from a prudent traditionalist into an angry ideologue." No one who espouses and understands traditional conservatism can reject developments of the past sixty years.

434. Making it even more difficult for traditional conservatives to adopt Buchanan as their standard bearer are changes of anti-Semitism leveled against him, and especially William F. Buckley's evaluation of those charges. After conducting a painstaking exegesis of the evidence involving statements Buchanan made in 1990, Buckley concluded: "I find it impossible to defend Pat Buchanan against the charge that what he did and said during the period under examination amounted to anti-Semitism, whatever it was that drove him to say and do it: most probably, an iconoclastic temperament." WILLIAM F. BUCKLEY, JR., IN SEARCH OF ANTI-SEMITISM 44 (1992). Richard Brookhiser, an author and senior editor at *National Review*, has also said that Buchanan's writings display "residues of animus" toward Jews. According to Brookhiser, "Buchanan's columns have picked away at Jews the way a kid picks at a scab." See HART, supra note 3, at 321 (quoting Brookhiser). See also NASH, supra note 3, at 338 (stating neoconservatives "dectected ominous signs of . . . neoisolationist nativism tinged with anti-Semitism" in Buchanan's work).


436. See, e.g., Wolfson, supra note 408, at 219; NASH, supra note 3, at 338.

437. Wolfson, supra note 408, at 219.

438. NASH, supra note 3, at 338.

As with so many other things, it is easier to talk the talk than walk the walk. Russell Kirk himself succumbed to this tendency. Wesley McDonald, Kirk’s biographer and protégé, has written:

[T]raditionalists such as Kirk can be correctly accused of having failed to articulate a fully developed sense of historical consciousness. Although he never doubted the wisdom of Edmund Burke’s famous observation that change is the means of a society’s conservation and Irving Babbitt’s insight that each new generation must creatively adjust to new circumstances, Kirk also experienced an ahistorical attachment to the past. History became for him an almost sacred garden in which no room could be made for new categories of thought.

C. Why Burke is a Liberal

Conservatives delight in ideological musings and debate. A great deal has been written defining, elaborating, attacking, and defending the various schools of conservative thought. Curiously, I know of no parallel liberal taxonomy, no accepted system of classifying different schools of liberalism. Some commentators have offered their individual categorizations of different kinds of liberals but none has achieved general acceptance. I shall not attempt one here. Nor shall I attempt a comprehensive definition of liberalism. Indeed, I doubt that is possible. The best evidence is that ideologies are value systems, and as is the case with conservatives there are surely groups of people with different value systems who consider themselves, and are considered by others, to be liberal.

440. Clinton Rossiter famously said Kirk often sounded like “a man born one hundred and fifty years late and in the wrong country.” Id. at 222. He also wrote: “It appears that Kirk, in his honest moments, is a man who has lost all patience with the course of American development in almost every field from art to politics” and that he is “passionately intent on restoration rather than conservation.” Id. at 221. Peter Viereck wrote:

The main defect of the new conservatism . . . is its rootless nostalgia for roots . . . . [R]omanticizing conservatives refuse to face up to the old and solid historical roots of most or much of American liberalism . . . . Their unhistorical appeal to history, their traditionless worship of tradition, characterize the conservatism of writers like Russell Kirk.

VIERECK, supra note 3, at 124-25.

441. MCDONALD, supra note10, at 215.

Still, if there is something that unites liberals — a spirit, a sensibility, an essence rather than a doctrine — it involves a desire to reduce human misery. There is no better liberal tract than A Christmas Carol by Charles Dickens, and no more powerful moment in that book than when the second phantom shows Scrooge two yellow, meager, ragged, and wolfish children. Scrooge asks if the children belong to the phantom. “These are Man’s,” the spirit replies. “This boy is Ignorance. This girl is Want. Beware them both, and all of their degree, but most of all beware this boy, for on his brow I see that written which is Doom, unless the writing be erased.”

Scrooge is appalled at the plight of the children for two reasons. His experiences with the first two ghosts have reawakened within him feelings of empathy and compassion. He is distressed to see fellow human beings suffering, especially innocent children. But there is a second and particularly Burkan reason why Scrooge — and Dickens hopes his readers — are distressed. As the phantom portends with his warning “Beware” and his omen of “Doom,” ignorance and want imperil civilization. Eventually these forces will explode. When Scrooge asks whether the children have any resources or refuge, the ghost repeats questions that Scrooge asked at the beginning of the story to a man who had asked Scrooge make a contribution to the needy and destitute. “Are there no prisons?” “Are there no workhouses?” There are plenty of prisons, we are told, but ignorance and want can only be contained for so long.

Interestingly, historian Bruce Kuklick suggests that American liberalism was born during roughly the same era as Dickens’s A Christmas Carol. Kuklick describes how American cities, under siege from mass immigrations by the poor and uneducated from Europe, faced frightening escalations in crime, violence, prostitution, and drug and alcohol use. Affluent citizens fled, and municipal services declined still further. Kuklick writes: “religious thinkers warned of social disintegration and demanded that the elite display a sense of obligation to the new class, if only to preserve for the well-to-do their own respected place in society.” The debate over “the social question” continued into the twentieth century and influenced both the Progressive Era and the New Deal.

443. CHARLES DICKENS, A CHRISTMAS CAROL 99 (Broadview Literary Texts 2003) (1843).
444. Id.
445. Id. at 44 (Scrooge’s questions to the man soliciting contributions); id. at 60 (the Ghost’s repeating those questions back to Scrooge).
446. See BRUCE KUKLICK, A HISTORY OF PHILOSOPHY IN AMERICA 1720-2000, at 104-05 (2001) (describing how the urban problems of the middle and late nineteenth century led to debates about how to address the “social question” and stating these debates continued into the Progressive and New Deal eras).
448. KUKLICK, supra note 446, at 105.
By analyzing how liberals and conservatives present their ideas, and the language they use to do so, cognitive linguist George Lakoff has developed a theory about what divides liberals and conservatives, and Lakoff's theory fits hand-in-glove with Dickens's novel and Kuklick's history. Lakoff argues that liberals and conservatives have different conceptions about the family.449 Conservatives believe in a “Strict Father” model of the family. As they see it, life is hard and filled with competition. The best parental love is therefore “tough love,” teaching self-discipline, self-reliance, and respect for authority. We reap what we sow. Those who follow rules and work hard are rewarded. Those who are slothful, deviate from the straight-and-narrow, or disrespect legitimate authority come to bad end. We love for our children, and therefore we prepare them for the world by raising them with rewards and punishments.

Liberals, on the other hand, embrace a “Nurturing Parent” model. They believe parents raise responsible and self-reliant children by caring for them, respecting them, and teaching them to respect both other individuals and the community as a whole. Children obey their caregivers gladly if they love and respect them, while fear induces only grudging obedience. Questioning parents is a healthy part of child development because, through this process, children understand how their parents make decisions and learn how to make responsible choices for themselves. Lakoff believes one's worldview about government and public policy is an extension of one's worldview about the family. Conservatives, therefore, believe that society must maintain strict systems of incentives and disincentives. “Without the incentive of reward and punishment, self-discipline will disappear” and eventually all “social life would come to grinding halt.”450 Liberals, on the other hand, believe that just as parents must protect and nurture their children, a responsible society must do the same with its weaker members. That is both the moral and the practical approach, for that is the best way to help the dependent become self-sufficient. The policy implications of Lakoff's theory are obvious, from how welfare programs should be structured, to whether the criminal justice system should be focused on punishment or rehabilitation, to whether to spend additional monies on defense or foreign aid.

Through the prism of Lakoff's theory, we can see A Christmas Carol as an allegory about converting a conservative into a liberal. In the beginning of the story, Scrooge believes society is best served if diligent, parsimonious people such as himself enjoy the full fruits of their labors. After all, he succeeded through enormous self-discipline, and he saw himself as morally worthy of his success. Those who fail to obey legitimate authority belong in prison; those who fail to support themselves should be sent to workhouses. It is through a strict system of rewards and punishments that people are disci-

450. Id. at 69.
plined into being responsible and productive, and society is held together. The phantoms convert Scrooge by showing him earlier scenes from his own life in which he was either loved or neglected, and in which he loved or neglected others. Scrooge then realized his belief system was a cruel illusion. His material wealth had little real value. His extreme self-discipline was, in fact, self-denial. He had denied his own humanity and the reasons for living: to love and be loved, to help others, to be part of a community.

Burke is a liberal, first and foremost, because he placed so high a premium on reducing human suffering. As someone who came from a persecuted land and people, he understood social justice. He risked his political career to relieve Catholics of the disabilities imposed upon them by the Penal Laws and to improve the economic condition of Ireland through free trade with England.⁴⁵¹ The greatest campaign of his life was to bring to an end the misery his fellow Englishmen were imposing upon the people of India. In the early years, he also pursued this effort despite being ridiculed and alienating the powerful. Burke’s actions speak for him, but his words were also clear. He endorsed “universal justice” (his phrase) and said “[t]he happiness or misery of multitudes can never be a thing indifferent.”⁴⁵² He declared that it was not true “that the real interest of any part of the community could be separated from the happiness of the rest.”⁴⁵³ When Burke stood before the Lords and argued why they should convict Warren Hastings, he called for “that spirit of equity, that spirit of justice, that spirit of protection, that spirit of leniency, which ought to characterize every British subject in power.”⁴⁵⁴

D. Burke as Common Ground

George Lakoff presented his Strict Father-Nurturing Parent theory for political rather than policy purposes. As a committed liberal, he wanted liberals to better understand political discourse and battle conservatives more successfully in political campaigns.⁴⁵⁵ But Lakoff also says that his theory has made him a more committed liberal because, among other things, child development research clearly shows that the Nurturing Parent model is superior to the Strict Father model. Although ideology may be more complex than Lakoff’s model, I suspect Lakoff is on to something important. He has an important piece of the puzzle, even if it is only one piece and the puzzle is quite large. Nevertheless, although Lakoff’s theory may be useful politically, liberal Burkeans will pay it no heed for purposes of developing public poli-

⁴⁵¹. See supra Parts I.B-II.B.
⁴⁵³. Id. at 298.
⁴⁵⁵. LAKOFF, supra note 449, at 335-36.
cies. They will do so because they, like Burke, are pragmatists. For them, public policy must be dictated by what works, based on experience, not on abstract theories. While research in child development may tell us a great deal about how children should be raised, it would be a mistake to extrapolate universal lessons about public policy from that research. Child rearing is different from public welfare, criminal justice, foreign policy, or national defense. It may be intuitively appealing to believe that the Nurturing Parent model can be successfully replicated in other areas, and it might turn out to be true, but we cannot assume that to be the case.

Burkeans of the left and right can talk to one another because they are pragmatists. To the extent that theories divide them, they are committed to putting theories aside in favor of experience. Burke once said that he had “insuperable reluctance . . . to destroy any established system of government upon a theory.” He put more stock in what was working than in untested theories. Ideologues committed to opposing theories cannot engage in fruitful dialogue. But because all Burkeans approach a problem with the common belief that the right answer is what ultimately works, then their differing predictions of what will work are tentative and neither need suffer the indignity of being proved wrong on a fundamental belief. Their agreement on the fundamental methodology transcends their differing predictions and allows them to carry on what, at times, may be a spirited but need never be a bitter conversation.

Liberal and conservative Burkeans can also talk to one another because they share common values. They reject the certainty of the neoconservatives; they do not believe it possible to confidently refashion the world according to plan. Societies are too complex to be fully comprehended. Predictions about the consequences that change will bring are unreliable. And nothing is as uncertain as consequences from the use of force. Burkeans reject the materialism of the libertarians. There are more important things than another pat of butter, as Russell Kirk memorably put it. Burkeans also reject the individualism of the libertarians. Burkeans are communitarians. Libertarians wish to provide absolute freedom to the individual. Burkeans believe that liberty is very much tied to the welfare of the community and that individuals are bound by responsibilities to the community and the greater good. Because a strong society requires a strong government, Burkeans reject the libertarian mantra for a smaller government. “Nothing turns out to be as oppressive and

456. Lakoff does not expressly contend that his theory should be used as a prescription for policy, beyond matters involving child rearing. He says: “[n]ow that I can see the unity and strength of liberal morality and politics, I feel more than ever that liberalism must be articulated fully, communicated clearly, and defended staunchly, not on an issue-by-issue basis, but as a whole, as a deeply moral perspective on politics.” Id. at 336. But he also says that the Strict Father model is at odds with the way the mind works, that is, with human nature itself. Id. at 366-78. This at least suggests it is relevant to matters beyond child rearing.

457. O’BRIEN, GREAT MELODY, supra note 38, at 447 (quoting Burke).
unjust as a feeble government,” wrote Burke. That is especially true in our age, when global corporations are acquiring ever greater influence. If governments are not strong enough to regulate corporations, then corporations will regulate governments. Burke knew that the East India Company’s tentacles extended throughout British government, into the financial sector, into Parliament, and into the Crown and its Ministries. The ways in which money controls politics have only gotten more complex.

In an age when religion has become increasingly prominent in American politics, Burke’s belief in the importance of religion has become an argument for classifying him as a conservative. Burke did indeed believe religion was important – but he believed it important in a particular way. It was not religious doctrine that Burke valued, and he was not a fundamentalist. Burke did not believe Scripture furnishes answers to policy, or indeed, even moral questions. Burke said:

The Scripture is no one summary of doctrines regularly digested, in which a man could not mistake his way. It is a most venerable, but most multifarious, collection of the records of the divine economy: a collection of an infinite variety, – of cosmogony, theology, history, prophecy, psalmody, morality, apologue, allegory, legislation, ethics, carried through different books, by different authors, at different ages, for different ends and purposes.

Burke warned that if we were not willing to do the hard work for ourselves, to sort out what should be taken literally and what figuratively, what should be taken as a story and what as an example, what was only temporary and what was permanent, then we would be afflicted by “dangerous fanaticism.” Burke felt the same way about religious doctrine. He insisted upon his right to accept church doctrine implicitly, to put his own explanation upon it, to take what he wished and leave the rest. For Burke, therefore, what was enriching about religion was wrestling personally with the allegories and teachings. Burke did not see one sect – or, indeed, one religion – as the sole possessor of truth. Burke is said to have remarked that after studying the competing claims of Catholicism and Protestantism, he was simply bewildered. During the trial of Warren Hastings, Burke maintained that the Eastern religions possessed as much morality and wisdom as did Christianity. Although he considered himself a Christian, Burke may not have recognized

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458. BURKE, REFLECTIONS, supra note 117, at 195.
460. Id. at 108.
462. See KIRK, EDMUND BURKE, supra note 6, at 133 (stating Burke so remarked).
463. See supra notes 340-41 and accompanying text.
the divinity of Christ. Michael McConnell finds it notable that throughout the
great volume of his speeches and writings Burke never refers to the central
tenet of Christianity – redemption through faith in Christ – nor even once
mentions Christ. Burke does refer to God but just as often uses ecumenical
terms such as “Supreme Ruler,” “Governor of the Universe,” “Sover-
eign of the world,” or the “one great Master, Author, and Founder of soci-
ety.” What Burke found important about religion was, as he put it, “the
great principle upon which they all agree, and the great object to which they
are all directed.” And what is that great principle if not the Golden Rule,
which in one formulation or another, is embraced by all of the great reli-

gions?

Burke spoke of “the moral imagination,” which has been described as
the awareness that “Man possesses a higher self, of which the imagination is a
part,” and that this “awareness of the ultimate good common to all mankind
forms the basis of the final end of politics, namely, the genuine commu-
nity.” Burke did not think the moral imagination was fueled entirely, or
even principally, by religion. He believed that the higher self was also in-
spired by art and literature. “Indeed, the theater is a better school of moral
sentiments than churches,” he wrote.

464. McConnell, supra note 34, at 400-01.
465. See e.g., Edmund Burke, An Appeal from the New to the Old Whigs, in
PORTABLE EDMUND BURKE, supra note 66, at 474, 491.
466. E.g., Edmund Burke, Speeches on the Impeachment of Warren Hastings, in
PORTABLE EDMUND BURKE, supra note 66, at 388, 394.
467. E.g., BURKE, REFLECTIONS, supra note 117, at 135.
468. E.g., id. at 79.
469. Id. at 127.
470. Some versions of the rule are stated in the positive. E.g., Leviticus 19:18
(King James) (“thou shall love thy neighbor as thyself”); Matthew 7:12 (King James)
(“Therefore all things whatsoever ye would that men should do to you, do ye even to
them: for this is the law and the prophets”). Others are put in the negative. Rabbi
Hillel summed up all of Judaism by saying, “[t]hat which is hurtful to thee do not to
thy neighbor.” MILTON STEINBERG, BASIC JUDAISM 12 (1947). Muhammad said in his
Fearwell Sermon, “[h]urt no one so that no one may hurt you.” Hinduism teaches,
“(d)0 naught unto others which would cause you pain if done to you.”
MAHABHARATA 5:15:17. Confucius said, “[w]hat you do not wish upon yourself,
extend not to others.” ANALECTS OF CONFUCIUS 15:3. See also ALAN GEWIRTH,
HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 128 (1982) (“The
Golden Rule is the common moral denominator of all of the world’s major reli-
gions.”); Macleod Yearsley, Introduction, in SELWYN GURNEY CHAMPION, THE
ELEVEN RELIGIONS AND THEIR PROVERBIAL LORE: A COMPARATIVE STUDY xvii
(1944) (stating that the foundational ethic of all religions “boil down into the funda-
mental Golden Rule of ‘Reciprocity.’”).
471. MCDONALD, supra note 10, at 56 (describing Kirk’s view of the “moral
imagination”); id. at 57 (stating that Burke coined the term “moral imagination”).
472. BURKE, REFLECTIONS, supra note 117, at 69.
Is there a way to sum up Burke's thinking, a brief statement that captures the core essence of Burkean philosophy? I think there is. Burke was fond of a Spartan adage, but ironically nothing better captures Burke's values, and those of his heirs, than the Oath to the Athenian City-State:

We will ever strive for the ideals and sacred things of the city, both alone and with the many; we will unceasingly seek to quicken the sense of public duty; we will revere and obey the city's laws; we will transmit this city not only, not less, but greater, better, and more beautiful than it was transmitted to us.

The Oath captures the devotion to tradition and ideals, the importance of inspiration and beauty, the responsibility to conserve and to improve, the belief in sacred things, and the dedication to the community. This is the spirit of Edmund Burke's philosophy, and of his true heirs.

V. CONCLUSION

It is a promising time for Burkeans. For the past half century, traditional conservatism has waned while libertarianism, neoconservatism, and social conservatism have flourished. But the war in Iraq is about to force an ideological realignment. Perhaps never before in American history has so relatively small and distinct an ideological group been as single-handedly influential in persuading the nation to undertake a war. The neoconservatives, therefore, are held responsible for what is widely considered a disaster. As Francis Fukuyama's resignation from the movement suggests, neoconservatism is falling on its own sword. The political right is about to shaken up, and many conservatives will be reconsidering their ideological identities. Moreover, the present environment is ideal for stimulating renewed interest in Burke because the Iraq war so starkly illustrates the difference between neoconservative and Burkean thinking and the essential wisdom of the latter.

Neoconservatives expected that American invading troops would be greeted as liberators and welcomed with flowers. They believed that Iraq

473. See supra note 141 and accompanying text.
474. This version of the Oath to the Athenian City-State is taken from the rotunda of the Maxwell School of Citizenship and Public Affairs at Syracuse University. See Mitchel B. Wallerstein, Dean of Maxwell School of Syracuse University, Citizenship 101: A Dean's Perspective (July 10, 2006), http://www.maxwell.syr.edu/deans/chaustaqua.asp (last visited June 21, 2007).
476. See JAMES FALLOWS, BLIND INTO BAGHDAD: AMERICA'S WAR IN IRAQ 64 n.* (quoting Vice President Richard Cheney as predicting that invading American troops
would warmly embrace democracy. As they saw it, the entire world yearns for democracy, and people of any nation or culture will seize upon an opportunity to adopt a democratic system. To the extent that they looked to history for guidance, the neoconservatives analogized to America rebuilding Germany and Japan after World War II.

No Burkean would have thought about the invasion of Iraq this way. England’s harsh treatment of Ireland had sensitized Edmund Burke to the dangers of ethnocentrism. Burke took the time to learn about other nations’ histories and cultures and attempted to see matters through their eyes. It was because he did this, for example, that he Burke was able to understand that the American colonies would not capitulate and that English policy was futile. As Burke would have quickly grasped, it was national chauvinism that led the Bush Administration to assume that Iraqis would see Americans as liberators and leap at the chance to adopt a Western-style government. A Burkean would have worried about the aftermath of removing a tyrannical regime through which a minority population of Sunnis had cruelly oppressed Shiite and Kurdish populations. Why would formerly oppressed groups not seek vengeance? Why would a minority population – despised as former oppressors – want to participate in a democracy in which they would be outlawed? Why would any Iraqis – long accustomed to exploitation – trust invaders from an oil-dependent nation? Any Burkean would have questioned the comparisons to Germany and Japan, countries with homogeneous populations. As James Fallows says, the traditional conservative believed that American war planners were ignoring human nature, and that the effort was likely to end in tears.

would be greeted “with flowers”), 79 (quoting Cheney as stating that American troops “will be greeted as liberators”), 99 (quoting Paul Wolfowitz, Deputy Secretary of Defense, as stating that he was “reasonably certain” that the Iraqi people would “welcome us as liberators”) (2006).

477. See id. at 39-40 (attributing such views to Fukuyama, Perle former CIA Director James Woolsey, and Secretary of Defense Donald Rumsfeld.) See also RICKS, supra note 475, at 17 (quoting Wolfowitz as stating, “I think democracy is a universal idea”), 22 (stating that “Wolfowitz and this fellow neoconservatives” were “essentially idealistic interventionists who believed in using American power to spread democracy”) (2006).

478. See FALLOWS, supra note 476, at 2-4, 32-33, 58-59, 68; RICKS, supra note 475, at 16.

479. See supra notes 206, 211, 235-36 and accompanying text.

480. America stands for things that “the rest of the world wants for itself,” said Paul Wolfowitz. FALLOWS, supra note 476 at 111 (quoting Wolfowitz).

481. As one analyst put it, “the extent of the Iraqi totalitarian state, its absolute power and control from Baghdad, not to mention the terror used to enforce compliance . . . and the attendant feeling of fear, weakness, and shame . . . do not provide a strong foundation on which to build new institutions and a modern state.” See id. at 58 (quoting Kanan Makiya).

482. See id. at xviii.
Moreover, the author of *Reflections on the French Revolution* understood the consequences of sweeping away national institutions. In France, the revolutionaries destroyed the monarchy and the church. The results were chaos and blood. In Iraq, the chief U.S. administrator disbanded the Iraqi army and barred Baath Party members from public employment, notwithstanding an Army War College study that warned that tearing “apart the army in the war’s aftermath could lead to the destruction of one of the only forces for unity within the society.”483 Anyone who has studied *Reflections* should have been able to predict the consequences of destroying the institutions that have held together a society, even institutions that have done so through terror.

We are still at war, and we have only begun to engage in a post-mortem about what led us to calamity. There is discussion about what led us into this mess, and in time there will be interest in whether certain schools provide wisdom that, if heeded, would have better served the nation. This, I believe, will generate more interest in Burke among both conservatives and liberals and, perhaps, an interest in building a Burkean bridge across the ideological divide. In this era of bitter partisanship, Edmund Burke may be able to make yet another valuable contribution.

483. Former Baath Party members who worked in the top three lawyers of any government ministry, university, hospital, or corporation operated by the government were barred from future public employment. See RICKS, *supra* note 475, at 158-59; See FALLOWS, *supra* note 476, at 103.