Civil Society and Its Discontents: The Two Pillars of Edmund Burke's Legal Philosophy

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Author’s Abstract:  This article will undertake a complete survey of the jurisprudential thought of Edmund Burke. In doing so, it will attempt to place civil society as the focus of all jurisprudential elements of Burke’s thought. Burke put forward the components of a legal order that tended toward the establishment of a fundamentally liberal society, with spontaneity as the engine of both law and social growth. The positive pillar of Burke’s thought refers to the maxims of jurisprudence that foster social harmony, allowing this growth to proceed apace. The complementing, negative pillar of Burke’s legal thought focuses on protecting these elements from radical redefinition by resisting the application of philosophic dogma, or ideology, onto man’s social condition through the instruments of power. By placing civil society and its support as the focus of Burke’s thought, this paper will attempt to rescue Burke from those who abbreviate his thought into a disposition against reform or a hidebound respect for tradition. It will offer a substitute reading of Burke’s works whereby Burke offers a legal system as a positive recipe for social happiness, and, therefore, civil society.

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1 University of Alabama School of Law, J.D., 2005; Jacksonville State University, B.A., 2001. The author is currently in the private law practice in Tuscaloosa, Alabama and may be reached at jamestodd79@gmail.com. He is a former Mont Pelerin Society Essay Contest Fellow (2006). Thanks to Professor William Brewbaker and Dr. Tony Freyer for their kind assistance and consultation during the research and preparation of this paper, as well as for the helpful suggestions and editorial assistance of Andrew Todd. During the later portions of this work, Emma Butler was a source of great encouragement.
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I. Introduction

As a member of Parliament for thirty-nine years, Edmund Burke (b. 1729—d. 1797) spent the majority of his life devoted to debate over legislation, which gave him ample opportunity to expound on law, liberty, and morality. While he never concluded his formal legal studies, he wrote to one of his many correspondents: “I have from my very early youth been conversant in reading and thinking upon the subject of our laws and Constitution, as well as upon those of other times and of other countries…..”

Burke left a comprehensive view of law and the legal order to be taken from the body of his writings and speeches. Few papers illuminating his thought have been advanced in recent legal scholarship; more likely, Burke’s influence on modern jurisprudence has been characterized as an adherence to tradition by today’s followers of Burke in their method of constitutional interpretation. Burke’s philosophy has been

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2 A note on sources: I have tried to use generally-accessible editions of Burke’s more renowned works, where possible. I have used the 1937 Harvard Classics edition of Burke’s *Reflections on the Revolution in France*. I have also used a recent edition of many of Burke’s other works reprinted in PETER J. STANLIS, EDMUND BURKE: SELECTED WRITINGS AND SPEECHES (1963) and DAVID BROMWICH (ED.), ON EMPIRE, LIBERTY AND REFORM: SPEECHES AND LETTERS (2000). Professor Stanlis also has a more recent multi-volume offering of Burke’s works available through Liberty Fund that I did not use in preparing this paper. Citations to the foregoing versions are made where appropriate. However, where necessary I have also employed a twelve-volume edition of Burke’s works compiled by the publisher John Nimmo, of London, cited as THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE (London, John Nimmo ed., 1887) (hereinafter “WORKS”). Burke is eminently readable and is oftentimes best left to speak for himself, and the reader will find him quoted generously throughout this paper.

While general biographical information on Burke is beyond the scope of this paper, I have benefited greatly in my understanding of Burke by reading several excellent biographies that I now commend to the reader. An admiring introduction to his life and thought is RUSSELL KIRK, EDMUND BURKE: A GENIUS RECONSIDERED (ISI ed., 1997) (1979). Kirk was perhaps the warmest proponent of Burke in the Twentieth Century, and placed him as the founder of intellectual conservatism in his classic THE CONSERVATIVE MIND, FROM BURKE TO SANTAYANA (1957). For a more in-depth treatment of Burke’s life, see the excellent two-volume series by Carl Cone: BURKE AND THE NATURE OF POLITICS IN THE AMERICAN REVOLUTION (1957) and BURKE AND THE NATURE OF POLITICS IN THE FRENCH REVOLUTION (1964). Also, I would recommend CONOR CRUISE O’BRIEN, THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE (1992) (placing strong emphasis on Burke’s Catholic sympathies). I have not yet read the recent two-volume biographical treatment of Burke by Professor F.P. Lock, the second volume of which was concluded in 2006.

There are numerous treatments of Burke’s political thought, though the foundation of all future Burke scholarship was laid in Dr. Peter Stanlis’s, EDMUND BURKE AND NATURAL LAW (1955) as well as his EDMUND BURKE: THE ENLIGHTENMENT AND REVOLUTION (1991) (the latter exploring many of the same themes as the former.) These works were integral in my formulation of this paper’s thesis and I have attempted to attribute to Dr. Stanlis’s accordingly.

3 EB, Letter to the Buckinghamshire Meeting on Parliamentary Reform, in 6 WORKS 292, 295.

4 See, e.g., Cass Sunstein, *Burkean Minimalism*, 105 U.MICH.L.REV 353 (2007) (ascribing to modern-day followers of Burke a method of constitutional interpretation characterized by “incrementalism” and paying heed to established traditions); Ernest Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C.L.REV. 619 (1994) (criticizing modern-day judicial conservatives from a Burkean perspective); James G. Wilson, Justice Diffused: A Comparison of Edmund Burke’s Conservatism with the Views of Five Conservative, Academic Judges, 40 U.MIAMIL.REV. 913 (1986) (using Burke’s ideas of political legitimacy in criticizing modern-day conservative jurisprudence). None of the recent scholarship subordinates Burke the philosopher against revolution to Burke the philosopher of liberal, spontaneous society, and this paper is made in modest hopes of nudging Burke scholarship in that direction.
treated as a reflexive disposition to preserve, rather than a system of positive principles of law and government. But one may find much more than a sentiment or disposition in Burke; his philosophy of law and government rests on a basis of positive principles and not a simple reflex. To do Burke any justice, a treatment of all aspects that one would associate with a comprehensive “system” of jurisprudence—discussion of the natural law and positive law, the constitution, regulatory law, the common law, liberty, equality, the judicial function, church and state—while bringing these topics together under its overarching themes, must be attempted.

Burke, while not in any way a systematic thinker, spoke and wrote routinely on questions of jurisprudence, such that his ideas may be put in treatise-like form appear largely consistent. He used the term “jurisprudence” often, as though he assumed it to be discrete discipline. His grandiose definition of the subject—“the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages, combining the natural principles of original justice with the infinite variety of human concerns…”—nicely encapsulates his overall philosophy of law. Burke’s legal philosophy arose not out of an abstract love of law itself—though he very much respected the legal order, properly constituted—but out of a much greater supporter of civil society and the liberty and human fulfillment that this order brings about.

This paper will offer civil society—and not simply a reverence for the past or for authority—as the focus of Burke’s legal thought. Furthermore, it will identify two main pillars that buttress Burke’s legal thought that follow from its focus on civil society. The first is that a free society depends upon the maintenance of a liberal, and well-developed, legal order. The second is that this free and civil society must be protected by this same legal order against the implementation of ideas arrayed against it, primarily through a proper definition of jurisprudential terms. The main protection for civil society comes in the form of just laws aimed at preserving social harmony—for civil society cannot exist or develop in the absence of social harmony. Primarily, government or laws should not be the cause of any societal distemper. For Burke, it is in the moments of social peril that dogmatists may prevail upon government with theories and visions regarding a different and more perfect society. In that case the entire legal order of society might be destroyed, as happened in Revolutionary France.

Burke’s earlier writings and speeches fully expound on the civil society he had in mind, and, when read in conjunction with his writings against the French Revolution, serve to provide a complete exposition of his thought. The positive aspect of Burke’s philosophy, to be discussed first, consists of the law preserving a robust civil society and fundamentally liberal order. Before encountering Burke’s jurisprudence, one must have a better sense of the liberal order of society Burke spent his career advancing.

A. Burke and Civil Society

[Society] gave alms to the indigent, defence to the weak, instruction to the ignorant, employment to the industrious, consolation to those who wanted it, nurture

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Burke’s conservatism was in service to a liberal order. He sought at all times to advance and protect the liberal constitutional order that had fostered social harmony and civil society for centuries in Britain. So much has been made of his defense of the “throne and altar” aspect of the feudal constitution that was beginning to crumble during his time. Tom Paine famously asserted that Burke was only interested in the plumage but not the dying bird. As this paper will attempt to show, this and related criticism places undue emphasis on Burke’s *Reflections on the Revolution in France* (and perhaps even then on isolated passages of this work) and overlooks the liberality of Burke’s writings; writings which point to a concern about the rudiments of a liberal constitutional order. Burke’s civil order is much deeper than the trappings of government and formal arrangements of political power. It focuses instead on the idea of society advanced by classical thought, the polis: a “regime” or order, the constitution of society which is its fundamental law in addition to the moral order guiding everyday life. It speaks to a system of mores, or customs, that have developed over time to facilitate relations among society’s members, to the great ends propounded by Burke in the introductory quote, as a supplement to posited law. It is developed by way of accumulated wisdom and experience and is seldom a matter of posited law. This is something akin to the spontaneous order of classical liberal thought, in that it is a system that is not constructed by way of willful human action, but by an association of actions that have accumulated through generations. Burke, however, firmly placed the development of this societal order under the divine care, and conceded that this development is partly the product of government. Civil society arises out of the accumulated action of many self-oriented people attempting to live together in harmony. “The individual,” Burke believed, “is foolish. The multitude, for the moment, is foolish, when they act without deliberation; but the species is wise, and when time is given to it as a species it almost always acts right.”

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7 Thomas Paine, Rights of Man 17 (Dover ed., 1999) (1791-2). (“[Burke] pities the plumage but forgets the dying bird.”)

8 For a comparison of Burke with Friedrich Hayek, the modern liberal theorist of the spontaneous order, see Linda C. Raeder, *The Liberalism/Conservatism of Edmund Burke and Friedrich Hayek: A Critical Comparison*, HUMANITAS, VOLUME X, NO. 1 70 (1997) at www.nhinet.org/raeder.htm (noting that Burke and Hayek “represent the same political tradition” by adhering to the same substantive political philosophy and the same views of society). This paper takes largely the same position; however, it will do for Burke what Raeder claims that Hayek did for himself—to “restate or systematize those basic principles whose observance generated and sustained Western constitutional government and the free society.” *Id.* at 70. While Hayek undertook this task in his seminal *The Constitution of Liberty* (1960), Burke the practical politician never attempted a similar essay, and, therefore, these principles must the abstracted by others from his body of work. Hayek laid down the abstract rules that must govern society and the spontaneous order while Burke focused on specific measures in reference to whether or not they were conducive to social harmony.

9 *Id.* at 75 (noting that Burke’s recognition that “[God] willed the state” does not find support in Hayek and that Hayek “avoided all reference to the transcendent”).

10 Edmund Burke, Speech on a Motion Made in the House of Commons on [the Reform of Representation of the Commons], in David Bromwich (Ed.), *On Empire, Liberty, and Reform: Speeches and Writings*
communities, Burke’s “little platoons,” in which man enjoys his daily existence and his most significant attachments. Burke recognized this society as it had developed, for example, in India, and called for the most delicate handling of such a society in imperial administration. The establishments of government should seek to preserve, and in no way should it jeopardize, the harmony man found in his life in these small platoons, as this is the essence of society and of man’s Aristotelian ideal. The great scholar of political ideas, Leo Strauss, summarizes this thinking as it applies to Burke. “[Burke] rejects the view that constitutions can be ‘made,’” Strauss notes, “in favor of the view that they must grow. He therefore rejects in particular the view that the best social order can be or ought to be the work of an individual, of a wise ‘legislator’ or founder.” As such, society is not something that springs, full grown, from the plan or idea of one man or group of men. It is not even a Lockean contract among voluntary, autonomous members. Such a fictional view of societal origins only serves the purpose of those who would use civil society as their philosophical template. Society can easily be remade along theoretical lines if it is assumed that it was purposefully created on a foregone theory in the first place. Burke would have none of this: “A prescriptive government, such as ours,” Burke stated, “never was the work of any legislator, never was made on any foregone theory.”

Burke’s goal as legislator was to preserve—or where necessary, create—social harmony. He acknowledged that “the true danger of every state is, to render its subjects justly discontented.” He especially sought to reform areas or practices of law by which disharmony was fomented. The oppression that some felt by governmental actions must not be allowed to fester; this could lead to desire in some to scrap the entire constitutional and political order rather than target the specific abuse at hand. No legal order is irredeemable when the fundamentals of that order are sound enough to sustain it and to provide the tools of its reform.

On matters of government policy, Burke was liberal Whig. He believed that the preservation of peace and commerce, and the prevention of violence and oppression, was the proper end of all government. His sympathy for the rights of the American Colonists, and detestation of the war prosecuted against them, is well-known, while his embrace of numerous reformist causes is less remembered. Burke defied almost every prejudice of his time. He wanted the slave trade abolished; in lieu of that he proposed a slave code is remarkably progressive. He was appalled by the depredations in British India and sought to correct them by reining in the East India Company and in leading the

11 Reflections, supra note 5, at 185.
12 Edmund Burke, Speech on Fox’s East India Bill, in SPEECHES AND WRITINGS 282, 296. (“All this vast mass [of the Indian social structure], composed of so many orders and classes of men, is again infinitely diversified by manners, by religion, by hereditary employment, through all their possible combinations. This renders the handling of India a matter in a high degree critical and delicate.”)
14 Speech on the Reform of the Representation, supra note 10, at 275.
16 Reflections, supra note 5, at 262 (arguing that the monarchy of France was not so corrupt and tyrannical that it was beyond all reform).
impeachment of Warren Hastings, an English official there. He had no condescending view of the rights of all people in all regions of the globe. Burke warmly embraced toleration for all religious sects, even those who would not tolerate others. He saw no inconsistency in championing the rights of religious dissenters while at the same time embracing the established church. Burke was an ecumenical who stressed the necessity of some religious adherence in aid of social cohesion, but felt that an undue stressing of religious differences in government policy jeopardized that societal balance so necessary for the full flowering of liberty and society.

Burke launched a generation’s reform of political administration that lasted well into the next century, bringing British government into the modern age. 17 Burke saw no inconsistency in his championing of reform and his detestation of revolution. To reform, government, thought Burke, was to preserve the Constitution. To revolutionize society is something altogether different—“vulgar in the conception, perilous in the execution.” 18

B. Burke and “Metaphysical Madness”

Edmund Burke was not a coffeehouse philosopher; he merely laid out first principles of politics and applied them to the matters of his day. Unlike Bacon, who shares with Burke the distinction of England’s greatest philosopher-politician, Burke is not remembered for musings on philosophical questions unattached from their applicability to contemporaneous events. Burke, the professional legislator, left us no typical philosophical “essays.” He acknowledged the difference: “A statesman differs from a professor in a university: the latter has only the general view of society; the former, the statesman, has a number of circumstances to combine with those general ideas, and to take into consideration. Circumstances are infinite, are infinitely combined, are variable and transient: he who does not take them into consideration is not erroneous, but stark mad…; he is metaphysically mad.” 19 Burke made a distinction between theory and principle. 20 Any application of thought to the circumstances of man, which is the duty of all who hold power over the legal order, involves the recognition of some governing principles empirically-tested to produce happiness and inure to the common good. Theory, however, is unconnected to the actual workings of man in society—it posits nothing useful or truthful about society or the legal order for the benefit of those charged with its superintendence. So quite naturally, it is precisely the professors and metaphysicians who would seek to undo his influence during the Nineteenth Century. 21 Unlike Bentham, Burke wrote no treatise on law or legislation generally; unlike

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17 See PAUL JOHNSON, THE BIRTH OF THE MODERN: WORLD SOCIETY, 1815-1830 395 (1991) (noting that the great wave of Nineteenth Century political reform was inaugurated by Burke’s “Speech on Economical Reform” in the Eighteenth Century)
18 Reflections, supra note 5, at 290.
19 Edmund Burke, Speech on the Petition of the Unitarians, in 7 WORKS 41, 41.
20 Id. “I never govern myself, no rational man ever did govern himself, by abstractions and universals. I do not put abstract ideas wholly out of any question; because I know well that under that name I should dismiss principles, and that without the guide and light of sound, well-understood principles, all reasonings in politics, as in everything else, would be only a confused jumble of particular facts and details, without the means of drawing any sort of theoretical or practical conclusion.” (emphasis added).
21 On radical critiques of Burke, see, generally, STANLIS, supra note 6.
Montesquieu, he did not ponder the theoretical basis of this or that constitution of government. Burke arrived at first principles reluctantly, through a deliberately-studied approach, in order to satisfy the business of legislation and in the end protecting European society from revolutionary fervor.

While the term did not have currency in his day, as it would in the next century, Burke’s great nemesis was ideology. Burke lacked the vocabulary to define the dogma that he saw as leading to totalitarianism in France. When ideology enters into the legal structure, law becomes nothing more than the systematic application of human theory, and therefore of human will, to the natural, conventional liberty that nourishes human society. Burke sought to rein in the influence of one person’s or a group of people’s will—will for him being the opposite of law, reason, and justice—over the life, liberty, and property of another. Burke’s conservatism sought to insulate the potential for justice and freedom he saw in prevailing institutions from theories looking to uproot them; the “metaphysical madness” of those who fail to allow circumstance to modify their principles and thinking. He rejected the application of a system of thought by means of political force which has as its goal a desire to supplant the moral order manifested in civil society.

Burke certainly did not reject the application of thought to the governance of society, and made the principle-theory distinction noted above. Burke instead opposed rationalistic systems of thought that sought to revolutionize man’s relation to society and to his fellow members, an attempt to “regenerate…the moral constitution of man.” Burke called this type of system “theoretical dogma.” Burke’s beliefs about the legal order point toward how civil society might insulate itself from the tyranny that a system of ideas may bring when put in practice. Burke prescience in forecasting the results of France’s much-exulted revolutionary moment may be extrapolated further into the future. His depiction of the all encompassing state in his Letters on a Regicide Peace, of the state projecting dominion over the minds of men by proselytism, and over objects by force, subsuming all individuality and community, may be applied to dozens of unsavory systems imposed over societies since his time.

Burke would never have been associated with any philosophical system that provided ready-made answers to all political questions, let alone to have arrived at total scientific or philosophical truth comprehending all facets of human existence, which is what ideologies claim to have done. Burke had too much respect for his predecessors, and for the potentiality of the future, and ceded much of the theory concerning the human condition to religion. Instead, the philosophy of Burke is the opposite of ideology, which

23 Burke noted that “the whole revolutionary system [is] the very reverse, and the reverse fundamentally, of all the laws, on which civil life has hitherto been upheld in all of the governments of the world.” Edmund Burke, A Letter to a Noble Lord, in SPEECHES AND WRITINGS 464, 498.
24 Letter to a Member of the National Assembly, in 4 WORKS 12, 28.
25 Thoughts on French Affairs, in 4 WORKS 315, 319 (emphasis taken away).
26 Burke, Letter II [on the Regicide Peace], in 5 WORKS 342, 375.
27 Burke would probably maintain with the classical liberal that society is not a product of ideology because it is not willfully constructed. However, Burke’s principles of law might be attacked as ideological in that they are normative. But Burke’s empirical attempt to conceptualize the existing order of society through the use of intelligible philosophical language is qualitatively different from engrafting a priori concepts onto those social relations—or the rationalist project. On this distinction see Michael Oakeshott, Political Education, in RATIONALISM IN POLITICS AND OTHER ESSAYS 43, 52-53 (Liberty Fund ed., 1991).
instead insists that (where legislation is called for) the statesman use as his guide the principle of prudence, circumstance, and experience in protecting—yet bettering—the pillars of humane society that Burke spent his career expounding. He should be guided by principles derived not from theory, but from practice. For Burkeans, the moral order is not created by ideology; it is not “created” at all. Civilization is not the product of a moment but comes about only through long, difficult development—the application of diverse principles of government and prudence to society over a long course of time, and in a manner best suited to the circumstances of the people. Wisdom and knowledge do not come to man at once. They involve a slow unfolding over time. “It were good, therefore,” wrote Francis Bacon of the English Constitution, “that men in their innovations would follow the example of time itself, which, indeed, innovateth greatly, but quietly, and by degrees, scarce to be perceived.” A stable civil society is not built by one person or in a day, but it can be undone in a day. Burke brought an insight into politics seldom seen in his day: he knew that government and law could either sustain or destroy the liberal order. The liberal order is not possible without law, but naked will masquerading as “law” could also be its undoing.

Furthermore, Burke did not believe that the precise elements of the English constitutional order should be the basis of all legal orders, everywhere. He never claimed for his ideas on English jurisprudence that they formulaically produce a balance of liberty and order under all social circumstances. Burke, in a celebrated speech, accepted that each society had organically developed according to its own principles. Those who advance rationalistic schemes of government, on the other hand, presumptively claim that they have solved the riddle of all human and social development such that their ideas might accommodate all social circumstances. For Burke, it was preposterous for one to claim that schools of philosophy can generate a system of social order better or more suited to man than the one that arises through his shared social experience.

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Man, being a political animal, cannot thrive without his historically-developed civilization. The so-called liberation of man from civilization as he knows it retards his moral and social development. Burke’s lifelong argument was essentially Aristotelian; that man is by nature a political animal. He needs the structure provided by society in order to reach his fullness as an earthly being. Civil society evolves in a way that is tailored to those needs.

The goal of this article is not to prove a refined point about one portion or another of Burke’s thought. Partial treatments of Burke’s thought have been at the root of much confusion and mischaracterization of him. Hardly anything Burke put forward can be understood outside its relation to everything else; such a paper would not be serviceable to the general reader or lawyer who might be surprised to find in Burke one of the language’s greatest expositions on the liberal legal order. Given the responsive and

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28 For a discussion of Burke’s rejection of “constructivism,” i.e., the idea that society is created by willful actors on a voluntary basis, see Yves Chiron, *The Influence of Burke’s Writings in Post-Revolutionary France, in IAN CROWE (ED.), THE ENDURING EDMUND BURKE: BICENTENNIAL ESSAYS 85, 91 (1997).


30 Speech on Fox’s East India Bill, *supra* note 12, at 296 (detailing India’s distinctive social development).
practical nature of his writings, Burke never delved deeply into one or another problem of political philosophy. Instead, this paper represents a lawyer’s reading of the writings and speeches of Burke, in an attempt to illustrate, topically, the two pillars laid out above by abstracting them from the body of his work. One finds that Burke repeatedly treats the legal order of a free people; one that nurtures both social harmony and civil society, and how the statesman is to prevent the legal order from being used as a tool against the society it is instead intended to nourish.

II. The Uses and Abuses and Legislation

_The essence of law...requires that it be made as much as possible for the benefit of the whole. If this principle is to be denied or evaded, what ground have we left to reason on? We must at once make a total change in all our ideas, and look for a new definition of law. Where to find it I confess myself at a loss._

Burke spent his entire career putting forward the confined purposes of legislation. He demanded that it have some view toward general justice, that it not trample upon long-understood rights, and that it not serve dogmatic schemes. He perceived that legislation, if not made for the interests of all, easily lent itself to abuse. Legislation not made for the benefit of the whole, or that is not generally applicable, is nothing more than a penalty on those either included in its punishments or excluded from its favors. Legislation provides for a framework of general rules in which society functions, leaving the principle of the rule to its own operation. Any rule short of a general rule hampers the full development of society. The maintenance of social harmony, Burke’s positive pillar, demands that all of its members might derive the same benefits and protections that emanate from that society. Furthermore, if law is to be a barrier to ideology, Burke’s negative pillar, it must be tailored to the people it purports to regulate, by “following, not forcing, public inclination.” It must recognize and protect the moral order, not reorient it according to some ulterior scheme.

Burke defined law obliquely, by noting oftentimes what it is not and what its benefits are. Life under a system of law is the opposite of slavery. Law provides stability and certainty, “establishing invariable grounds of hope and fear...keep[ing] the actions of men in a certain course, or direct[ing] them to a certain end.” Burke in one speech puts forward two requisites of law: it must be known and it must be stable. To Burke, law provides stability “in the modes of holding property,” allowing for socially

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32 _Reflections, supra_ note 5, at 302 (noting that the best legislators “have been satisfied with the establishment of some sure, solid, ruling principle in government...and having fixed the principle, they have left it to its own operation”).
34 Edmund Burke, Speech on the Relief of Protestant Dissenters, _in 7 WORKS_ 23, 24.
35 _Reflections, supra_ note 5, at 231.
36 Speech on the Middlesex Election, _in 7 WORKS_ 60, 64. These particular elements of law will be discussed in the section on the judicial function, _infra_, at II(A).
necessary things such as the continuation of child rearing and education. All laws must have in their view justice. Justice is the great “standing policy” of civil society; laws not serving the ends of justice are “no policy at all.” Like Aristotle, Burke furnished a general definition of “justice” as an “equality of restraint,” where “the liberty of no one man, and no body of men, and no number of men, can find means to trespass on the liberty of any person, or description of persons, in society.” The contours of Burkean justice, as the recognition of a sphere of liberty available to all, are all present in his writings and speeches concerning the proscription of legislation that does not serve the end of justice for all or some in society. Burkean justice is “ascertained by wise laws, and secured by well-constructed institutions.”

Burke recognized in more than one instance the sovereignty of Parliament, the legislative organ in British jurisprudence. But for him, Parliament is not wise in imposing its will simply to prove a point of prerogative. It is better that the subject be happy and prosperous than for Parliament to win a constitutional argument against him. The lawmaking power should not be exercised to prove its existence, in a fashion irrespective of the justness of the policy. Burke famously noted that nobody will be argued into slavery. Burke, for example, framed his opposition to the revenue laws passed against the American colonies not in constitutional terms, but in terms of the soundness of the policy. The true test for good legislation depends not upon “what a lawyer tells me I may do, but what humanity, reason, and justice tell me I ought to do.” Legislators, unlike lawyers, should not be bound to strict rules. Legislators should be guided instead by “the great principles of reason and equity and the general sense of mankind,” which is a moral on top of the constitutional basis for all governmental action. Burke at one point defined legislation as “[i]n effect to follow, not to force, the public inclination,—to give a direction, a form, a technical dress, and a specific sanction, to the general sense of the community…” This is a definition of legislation that is entirely antithetical to one allowing for a priori schemes.

Burke held with Cicero and Aquinas that the ultimate aim of any law is that it be for the common good. The common good is “the essence of law.” His treatment of this subject is a Tract on the Popery Laws, which reads as a legal brief setting out why the Irish Penal Laws were void and serves as Burke’s dissertation on general principles of law. Burke spent his entire career in opposition to injustice in Ireland, his native land, and produced some of his most thoughtful writings and speeches in the effort. This

37 Reflections at 231. Burke concludes this thought by noting that certainty in property “form[s] a solid ground on which any parent could speculate in the education of his offspring, or in a choice for their future establishment in the world.”
38 Id. at 289.
39 Letter to Charles-Jean-Francois Depont, supra note 22, at 405.
40 Id.
41 EB, Speech on American Taxation (1774), in 2 WORKS 34. (“The Englishmen in America will feel that [unlimited revenue laws are] slavery; that this is legal slavery will be no compensation either to his feelings or his understanding.”)
42 Id. at 73.
43 EB, Speech on Conciliation with America, in 2 WORKS 99, 140-141.
44 Letter to the Sheriffs of Bristol on the Affairs of America, supra note 33.
45 Id. at 225.
essay, on the Penal Laws of Ireland, serves as the basis of all of Burke’s work concerning Ireland, and provides the best insight into his view of proper legislation.

According to the Tract, law should not do injustice to anyone, not even an individual. When it has injustice, however small, as its purpose, it violates the great test of legislation. The more people it targets for its injustice, the less valid it becomes—“its extent determines its invalidity.” With this as Burke’s test for legislation it is no wonder why he always denounced laws that disabled entire populations. Law must bear the imprimatur of the people—if it oppresses the people it cannot have the people’s authority, an authority essential to the validity of a law. There is no way one could “allege any reason for the proscription for so large a part of the kingdom, which would not hold equally to support, under parallel circumstances, the proscription of the whole.”

Though law is a reflection of the will of the people, Burke was not a pure democrat. Supposing that the majority of the people gave sanction to a widespread exclusion of fellow citizens from the common advantages of society, the law would still be null and void. Such a law would not be for the common good.

Burke considered the common good to be the ultimate aim of legislation, bringing to better light why he insisted a representative’s duty to be to the nation at large, and not to his particular constituency. This permits Parliament to act “upon a very enlarged view of things,” and not degenerate into “a confused and scuffling bustle of local agency.” This can lead to nothing but legislative favoritism, partially-applicable legislation, and incomplete justice as a consequence. For Burke, “[p]artiality and law are contradictory terms.”

Law must be promulgated by “a proper and sufficient human power to declare and modify the matter of the law.” That human power must posses the constitutional authority to act and must recognize solemn compacts made to proscribe certain types of laws. No constitution, however, may entrust the legislator to make a law in contravention of a “superior law.” That superior law is, of course, natural law, a preeminent consideration in Burke’s jurisprudence that will be treated separately in this article. The natural law dictates that legislation suit two foundations of positive law, alluded to in Burke’s definition of law noted above: equity and utility.

Equity is equality or fairness. Law must recognize man’s common nature, and treat all with the dignity entitled to man, who is created in God’s image. This is the
corollary to the great “common good” principle of legislation. The more targeted a law is, the more likely it will be substantially unjust. Equality is that “which Philo, with propriety and beauty, calls the mother of justice.” Law must assume all to be equally amenable and subject to it, and all must be included in the “common advantages of society.” If classes and exemptions are recognized, such a process would inevitably support the enactment of a law proscribing all but the lawmaker—tyranny by definition. Even if it may be said that the rich take advantage of a law for their benefit, they should not be outside of the law’s protection: “The same laws which secure property encourage avarice; and the fences made about honest acquisition are the strong bars which secure the hoards of the miser.” The idea behind this is that it is impossible that any useful principle of law should be established that does not advantage the weakest as well as greatest of the population. Legislatures possess only the authority that the people at large have. They should seek the will of the people at large in exercising a legislative judgment on behalf of the people, and the people are presumed to accept what the lawmakers have enacted, as an expression of popular will. A subject should not be burdened by a law in which he had no share in making. “The taking away of a vote,” for Burke, “is the taking away of the shield which the subject has, not only against the oppression of power, but the worst of all oppressions, the persecution of private society and private manners.” Without the small protections afforded by the franchise, those disfranchised, should they fall into popular disfavor, are easy prey of the electoral process.

The second foundation of law is utility. Utility is not the end of all law, the calculus employed by Bentham or Mill; it simply means that the substance of a law is rationally tied to the common interests of society. Utility is not an ultimate test of legislation. It simply calls on the legislator to use his divinely-endowed rational nature to frame a law that best comports with original justice. “General and public utility,” recognizes that the essence of the law—the common good—is not furthered by irrational or non-useful laws. Applied specifically to the legal disabilities of the Irish Catholics, “a law which shuts out from all secure and valuable property the bulk of the people cannot be made for the utility of the party so excluded.” Burke rejected the hypothesis that the happiness of the community can be secured by laws that serve anything other than the common good; even if such was the case, the law against the general good would not be just—it would not even qualify as a law. Constitutions, like regular laws, must

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60 Id. at 214.
61 Id. at 213.
62 Id. at 215-216. Burke was not ashamed to use “slippery-slope” arguments. (“For, if [exceptions to legal equality] grow to be frequent, in what would they differ from an abrogation of the rule itself? By becoming this frequent, they might even go further, establishing themselves into a principle, convert the rule into an exception.”); id. at 216.
63 EB, Speech on Repeal of the Marriage Act, in 7 WORKS 131, 134.
64 Id.
66 EB, Letter to a Peer of Ireland on the Penal Laws against Irish Catholics, in SELECTED WRITINGS 229, 232.
67 Id.
69 Id. at 215.
70 Id. at 214.
also be made for the common good.\textsuperscript{71} Bentham, Mackintosh, and Mill saw utility as the great end or purpose of legislation—the maximum of happiness for the greatest number. Utility, however, is the means to securing the proper, natural law purpose of legislation. Utility preserves social harmony by keeping law substantively just, while equity preserves the same by keeping law generally applicable.

The unintended consequence of legislation may give rise to grievances. Burke foresaw in his great speeches on American policy, for example, that exacting revenue against the American colonists’ protests would imperil the empire and destroy the commercial prosperity that had developed under the existing legal regime. In arguing against taxing the colonists for revenue, he pointed out that more revenue came from the colonies from external duties, before the imposition of the new taxes. This evidenced a larger principle at work: “Tyranny is a poor provider. It knows neither how to accumulate nor how to extract.”\textsuperscript{72} The exercise of sovereign power is a thing seriously to be considered and fraught with great consequences. Burke ridiculed those whose American policy was nothing more than to press Parliamentary claims to the breaking point.\textsuperscript{73} Sovereignty is a means by which Parliament may enact just and beneficent legislation and not a mechanism for the raw exercise of power.

Laws must be stable. Men frame their habits and modes of dealing in view of existing policy, such that it would be unjust for the legislature to occasion a great disruption of the legal scheme to which society has become accustomed. Burke goes as far as to suggest that a stable imperfect law is sometimes better than a new, more perfect one. For example, Burke noted the state of British colonial regulation as one of “imperfect freedom;”\textsuperscript{74} however, Americans had grown accustomed to the commercial law in such a way that to change the regime would upset long-established courses of dealing. Burke defended the Navigation Act that had regulated colonial commerce as a law justified for no other reason than its long persistence as a statute and the dependencies that had grown up around it.\textsuperscript{75} As of 1774, the colonists “scarcely had remembered a time when they were not subject to such restraint.”\textsuperscript{76} Burke coined the phrase “salutary neglect,” which carries with it the idea that dependency by a people upon a certain legal framework proves its legitimacy and should secure that law (or absence of a law) against repeal.\textsuperscript{77} This was especially true in the case of the American colonists, where a dependence on government non-intervention had allowed them to build up a prosperous, commercial society. If there is a clear case of Burke as the advocate of non-interference with established social tranquility, it was in regard to the

\begin{footnotesize}
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\item \textsuperscript{71} Id. at 219.
\item \textsuperscript{72} Speech on American Taxation, (1774), supra note 41, at 77.
\item \textsuperscript{73} Speech on Conciliation with America, supra note 43, at 145.
\item \textsuperscript{74} Speech on American Taxation at 34.
\item \textsuperscript{75} Id. at 33; See also EB, Observations on a Late Publication on the Present State of the Nation, in 1 WORKS 269, 378 (hereafter “Observations”) (arguing against repeal of the Navigation Act); JOHN PLAMENATZ, 1 MAN AND SOCIETY 338 (observing that “[c]ertain relations had arisen during the last one hundred and fifty years between the mother country and the colonies…. [T]hey had in fact proved acceptable to both parties, and that was their sufficient justification.”).
\item \textsuperscript{76} Observations at 33.
\item \textsuperscript{77} Compare the Penal Laws of Ireland, which Burke knew very well were enacted for the sole purpose of oppression of one class of people and the elevation of another. Patently unjust law, however well-established, may never be legitimated by time or prescription. On “salutary neglect,” see Speech on Conciliation with America, supra note 43, at 79.
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Americans. For Burke, there was a strong presumption in favor of any settled scheme in favor of any untried project, especially where existing social harmony is at stake.  

A law must “fairly describe its object.” Criminal statutes, especially, must clearly define the prohibited conduct. Burke, in a letter to two constituents, protested a proposed act for the partial suspension of habeas corpus that authorizes the indeterminate detention of “pirates.” By pirates, the act meant, according to Burke, the commanders and mariners of American ships during the American war.  

Burke’s criticism of the statute was that it categorized American rebels according to the denotation of pirate, “confounding not only the natural distinction of things, but the order of crimes—which, whether by putting them from a higher part of the scale to the lower or from the lower to the higher, is never done without dangerously disordering the whole frame of jurisprudence.” Burke ceded that their action was treasonous, but it was unjust to consider them as pirates for the purpose of denying them habeas corpus when captured, in effect degrading their offense without lightening the punishment (a punishment of death and forfeiture). Simply put, those not engaged in infamous actions, such as piracy on the high seas, but instead are engaged in acts of “mistaken virtue,” such as rebellion, are not to be confused with one another. The law should not resort to such sleight of hand. The very vocabulary of the law might impair the liberty of the subject. Burke expressed it thusly in the context of religion: “A very great part of the mischiefs, that vex the world,” Burke noted in a letter to his son, “arises from words.”

It was no argument for Burke that an unjust law may persist because of the laxness in its enforcement. If the target of the law is a real evil, the lack of enforcement is a scandal. But if the prohibited conduct is not a moral or political evil, the law should not serve as a potential menace to those wishing to engage in the proscribed conduct. The laws may be used as a tool for the unscrupulous minister—“roused from their sleep…as instruments of oppression.” The freedom of the subject should not rest on the simple refusal of a minister to enforce a bad law, a refusal that may be the product of political expedience, private inclination, or the manners of the age. Unjust laws, therefore, may become “the instruments of private malice, private avarice, and not of public regulation.” There is nothing quite so vexatious as the revival in the enforcement of a law, the non-enforcement of which had generated much happiness and dependency throughout society.

Law must be adequately tailored to the society it purports to regulate. “People must be governed in a manner agreeable to their temper and disposition; and men of free character and spirit must be ruled with, at least, some condescension to this spirit and this

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78 Speech on Reform of Representation of the Commons in Parliament, supra note 10, at 94.
79 Letter to the Sheriffs of Bristol, supra note 33, at 139.
80 Id. at 190.
81 Id. at 191.
82 Id. at 191.
83 Id. at 26.
84 Id.
85 Id.
86 Id. at 27.
Constitutions and laws evolve spontaneously; he ridiculed the speculative philosophers of France, who have devised a ready-made parchment Constitution suited for nations of every character and stripe. Instead, Burke drew from Montesquieu that the “general character and situation of a people must determine what sort of government is fitted for them.” Burke realized earlier than his contemporaries that the Americans, as descendants of Englishmen, schooled in the liberties of Englishmen, would not stand for oppressive taxes and penalties. Burke saw nothing but a gross violation of this principle of legislation in Parliament’s policy on America.

Law should not have as its basis a fear of punishment. Burke noted in one instance that, prior to the French Revolution, the King of France was the fountain of honor and justice. For this reason he was obeyed. The government of the National Assembly, however, motivated obedience only by fear and force, and not legitimacy. The exercise of absolute power will never elicit from the subject the perfect obedience necessary for societal harmony. Burke eloquently addressed the principle in a letter to his fellow Whig Charles James Fox: “People crushed by law have no hopes but from power. If laws are their enemies, they will be enemies to laws; and those who have much to hope and nothing to lose will always be dangerous, more or less.”

Likewise, laws should not be enacted to penalize entire populations. This recurs as a theme throughout Burke’s political writings, whether the victims are entire nations, minorities within society, or religious groups. Instead, “[t]he coercive authority of the state is limited to that which is necessary for its existence. To this belongs the whole order of criminal law. It considers as crimes…trespasses against the rules for which society is instituted… It does bear, and must, with the vices and follies of men, until they actually strike at the root of order.”

Law, therefore, should proscribe conduct—and only that inimical to society—and not belief, birth, or status. Burke treats the rule against penalizing entire groups of people with more depth when discussing the administration of justice.

It is at the root of the liberal legal order that legislation simply provide a generally-applicable framework in which civil society flourishes. The rules of just legislation Burke put forward stemmed from his desire to remove instabilities created by unjust law. The positive pillar of Burke’s thought—the general happiness of free society—depends mightily on a proper use of legislation. Burke hardly ever sought to add to society’s burdens through new or added law. He did not see legislation as a fix for all society’s problems. His best known causes were in aid of Parliamentary action seeking to undo the consequences of bad legislation. “Law” for Burke was not so much

87 Observations, supra note 75, at 395. See also Letter to Richard Burke, supra note 82, at 431; Reflections, supra note 5, at 314 (“It is remarkable, that, in a great arrangement of mankind [the French revolutionary constitution], not one reference whatsoever is to be found to anything moral or anything politic; nothing that relates to the concerns, the actions, the passions, the interests of men. Hominem non sapient.”).
88 Letter to a Noble Lord, supra note 23, at 504.
89 Speech on Conciliation with America, supra note 43, at 141.
90 Observations, supra note 75, at 395.
91 Speech on Conciliation with America at 178.
92 EB, Letter to Hon. Charles James Fox, in 6 WORKS 137, 147.
94 For example, he sought to repeal the Popery Laws, the Test Acts, the East India Company monopoly, and the various measures that inflamed the American colonists.
legislation as it was the common law, discussed *infra*, which had evolved to suit the specific circumstances and relationships found among members of society. Legislation, just like the common law, should reinforce and not supplant the custom and mores that are foundational to a functioning, harmonious society. If legislation disrupts social harmony, and trespasses on long-established dependencies, it matters not whether it is technically constitutional, because it is immoral. Moreover, if the rational citizen is happy that he lives in freedom, he is free, and that test marks the prudential boundary of legislative power.

A. Society’s Interest in Justice and Mercy

Burke’s liberal and humane sentiments were in no area better displayed that in his treatment of the administration of justice. He continued his recurrent theme of social harmony in making the case for leniency even for the avowed enemies of society. Burke proffered some suggestions to a restored government in France on dealing with those responsible for the crimes of the Revolution:

I am not for a total indemnity, nor a general punishment. And first, the body and mass of the people never ought to be treated as criminal. They may become an object of more or less constant watchfulness and suspicion, as their preservation may best require, but they can never be an object of punishment.

Burke continues:

To punish [those culpable] capitally would be to make massacres. Massacres only increase the ferocity of men and teach them to regard their own lives and those of others as of little value; whereas the great policy of government is, to teach people to think both of great importance in the eyes of God and the state, and never to be sacrificed or even hazarded to gratify their passions, or for anything but the duties prescribed by the rules of morality, and under the direction of public law and public authority.

Burke, despite his hatred of the French Revolution and what those responsible for it had done, extended his humane sentiments to those held captive by revolutionary passions. As Burke saw it: “The offences of war are obliterated by peace.”

The regicides, those guilty of other murders, those who demolished churches, and those who led the Jacobin Clubs, should not “escape a punishment suitable to the nature,

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95 Letter to the Sheriffs of Bristol, *supra* note 33, at 166.
96 *Id.* at 169.
98 *Id.* at 463.
quality, and degree of their offence, by a steady but a measured justice.” 99 Provided,
however, that they receive due process of law according to French jurisprudence and
criminal precedents. 100 In no way should any class of accused be lumped into tables of
proscription; due allowance should be made to any mitigating circumstances of an
individual’s case. “Mercy is not a thing opposed to justice.” Burke offered. “It is an
essential part of it—as necessary in criminal cases as in civil affairs equity is to law. It is
only for the Jacobins never to pardon. They have not done it in a single instance.” 101

After detailing the history of English penal statutes in one of his most celebrated
speeches, Burke concluded that “[l]aws made against an whole nation were not the most
effectual means for securing its obedience.” 102 General indemnities are a natural human
impulse, but also an impulse to laziness in the administration of justice.

This a want of disposition to proceed laboriously
according to the cases, and according to the rules and
principles of justice on each case: a want of disposition
to assort criminals, to discriminate the degrees and
modes of guilt, to separate accomplices from principles,
leaders from followers, seducers from the seduced, and
then, by following the same principles in the same detail,
to class punishments, and to fit them to the nature and
kind of the delinquency. 103

And punishment should not bind a people perpetually—there is no such thing as
inherited guilt. No crime is so great that the punishment should be exacted generation
after generation, as in the sad case of the Irish Catholics. 104

Burke advanced some thoughts on the punishment of those arrested in the Gordon
Riots of 1780. 105 The death penalty should always be used sparingly, and, as in the case
of the French Jacobins, Burke advocated the consideration of mitigating circumstances in
each particular case. One mitigating factor is whether a rister was following rather than
leading, and whether the actor knew the illegality of his conduct. 106 Burke goes on in a
short memorandum to sketch other mitigating factors in outline form. They are: whether
one is a follower or principal, whether one is roused to riot by instant passion rather than

99 Id. at 464. Burke sees those of the latter class as having “rebelle against the law of Nature and outraged
man as man…” Id. at 463.
100 Id. at 464.
101 Id. at 465.
102 Speech on Conciliation with America, supra note 43, at 150-151.
103 On the Policy of the Allies, supra note 80, at 466-467.
104 Letter to Richard Burke, supra note 82, at 436 (noting the Seventeenth Century origins of the Penal
Laws).
105 These anti-Catholic riots were instigated by Lord George Gordon. Burke had personal reasons for
despising the rioters. As a leading advocate of Catholic Emancipation in Ireland, he and his property were
particularly targeted by the rioters. See, generally CARL CONE, BURKE AND THE NATURE OF POLITICS: THE
106 EB, Some Additional Reflections on the Executions, in 6 WORKS 250. Burke further laments the fact
that the ringleaders were able to escape arrest, leaving “into the hands of justice [the] poor, thoughtless set
of creatures, very little aware of the nature of their offence.” They were more unlucky than criminal. Their
crimes are not justified by their ignorance of the law, but mitigated by it; id. at 251.
“early and deliberate purposes,” whether one is young or old, male or female, and whether one is intoxicated instead of acting out of wantonness.\(^{107}\)

He wrote to Sir Grey Cooper, a Secretary of the Treasury, that “[j]ustice and mercy have not such opposite interests as people are apt to imagine.”\(^{108}\) Burke was skeptical of the deterrence quality of capital punishment, especially if widespread, retaliatory executions are employed.\(^{109}\) No criminal will be cowed by the government’s disrespect for the life of the subject. He will be more hardened than subdued. As for the general population, “[t]he sense of justice in men is overloaded and fatigued with a long series of executions, or with such a carnage at once as rather resembles a massacre than a sober execution of the laws. The laws thus lose their terror in the minds of the wicked, and their reverence in the minds of the virtuous.”\(^{110}\) Burke ultimately saw that no one person was responsible for the Gordon Riots—they are instead the culmination of a bigotry that had found ample support in law: “For we must consider that the whole nation has been for a long time guilty of their crime.”\(^{111}\) As a result, the punishment should be selective, a “well tempered severity” or “as steady and cool as possible.”\(^{112}\)

There are times when public necessity requires the suspension of the law’s operation. Foreshadowing Abraham Lincoln, Burke noted:

> There are occasions, I admit, of public necessity, so vast so clear, so evident, that they supersede all laws. Laws being only made for the benefit of the community, cannot in any one of its parts resist a demand which may comprehend the total of the public interest. To be sure, no law can set itself up against the cause and reason of all law; but such a case very rarely happens.…\(^{113}\)

The clear implication of this is that law, when it works against its entire purpose (the preservation of the community), is not to be considered paramount to this purpose. This is an exacting standard—law cannot be suspended to suit mere temporary convenience.\(^{114}\)

Central to any system of jurisprudence is a conception of the judicial function. Most all of Burke’s views on judicial power are contained in his critique of the court system provided under the new, revolutionary constitution of France. Burke saw the judiciary as a balance to the supreme power of the state that exists exterior to the state—above all the courts of justice ought to be independent from both the other organs of government and (most especially) the popular will.\(^{115}\) Burke expressed concern that the newly-constituted courts of France would not preserve their independence from the

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\(^{107}\) Id. at 253.

\(^{108}\) EB, Letter to Sir Grey Cooper (1780), in 6 WORKS 243.

\(^{109}\) EB, Some Thoughts on the Approaching Executions, in 6 WORKS 245, 247.

\(^{110}\) Id.

\(^{111}\) Id. at 248.

\(^{112}\) Id.

\(^{113}\) EB, Speech on a Plan Economical Reform (1780), in 2 WORKS 265, 329.

\(^{114}\) Id.

\(^{115}\) Id. at 351.
democratic temper, which was to him the singular virtue of the abolished parlements. Burke related with approbation that judges of the parlements, who had a power akin to American judicial review, were appointed for life by the king and not subject to his power. It is easy to infer from Burke’s sentiments concerning the parlements that he views the role of the judiciary as a bulwark against innovation and arbitrariness by the supreme power. The judiciary secures the proper functioning of the law even in times of distress or peril. France in 1790, more than ever, needed a judicature ready to preserve the long-established laws and liberties against the democratic reaction of the day, as he termed it, as a “balance[] and corrective[].” Burke applauded the process of remonstration, by which the Parlement of Paris rendered the decree of the King unconstitutional. All law should be judicially tested according to what Burke called “the principles of general jurisprudence.” This exercise was to him the height of judicial independence; Burke saw nothing but judicial subservience in the newly-minted Constitution of France. The new courts of France were not allowed to review the decisions of administrative bodies of the government, nor could they pass upon law not decreed by the National Assembly. Burke detected further folly; unlike in the revolutionary scheme, judges should be free to draw upon custom and tradition and not merely positive law in protecting against tyranny. For the legislature to prescribe the rules of judicial review and decision, as the National Assembly had done, would be to destroy the independence necessary to the judicial function. Furthermore, Burke forecasted the trouble associated with making all public ministers exempt from the jurisdiction of the courts, which effectively put them above both the protections and constraints of the law and at the whim of the National Assembly.

Burke heaped further criticism on the judicial system set up by the National Assembly in his Letter to a Member of the National Assembly. The Revolutionary judicature was too much controlled by the Assembly to perform its critical function of ensuring respect for the law. The courts were packed with corrupt officers of the Assembly, “men, who had their minds seasoned with theories perfectly conformable to their practice [of confiscation and robbery], and who had always laughed at possession and prescription, and defied all the fundamental maxims of jurisprudence.” This is far from the neutrality and respect for the law that Burke saw as essential to the judicial function.

Even in times of political turmoil and revolution, the judiciary is to perform its function with the utmost respect for the lives and fortunes of the people. In this respect Burke praised Oliver Cromwell, who refrain from using the judiciary of England as an

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116 Reflections, supra note 5, at 338.
117 Letter to a Member of the National Assembly, supra note 24, at 45. Burke calls the Parlement of Paris “guardians of the ancient laws, usages, and Constitution of the kingdom” who, at the inception of the Revolution, should have “sounded the alarm to the whole nation” rather than “suffer[] the king’s ministers to new-model the whole representation of the [Estates General].”
118 Reflections, supra note 5, at 339.
119 Id. at 339-340. Burke is critical here of the Assembly appointing the judges as well as providing the rule of decision for each case rather than allowing the judge the discretion to draw upon the inherited body of French jurisprudence.
120 Id. at 340.
121 Letter to a Member of the National Assembly, supra note 24, at 12.
122 Id.
instrument for his Puritan revolution. Cromwell had the eminent jurist Sir Matthew Hale “administer, in a manner agreeable to his pure sentiments and unspotted character, that justice without which human society cannot subsist.” The judge does not support any particular government or administration, and is not to be party to any revolution or counterrevolution. His only loyalty is to “civil order itself.”

To Burke, Hale exemplified this in a jurist and Cromwell set the example the French should follow in their administration of “revolutionary” justice. A change in government should not reorder well-established notions of justice. According to Burke, to Cromwell “we are indebted...for the preservation of our laws, which some senseless assertors of the rights of men were then on the point of entirely erasing, as relics of feudality and barbarism.”

Even during those days of “military and despotic” government, “[e]very man was yet safe in his house and in his property.”

Burke, in proposing to reform civil offices, ranked judges as the first in his list of those deserving claims on the public purse. Independence of judges is one of the fundamentals of the civil community, the better to serve the public justice. They should not feel the need to resort to the political process in demanding an adequate salary; such a necessity might ultimately lead them to extort litigants for money. Judges should remain “wholly unconnected with the political world.” In the debate over criminal libel, discussed infra, some were asserting that no change in the power of the jury was necessary because a judge would (despite the common practice) respect the jury out of fear of the people. This made no sense to Burke. If the judge loses his independence to the jury because of an undue desire to be popular, all the more reason for Parliament to fix a clear rule defining the province of the judge and jury. No judge should, on his own, forfeit his prerogative to suit outside forces. Only the legislature should listen to these popular demands.

The judicial function preserves individual liberty. Burke, in the heat of the Wilkes Affair, used the opportunity to rail against legislative trials. He believed that Wilkes, though a radical, was duly elected by the constituency of Middlesex and was therefore deserving of his seat in the House of Commons. It is not for the Commons to judge his alleged crimes against the state, as a matter of first principles. He derided the notion that legislatures are some kind of “court[] of criminal equity” on par with the Star Chamber of the Tudors and Stuarts: “A large and liberal construction in ascertaining offences, and a discretionary power in punishing them, is the idea of criminal equity; which is in truth a monster of jurisprudence. It signifies nothing whether a court for this purpose be a committee of council, a House of Commons, or a House of Lords; the

123 Id. at 13.
124 Id.
125 Id.
126 Id. at 37.
127 Speech on Economical Reform, supra note 113, at 351.
128 Id.
130 Id.
131 John Wilkes (1727-1797) was a radical opponent of the king and publisher of the North Briton, wherein his libel of the king kept him afool of the law. However, Wilkes received the continued support of the electorate of Middlesex, only to have Parliament refuse to seat him after each poll. J. STEVEN WATSON, THE REIGN OF GEORGE III, 1760-1815, 99-102, 131-143 (1988).
liberty of the subject will be equally subverted by it.”

Crimes should be tried before a proper judicial tribunal. As a judicial body, Parliament has “no credit, no character at all. [Its] judgments stink in the nostrils of the people.”

Burke, in another speech arising out of the Wilkes Affair, drew a distinction between legislative acts and judicial decisions. Legislation only takes account of two things: original justice and discretionary application. Legislation may confer certain rights or take those rights already established away. In doing so a legislator, unlike the lawyer, is only bound to respect original justice, not positive law. In making the decision to enact or repeal legislation, the narrow forms of law do not bind the legislator, only “the general principles of reason and equity, and the general sense of mankind.” A judge, on the other hand, does not repair to original justice or a discretionary application of it when he performs his duty—he has recourse only to the application of fixed, known rules made by the legislature. Original justice comes “second hand” to him, through the established law of the land. This being the case, the legislature may not pass upon the incapacity of Wilkes to sit in Parliament. The principles of fixed law and against an occasional application of law would be violated. Wilkes would be deprived of his right to sit in the House of Commons based upon law not known to him—Parliament itself did not know what basis it would use to deprive Wilkes of his seat.

In direct contrast to Oliver Wendell Holmes, Jr., Burke denied that law is merely what the court (or administer of justice) says it is: “No man in Westminster Hall, or in court upon earth, will say that is law, upon which, if a man going to his counsel should say to him, ‘What is my tenure in law of this estate?’ he would answer, ‘Truly, Sir, I know not; the court has no rule but its own discretion; they will determine.”

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Burke’s assessment of the need for justice and a judicial system arises from two distinct reverences. First, as will later be addressed, the administration of case-by-case justice fosters the growth of a common law, which, owing to its development through the adjudicative process, especially suits itself to the circumstances of members of society and thereby social harmony. Furthermore, the common law, as it unfolds itself in concrete cases, can hardly be based upon theory or abstraction. Better than legislation, it provides a medium through which the diverse facts of social and commercial life may be taken into cognizance to suit individual circumstances. More importantly from the standpoint of resisting philosophic dogma, Burke realized the superiority of adjudication on the merits of one’s individual case over collective trial and punishment, the latter having been used throughout history as a political tool. The imposition of ideology onto

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132 EB, Thoughts on the Cause of the Present Discontents, in 1 WORKS 433, 500.
133 Speech on the Middlesex Election, supra note 36, 63.
134 Id.
135 Id.
136 Letter to the Sheriffs of Bristol, supra note 33, at 144.
137 Speech on the Middlesex Election, supra note 36, at 64.
138 Id. Holmes posits a definition of law from the perspective of the “bad man,” which is “[t]he prophecies of what the courts will do in fact, and nothing more pretentious.” O.W. Holmes, Jr., The Path of the Law, in GEORGE C. CHRISTIE AND PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS IN THE PHILOSOPHY OF LAW (2ND ED., 1995) 806, 809.
the social order depends heavily upon the notion of collective guilt and punishment. Legislation that would require entire denominations of people to be lumped together for the purpose of proscription and punishment is the opposite of law—“it is an act of unnatural rebellion against the legal dominion of reason and justice; and this vice, in any constitution that entertains it, at one time or other will certainly bring on its ruin.”¹³⁹ The French Revolution typified this idea, where an entire class of people was deemed guilty according only to their inherited status. The Jacobins knew that without eradicating this class they could never inaugurate what had been their theoretical vision of society.

III. Burke’s Natural Law Philosophy

We are all born—high as well as low—governors as well as governed—in subjection to one great, immutable, pre-existing law, a law prior to all our devices and all our conspiracies, paramount to our feelings, by which we are connected in the eternal frame of the universe, and out of which we cannot stir. This great law does not arise from our combinations and compacts; on the contrary, it gives them all the sanction they can have.¹⁴⁰

With recurring statements such as these, there is no doubt that Burke posited a conception of society divine in origin and subject to a natural law.¹⁴¹ For Burke, no discussion of society—that is, the positive pillar of his thought—can be had without a correspondent discussion about the moral limitations on human power. Natural law is for Burke the same as the will of God, manifested as the law impressed upon man’s rational nature as a divinely-created being.¹⁴² Burke made reference to power, the legitimacy of which is tested by “eternal, immutable law, in which will and reason are the same.”¹⁴³ In a famous passage, Burke posited that society is a contract, and each society’s contract is part of the larger contract of

…eternal society, linking the lower with the higher natures, connecting the visible and the invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and moral natures, each in their appointed place. This law is not subject to the will of those, who by an obligation above them, and infinitely superior, are bound to submit their will to that law.¹⁴⁴

Natural law exists to give sanction to man’s duties and obligations—voluntary choice is not the touchstone. The voluntaristic, “contract” view of the legal order, while deceptively pleasing to those who favor individual liberty, points to no higher basis of

¹³⁹ Speech at the Bristol Guildhall Previous to the Election, supra note 52, at 253.
¹⁴¹ This proposition is, I believe, definitively established in STANLIS, supra note 6.
¹⁴³ Reflections, supra note 5, at 230.
¹⁴⁴ Id. at 232.
society than volition among its members. While there was Locke who thought that a liberal order followed from the contract, there was Hobbes, who believed that the contract implied that man had bargained away almost all attributes of autonomy for the protections of the state. Because of these dangers associated with these conflicting interpretations, Burke refused to enter into a discussion of a precise theory of governmental and societal origins, and focused his attention instead upon the ends and purposes of society and the consequences of such for governmental power. Much more pressing and relevant to Burke was the natural law limitation on government. Burke expressly rejected the command or sovereignty theory of law and obligation put forward by positivists such as Thomas Hobbes, and later, John Austin, in favor of compulsory duties arising out of natural law:

I allow, that, if no Supreme Ruler exists, wise to form, and potent to enforce, the moral law, there is no sanction to any contract, virtual or even actual, against the will of prevalent power. On that hypothesis, let any set of men be strong enough to set their duties at defiance, and they cease to be duties any longer…. [T]he awful Author of our being is the Author of our place and order in existence,--and that, having disposed and marshaled us by a divine tactic, not according to our own will, but according to His, He has in and by that disposition virtually subjected us to act the part which belongs to the place assigned us. We have obligations to mankind at large, which are not in consequence of any special voluntary pact. They arise from the relation of man to man, and the relation of man to God, which relations are not a matter of choice. On the contrary, the force of all the pacts which we enter into with any particular person or number of persons amongst mankind depends upon these prior obligations. In some cases [these] are voluntary, in others they are necessary,--but the duties are all compulsive.

He struck at the heart of positivism even more clearly in another essay:

It would be hard to point out any error more truly subversive of all order and beauty, of all peace and happiness in human society, than the proposition, that any body of men have a right to make what laws they please,—or that laws can derive any authority from their institution merely, and independent of the quality of the subject-matter.

...
This seems to be, indeed, the doctrine which Hobbes broached in the last century, and which was then so frequently and ably refuted.... Of all things this was the most truly absurd, to fancy that a rule of justice was to be taken from constitutions of commonwealths, or that laws derived their authority from the statutes of the people, the edicts of princes, or the decrees of judges.\textsuperscript{147}

Despite some Nineteenth Century confusion, when many positivists claimed Burke as one of their predecessors,\textsuperscript{148} the inescapable conclusion to be drawn from Burke’s work is that he warmly embraced natural law and rejected emerging notions of Utilitarianism and Positivism.\textsuperscript{149} Burke, a student of the works of natural law theorists such as Cicero, Hooker, and Vattel, drew from these writers natural law principles of jurisprudence.\textsuperscript{150}

Burke repeatedly stressed that law should reflect rules of eternal justice and reason; his preferred designation is “original justice.”\textsuperscript{151} It is for the statesman, in the exercise of the classical virtue of prudence, to give effect to these eternal rules of justice. Even in the exercise of legislative or administrative prudence, positive law will at best be a rough approximation of natural law. This was no excuse for injustice. To Burke, the rule of Warren Hastings in India typified a lack of prudence in applying natural law to governance. In denying due process to Indians charged with crime, Hastings unforgivably dispensed with “substantial and eternal justice.”\textsuperscript{152} Burke’s prosecution of the case against Hastings was driven by a desire to secure the recognition of the natural law in the governance of India.

In effect, Sir, every legal, regular authority, in matters of revenue, of political administration, of criminal law, of civil law, in many of the most essential parts of military discipline, is laid level with the ground; and an oppressive, irregular, capricious, unsteady, rapacious, and peculating despotism, with a direct disavowal of obedience to any authority at home, and without any fixed maxim, principle, or rule of proceeding to guide them in India, is at present the state of your charter-government over great kingdoms.\textsuperscript{153}

\textsuperscript{147} Tract on the Popery Laws, \textit{supra} note 15, at 214.
\textsuperscript{148} \textit{See, generally STANLIS, supra} note 6 (detailing the attribution of positivistic notions to Burke and refuting them).
\textsuperscript{149} LOUIS BREDVOLD AND RALPH ROSS (EDS.), \textit{THE PHILOSOPHY OF EDMUND BURKE} 13 (1967). This book, while not an academic treatise on Burke’s philosophy, provides a rich sampling of passages from Burke’s writings and speeches on various philosophical matters, including law and jurisprudence.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Reflections supra} note 5, at 231; Tract on the Popery Laws, \textit{supra} note 15, at 214. (“All human laws are, properly speaking, only declaratory; they may alter the mode and application, but they have no power over the substance of original justice.”)
\textsuperscript{152} Speech on Mr. Fox’s East India Bill, \textit{supra} note 12, 325.
\textsuperscript{153} \textit{Id. at 345.} For Burke, and most other natural law theorists, original justice does not vary from country to country—only the means of giving it effect.
The prudence of the statesman in formulating positive law is the only way to give effect to the natural law. Prudence, which takes into account human reason and human nature, is the antithesis of the speculation of the philosophes. Burke apprehends, “it is a moral and virtuous discretion, and not any abstract theory of right, which keeps governments faithful to their ends.”

Burke believed in a transcendent moral duty prior to any institution or social arrangement, which bound man to certain ethical norms and civic obligations. He saw political questions as moral ones, not philosophical or abstract questions. It is impossible to overstate prudence as an ingredient of Burke’s jurisprudential thought; it recurs as a theme in Burke’s writings and speeches countless times. The legislator should realize that the natural law should not be applicable as though it was a mathematical theorem; as noted above, Burke agreed with Aquinas that society must be governed according to its own needs and particular circumstances. Prudence, therefore, serves as the means by which natural law, by degrees, is applied to society. It is for the legislator, in Burke’s estimation, to “fix the state upon these bases of morals and politics, which are our old and immemorial, and, I hope, will be our eternal possession.” Prudence allows for differentiation between what is fitting a society’s condition and a people’s disposition; no society is ready-made to accept wholly the natural law in a single day. It is beyond the comprehension of any one man, or ruling power, or even one generation to set society on a natural-law path. For Burke this process is almost dialectical: it is only through a long and intricate process of the promulgation of rules, and then implementation of remedies to address the inconveniences arising from those rules (such as through the process of judicial equity), that these human contrivances might be brought into rough approximation to natural law.

Burke recognized a capacity of Natural law change. Change is part of the law of nature—it is irresistible and unavoidable. It is for the statesman, through the operation of prudence, to provide that change take place a measure that does not disrupt happy dependencies. Change should be reform-oriented and not needlessly disruptive.

Burke’s Natural law philosophy leads him to the absolute, unqualified rejection of arbitrary power. No one may possess it, no one may confer it; and this proscription applies to the governor and the governed. The liberal order of civil society could not exist without some notion of a natural law which constrains human power. The natural law holds as inviolate those trappings of freedom from state control that allow for the full development of man in society. The rise of positivism led to a commensurate rise of the state—states with the pretension of omnipotence and full sovereignty. Nothing has

154 STANLIS, supra note 6, at 103.
155 EB, Speech on the Petition of the Unitarians, supra note 19, at 42.
156 STANLIS, supra note 6, at 73.
157 Letter to a Member of the National Assembly, supra note 24, at 47.
158 Id. at 16.
159 EB, Speech on the Duration of Parliaments, in WRITINGS AND SPEECHES 320.
160 EB, Letter to Sir Hercules Langrishe, in 4 WORKS 241, 301.
161 Speech on the Impeachment of Warren Hastings, supra note 140, at 397 (arguing that Hastings’ defense of having been conferred arbitrary power was not compatible with natural law).
been more beneficial to the advance of ideological government than the corresponding rejection in legal theory of natural law.

IV. Natural Rights

Everybody is satisfied that a conservation and secure enjoyment of our natural rights is the great and ultimate purpose of civil society, and that therefore all forms whatsoever of government are only good as they are subservient to the purpose to which they are entirely subordinate.  

A. The Rights of Man and Society

No aspect of legal theory during Burke’s time was more prescient than the theory of rights. Unlike the topic of societal origins, Burke did not hesitate to enter into the debate concerning a proper definition of rights. The importance of clear thinking concerning rights to both pillars of Burke’s thought caused Burke to insist that rights be properly defined as the blessings of society and not as claims set up against society. Burke clearly recognized the existence of natural rights, but no aspect of his thought is more nuanced. He made a strong distinction between real natural rights and false ones. 

Burke accepted natural rights in the sense that the Scholastics had—a right to life, liberty, and property that every ruling power in every society must respect. Natural rights are not rights enjoyed by man qua man the scientific being, who once enjoyed them to their fullest in a primordial state of nature, but by man who is bound to the social and ethical duties incumbent upon him by the natural law. False natural rights may also be termed, as by Burke, “the supposed rights of man as man.” Burke would not entertain any notion of individuality that set itself up as adverse to society. To him, this was the same arbitrariness as that of a ruler who set himself up as higher than the natural law. To those claiming antisocial rights of man, “all natural rights must be the rights of individuals, as by nature there is no thing as a corporate personality: all these ideas are mere fictions of the law, they are creatures of voluntary institution; men as men are individuals, and nothing else.” As the preceding passage suggests, Burke went so far as to claim that as far as man-in-society is concerned there is no dichotomy between

164 Speech on Mr. Fox’s East India Bill, supra note 12, at 289-290; Reflections, supra note 5, at 196 (“Far am I from denying in theory, full as far is my heart from withholding in practice…the real rights of men. In denying their false claims of right, I do not mean to injure those which are real, and are such as their pretended rights would totally destroy.”)
165 Plamenatz makes the same point, concerning Burke’s emphasis that rights make no sense outside of the social union: “We cannot, by considering human nature merely as such, outside any particular social order, decide what rights men ought to have. …Though it is specifically human to have rights, to make and recognize claims, there are no rights of man; there are only claims that are valid in a particular social order.” PLAMENATZ, supra note 75, at 341.
166 Speech on Reform of Representation of the Commons in Parliament, supra note 10, at 92. It is interesting that this speech, made eight years before the French Revolution began, demonstrates that Burke came to that Revolution already armed with a developed set of ideas concerning the “rights of man.”
167 Id. at 93 (emphasis in original).
natural and civil rights; to man, who is born into society, the artificial is natural: “For man is by nature reasonable; and he is never perfectly in his natural state, but when he is placed where reason may be best cultivated and most predominates. Art is man’s nature.” Man best cultivates this reason in the civil society that comes naturally to him, and not in “a savage and incoherent mode of life.” It is this rejection of a distinction between the natural and the artificial that set Burke at odds with the natural rights theorists of the Enlightenment. Civil society and its prescriptive constitution have existed from time out of mind—there is no “state of nature” alternative for man to his social existence. Everything to man, quite naturally, is artificial, as it had developed over the course of centuries of social life.

In short, natural rights derive from natural law and not a hypothetical state of nature. Peter Stanlis, a leading scholar of the natural law, describes the difference between Burke’s conception of natural law and the one held by Hobbes and Locke, which Burke rejected:

Under the added impact of natural science and deistic speculation, as the eighteenth century unfolded the classical and Scholastic Natural law was ripped completely loose of its divine origin, so that from a law fitted to the spiritual nature of man, as a being of supernatural destiny, it became merely a fancied description of the physical order of nature, or a hedonistic and utilitarian precept for the survival of man as a biological creature in the jungle of nature.

Burke rejected out of hand claims of “natural” right that rested on the mechanistic philosophy of Hobbes and Locke and embraced by the philosophes and Revolutionaries of his own day. Burke considered these rights of man as aimed at destroying societies and institutions in the name of the private reason of primitive man; rights unattached to the moral order and duties naturally befitting man by the divine order of things. Rights-of-man theorists sought to destroy society as an impediment to man’s exercise of his natural rights. Burke rejected this primitivism, conceived of by Rousseau, and saw society as the means of ultimate perfection of man and not a hindrance to that perfection—a product of corporate wisdom and not anyone’s private inclination. Life, liberty, and property (true natural rights) are best secured through the civilizing medium of society. Would man truly be secure in his property in the absence of civil authority? In the absence of society’s well-wrought rules of property law by which man might have security in his possession? Burke’s lifelong argument was essentially Aristotelian: that man is not fully civilized, or able to reach his higher nature, unless he is a member of a political society and culture. Man is by nature a political animal.

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168 Appeal from the New to the Old Whigs, supra note 146, at 176.
169 Id. at 175-176.
170 STANLIS, supra note 6, at 129 ff.
171 Speech on the Reform of Representation, supra note 10, at 273.
172 STANLIS at 23.
173 Thoughts on French Affairs, supra note 25, at 323.
According to Burke, “[g]overnment is a contrivance of human wisdom to provide for human wants.” The creation of government involves some “refraction” of natural rights into a new species of rights that crop up when this society is formed, leading Burke to conclude that any rights worth discussing have their origin in civil society and do not have the simplicity of natural rights.

Indeed in the gross and complicated mass of human passions and concerns, the primitive rights of men undergo such a variety of refractions and reflections, that it becomes absurd to talk of them as if they are continued in the simplicity of their original direction.

While Locke maintained that civil society protected natural rights, Burke does not dwell on natural rights but stresses that civil society originates new rights—rights to be venerated because they provide a vindication of Lockean natural rights, as modified by society, that could not be made in their absence. All rights actually enjoyed by man are civil ones, and it is these rights that concerned Burke most. Civil society provides for natural wants, not rights—rights are those things produced in society’s complex business of satisfying man’s natural needs.

Russell Kirk puts it thusly:

> Every society develops such rights through its historic experience; the form of such rights will vary from one people to another, but their source is Providential intent; through these rights, man becomes truly human; the oppressor, depriving men of rights, dehumanizes men.

Upon the institution of society, man must divest himself of the rights he enjoyed as an “uncovenanted man” to obtain the satisfaction of his wants necessarily afforded by civil society. Burke cited as examples the forfeiture of the right of self-defense and the right to judge one’s own case. They would be enjoyed by unfettered man, yet they are inconsistent with civil society—repugnant to it. Burke ridiculed the French revolutionaries who at once claim a natural right of suffrage only to riddle the exercise of...
it with technicalities and qualifications. \(^{182}\) This served for Burke as yet another example of the refraction of a natural right to conform to the needs of society. “Men cannot enjoy the rights of an uncivil and a civil state together.” \(^{183}\) Instead, these natural rights, which allow for unchecked individual action, must take on form consistent with society. Prudence determines to what extent natural rights will be curbed by positive law. For example, few would dispute a natural right of self-defense. For Burke: “This, though one of the rights by the law of Nature, yet is so capable of abuses that it may not be unwise to make some regulations concerning [the use of arms].” \(^{184}\) “A man desires a sword: why should he be refused? A sword is a means of defence, and defence is the natural right of man,—nay, the first of all his rights, and which comprehends them all. But if I know that the sword desired is to be employed to cut my own throat, common sense, and my own self-defence, dictate to me to keep out of his hands this natural right of the sword.” \(^{185}\) The natural right of self-defense does not prevent the state from disarming the assassin. But in Ireland, the regulation of arms had gone too far. Catholics were forbidden from owning them, and were subject to having their homes searched without warrant for unauthorized firearms. In fact, periodic searches of homes were required by law. Universal proscription of arms for any people, for Burke, is an example of a natural right not prudently regulated but completely ignored. \(^{186}\) Any law completely abridging, rather than prudently regulating, the exercise of natural rights is void.

The inclinations and passions of man must be thwarted by what Burke called “a power out of themselves.” \(^{187}\) The very restraints placed upon an individual’s passion, Burke famously posited, “are to be reckoned among his rights.” \(^{188}\) Since society exists for the satisfaction of a person’s wants, this satisfaction becomes a right to him. In order to have these things provided for in this society (which are a right), there must be a restraint on all individual action harmful to society. It is in the interest of the person restrained to be so thwarted, so that he might instead partake of the benefits that accrue to him in society.

Burke did not exalt the state to the detriment of any individual’s rights. He simply maintained that real natural rights—life, liberty, and property—are incapable of any realization without the civilizing effect of society. Any rights not consistent with society are but pretense—purely ahistorical and theoretical. “The rights of men—that is to say, the natural rights of mankind—are indeed sacred things; and if any public measure is proved mischievously to affect them, the objection ought to be fatal to that measure, even if no charter at all could be set up against it.” \(^{189}\) The sovereign recognition of the natural rights of mankind in chartered form is yet one of the inestimable advantages of civil society; one commentator refers to Burke’s chartered rights are “the complex of liberties, privileges, and immunities which men (including Indians) had acquired through

\(^{182}\) Reflections, supra note 5, at 307. (“You order him to buy the right [to vote], which you told before told him nature had given him gratuitously at his birth, and of which no authority on earth could lawfully deprive him.”)

\(^{183}\) Id. at 197.

\(^{184}\) Tract on the Popery Laws, supra note 181, at 314.

\(^{185}\) Speech on the Petition of the Unitarians, supra note 19, at 55.

\(^{186}\) Tract on the Popery Laws, supra note 181, at 315.

\(^{187}\) Reflections, supra note 5, at 198.

\(^{188}\) Id.

\(^{189}\) Speech on Mr. Fox’s East India Bill, supra note 12, at 289.
the growth of a society...." As for Burke’s false rights: “political power and commercial monopoly are not the rights of men;” these are, in fact, in derogation of the real rights of liberty and property. To put this in context, the East India Company had no “right” (its Parliamentary charter notwithstanding) to despoil the people of India, to execute them without trial, and to plunder their property. It is the solemn obligation of Parliament to “correct, and if necessary for the purpose....wholly destroy, every species of power and authority exercised by British subjects to the oppression, wrong, and detriment of the people, and to the impoverishment and desolation of the countries subject to it.” A political charter may very well recognize rights, as did the Magna Charta. But the true test is whether the rights recognized therein are real or contrived. “The pretended rights of man...cannot be the rights of the people. For to be a people, and to have these rights, are things incompatible. The one supposes the presence, the other the absence, of a state of civil society.” Proponents of “rights of man” theories believe “that all [government is usurpation, and is so far from having a claim to our obedience, it is not only our right, but out duty, to resist it.” Those who embrace true natural rights are not so foolish to share in this philosophy, lest the civilizing medium allowing for the fulfillment of modified natural rights disappears entirely. Indeed, it is part of the law of nature that man is a political animal, and he is destined to enjoy the rights that the natural law confers on him only by living in society. Recall that Burke made little of the “artificial” and “natural” distinction, such that law, rights, and institutions could be both. His natural rights are a matter of politics, subject to historical changes and the slow course of civilization, because civil society is absolutely necessary in fulfilling the natural law in the life of man. Burke knows that if the claims of those seeking anti-social rights of man were to be realized, those claimants would bring the European order to anarchy and eventually the total state.

All of this led Burke to conclude that rights cannot rest upon an abstraction; they must vary with times and circumstances. Human wants and passions are infinite, and as rights exist to redress the balance of human wants and societal needs they must not be categorical. Burke holds that “the rights of men are in sort of a middle, incapable of definition, not possible to be discerned. The rights of men in governments are their advantages; and these are often in balances between differences of good; in compromises sometimes between good and evil, and sometimes between evil and evil.” The rights of men are subject to moral, not metaphysical calculation. They depend upon prudence and not science.

These are therefore not natural; they are positively instituted by a particular society as a way to preserve the modified exercise of natural rights. Rights rest on the convention called society—all other claims of right, such as the “rights of man,” are outside the convention and are null and void. He asks rhetorically, “How can any man

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190 KIRK, supra note 175, at 102. See, generally, Russell Kirk, Burke and Natural Rights, 13 REV. OF POLITICS 441 (1951) (providing a clear exposition of Burke’s divinely-based theory of natural rights and contrasting it with competing theories of right).
191 Speech on Fox’s East India Bill at 290.
192 EB, Motion Relative to the Speech from the Throne (1784), in 2 WORKS at 567-568.
193 Appeal from the New to the Old Whigs, supra note 146, at 188.
194 Speech on Reform of Representation, supra note 10, at 93.
196 Reflections, supra note 5, at 199-200.
claim under the convention of civil society, rights which do not so much as suppose its
very existence? Rights which are absolutely repugnant to it?"  One cannot claim the
protection of society while at the same time claim the natural rights of man as man.

B. Civil Rights or the “Rights of Englishmen”

Now that Burke dispelled all notions of abstract rights of man, what of the civil
rights that are concrete? Burke elaborated on his definition of civil rights under English
law to involve a Kantian conception of individuality: “Whatever each man can separately
do, without trespassing on others, he has a right to do for himself; and he has a right to a
fair portion of all which society, with all its combinations of skill and force, can do in his
favor.” The rights of man living in society (or “what society can do in his favor”) do
not inhere in nature, nor are they conjured by reason and abstraction, but are derived by
man’s social inheritance. He laid particular stress on this point in his Reflections. In
noting that celebrated legal writers, such as Coke and Blackstone, had studied ancient
documents and charters, Burke pointed out that this “demonstrates the powerful
prepossession toward antiquity, with which minds of all our lawyers and legislators, and
of all people with whom they wish to influence, have always been filled; and the
stationery policy of this kingdom in considering their most sacred rights and franchises as
an inheritance.” There are no claims of civil right universally attributable to
personhood; rather, the only rights cognizable to Burke are those that attach to the status
of Englishman. These rights of Englishmen are discerned in, and rest on, “positive,
recorded, hereditary title” and are not “vague speculative right[s]” that can be “scrambled
for and torn to pieces by every wild, litigious spirit.” The rights of Englishmen are to
be found in history and the law serves to declare the substance of these rights, and to
transmit them to future generations by way of inheritance. Just as a property’s title
passes from father to son, so too do individual liberties—the implication being that this
hereditary system must stand or fall together. By analogy, the Jacobin desire to
destroy the constitutional structure that had existed in France for centuries is to destroy
the societal wellspring of all the rights of Frenchmen.

Individuals enjoy their rights by prescription, to Burke “the soundest, the most
general, and the most recognized title between man and man that is known in municipal
or in public jurisprudence.” Prescription not only hands down established rights in
their recognized form, it serves to “enrich and strengthen” them. Prescription gives to
the holder of anything good title against all opposition to it; it is a property law doctrine
that allows one’s long possession of something to ripen into ownership. Revolution destroys the process of prescription and thus the basis for all rights, treating the process as if it were an “aggravated injustice.”

* * *

Ultimately, to understand Burke’s conception of rights one must recognize with him that there are two tiers of rights: the natural and the civil. Natural rights are an emanation of the natural law—they are rights willed by God for man. They form the unseen backdrop of any society and do not vary from culture to culture. Natural rights are not readily apparent because society, through the long process of usage and prescription, has evolved its own peculiar mechanisms for giving fulfillment to them. These mechanisms regulate and qualify natural rights so as to allow man to have a social existence, thus blurring the distinction between the two types of rights so that, while they may be acknowledged as separate, they cannot be realized in distinct form. These peculiar mechanisms are man’s civil rights, and they vary from culture to culture. Burke’s natural rights theory is premised on the idea that natural rights will not be enjoyed by man absent society’s protection of and necessary modification of them. Rights develop in the application of human wisdom to the circumstances of man. They are a blessing of society and not the gift of the state. Nothing in Burke’s conception of rights should be construed to hold that rights exist by the grace of government. He recognized repeatedly the supremacy of natural law and its concomitant natural rights. Government interposes between man and these natural rights only to the extent necessary for the prudential regulation of man in society, and it only regulates as necessary to sustain society and social harmony. This salutary protection of social development, in turn, generates prescriptive claims of right that (eventually) any prudent government must recognize, ratify, and accommodate. These prescriptive claims of right are the essence of Burke’s thought concerning rights, as the only ones truly worth discussing in political debate. Natural rights are advanced only in their complete breach.

Natural rights, to have any usefulness, depend upon—and are therefore not above—society. Rights of man theory, on the other hand, posits the elimination of society, which is deemed as an impediment to the natural liberty of man. When this is understood it is easy to see which view looks to the destruction of the moral order and bring out in Burke the negative, defensive pillar of his thought. To defend the intricate

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205 Cf. Paul Lucas, On Edmund Burke’s Doctrine of Prescription; Or, an Appeal from the New to the Old Lawyers, 11 HIST. J. 35, 39 (1968). Lucas attempts to show that Burke’s prescription had no basis in any of the European legal systems of the time, or even in traditional natural law thought. Instead, traditional prescription was an attempt to punish those who slept on their rights in property as against an adverse claimant acting in good faith with just title. Burke never qualified prescription in such a way. “[F]or Edmund Burke, the positive laws of inheritance allow one knowingly to retain and in good conscience to enjoy the notorious spoils of one’s rapacious ancestors.” Id. at 44. Burke would probably dispute this characterization of those possessed of wealth, as he details the honest acquisition of the Duke of Bedford’s distinguished ancestor, Lord Keppel, as compared to the Duke’s embrace of thought that would uproot all that had been previously and honestly acquired. Letter to a Noble Lord, id., passim.

206 Id. at 498.

207 Tract on the Popery Laws, supra note 15, at 214 (discussing the applicability of natural law); Speech on Fox’s East India Bill, supra note 12, at 289 (universal natural right).
manner in which society had come to develop its prescriptive rights, Burke has to fend off ideological conceptions of rights which countenanced no society at all.

V. Liberty and Equality

A. Liberty as Social Freedom

Liberty, such as deserves the name, is an honest, equitable, diffusive, and impartial principle. It is a great and enlarged virtue, and not a sordid, selfish, and illiberal vice. It is the portion of the mass of the citizens, and not the haughty license of some potent individual, or some predominant faction.\(^{208}\)

Burke detested abstractions. Burke likewise detested fanaticism. So it should be no surprise that Burke inveighed against fanatical abstractions to the fullest extent of his abilities, which is to say more stupendously than anyone else in modern history. Liberty should not be based upon the theories of the metaphysician, or else it could be just as easily uprooted by the next fanciful doctrine. Liberty should instead be part-and-parcel of some form of constitutional order, which places liberty on a footing grounded on custom and convention, “ascertained by wise laws, and secured by well-constructed institutions.”\(^{209}\) To Burke, liberty made no sense separate from the institutions to which it is tied. “I allow, as I ought to do, for the effusions which come from a general zeal for liberty…. But in a question of whether any particular Constitution is or is not a plan of rational liberty, this kind of rhetorical flourish in favor or freedom in general is surely a little out of its place.”\(^{210}\)

The constitutional order balances liberty against other interests just as necessary to the existence of civil society. In praising his political allies in the debate on America, Burke noted that “[t]he liberty they pursued was a liberty inseparable from order, from virtue, from morals, and from religion; and was neither hypocritically nor fanatically followed.”\(^{211}\) In a speech shortly after his election to his Bristol seat in Parliament, Burke eloquently placed liberty on no less a basis than the English Constitution:

The distinguishing part of our Constitution is its liberty. To preserve that liberty inviolate seems the particular duty and proper trust of a member of the House of Commons. But the liberty, the only liberty, I mean is a liberty connected with order: that not only exists along with order and virtue, but which cannot exist at all without them. It inheres in good and steady government, as in its substance and vital

\(^{208}\) Letter to Richard Burke, supra note 82, at 421.
\(^{209}\) Letter to Charles-Jean-François Depont, supra note 22, at 405.
\(^{210}\) Appeal from the New to the Old Whigs, supra note 146, at 77 (emphasis in original).
\(^{211}\) Letter to a Noble Lord, supra note 23, at 476.
principle.212

Burke saw it as his duty as a legislator to preserve liberty to all people living within British dominions. He made no distinction between the Englishman living in London and the colonist of America or the native of India.213 Burke emphatically did not embrace the universality inherent in “rights of man” theories, but instead the idea that British governance carried with it the duty to observe longstanding liberties as they had emerged to vindicate natural rights in each particular society.214 There was no more outspoken advocate of imperial responsibility in the Eighteenth Century than Burke.215 Burke, in praising the colonists’ love of liberty, noted that the same are devoted to liberty “according to English ideas and on English principles. Abstract liberty, like other mere abstractions, is not to be found.”216 He went on to prove the concreteness of liberty by noting that liberty inheres around some sensible object, such as freedom from arbitrary taxation in the colonists’ case. The liberty sought by the subjects makes no sense without a reference to the pain to be avoided, providing what Burke calls the “criterion of their happiness.”217 Burke went even further in defending the colonists by tracing the lineage of anti-tax sentiment in the history of English liberty.218 There is no better claim of liberty for Burke than one that is at once pedigreed, concrete, and limited by reference to that from which the claimant seeks to be freed.

But liberties are neither indefeasible nor nonnegotiable. Burke, in this sense, shied away from the absolutes of revolutionaries, and (as we have seen) recognized that the very existence of government signifies the forfeiture of some of a man’s “natural” liberty. Civil government, and the prudence of its leaders, comes in to redress the balance of liberty and order, giving rise to the legislative duty Burke pronounced in his 1774 speech at Bristol.219 This is consistent with Burke’s rejection of abstract rights; to say that liberty is contingent on the just claims of the public order is to make it a quantity that is negotiated and balanced against other interests, such as the bounty of an empire. If natural liberty is something to be contorted in the institution of civil government, civil liberties are to be treated no differently. Burke explained, in an oft-quoted passage:

212 EB, Speech at His Arrival at Bristol (1774), in 2 WORKS 80, 87.
213 Letter to a Noble Lord at 476, 483-484 (noting that his labor on behalf of India and colonial peoples was the most important of his life). See also “Speech on Conciliation with America,” supra note 43, at 141 (“My idea…is, to admit the people of our colonies into an interest in the Constitution….”).
214 Burke believed that the charter of the East India Company should be replaced by the Magna Charta, which was the general intention of Fox’s East India Bill—to be “the magna charta of Hindostan.” Speech on Fox’s East India Bill, supra note 12, at 292 (emphasis in original); See also Frohnen and Reid, supra note 4, at 40.
215 “[Burke] was the first English statesman fully to understand the moral import of the problem of subject races…. He did not ask the abandonment of British dominion in India, though he may have doubted the wisdom of its conquest. All that he insisted upon was this, that in imperial adventure the conquering race must abide by a moral code. A lie was a lie whether its victim be black or white. The Europeans must respect the powers and rights of the Hindu as he would compelled by law to respect them in his own State.” HAROLD LASKI, POLITICAL THOUGHT IN ENGLAND FROM LOCKE TO BENTHAM 232-233 (1920).
216 Speech on Conciliation with America, supra note 43, at 120.
217 Id.
218 Id. at 121.
219 Speech to the Electors of Bristol, in SPEECHES AND LETTERS 48, 55 (observing that the legislator must not follow the will of his constituents but instead his own sense of the general good).
All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights, the we may enjoy others; and we chose rather to be happy citizens than subtle disputants. And we must give away some natural liberty, to enjoy civil advantages, so we must sacrifice some civil liberties, for the advantages to be derived from the communion and fellowship of a great empire.\textsuperscript{220}

But at the same time Burke argued for the expansion of liberty, because only the free and happy subject will be the obedient one. Once the subject realizes that there is no mutuality between his government and his privileges, the sovereignty of the government is gone.\textsuperscript{221} The sovereignty of the law alone does not inspire in the subject the “liberal obedience” necessary for the proper functioning of government.\textsuperscript{222} Rather, it is when the subject recognizes that his rights are intimately bound up with that sovereignty. The only freedom that will ever be secure to the citizen is what Burke, in his classic letter to Depont, called “social freedom.”\textsuperscript{223} This is the classical liberal notion that man should be free to the extent that he does not impinge upon the corresponding freedoms of others.\textsuperscript{224} This balance of freedoms is called “justice,” where absolute freedom of man in society is redressed to conform to the reciprocal demands of his fellow members.\textsuperscript{225} At the very bottom, the rights of the subject are held in trust by Parliament, not the ministry or the crown.\textsuperscript{226} In discussing the liberties of the colonists, Burke made clear that the ministry should have no jurisdiction to alter the constitutional rights of the subject.\textsuperscript{227} A matter of such importance is properly with the representative body. As we shall see, the Commons is the proper repository of the constitutional interests of the individual subject, just as the monarchy and aristocracy must assert their own prerogatives.

Burke detested fanciful schemes of liberty conceived by metaphysicians and “scientists.” Freedom is not the product of abstract speculation. Liberty, unlike mathematics and hard science, is “variously mixed and modified, enjoyed in very different degrees, and shaped into an infinite diversity of forms, according to the temper and circumstances of every community.”\textsuperscript{228} The legislature of a given society exercises, over positive, or civil rights, an absolute power to modify, condition, qualify or repeal them, “with all the power of creator over the creature.”\textsuperscript{229} It is for the practical statesman, and not the visionary schemer, to determine the quantity of liberty to be enjoyed by the community, with an extremely strong presumption in favor of the expansion of liberty.

\textsuperscript{220} Id. at 169.
\textsuperscript{221} Id. at 179-180.
\textsuperscript{222} Id. at 181.
\textsuperscript{223} Letter to Charles-Jean-Francois Depont, supra note 22, at 405.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} See, eg., Address to the King, in 6 WORKS 161, 179. (“Parliament is a security for the protection of freedom...”).
\textsuperscript{227} Letter to the Sheriffs of Bristol, supra note 33, at 222.
\textsuperscript{228} Id. at 229.
\textsuperscript{229} EB, Speech on the Act of Uniformity, in 7 WORKS 5, 15.
Burke saw behind the claims of extravagant liberty made by the French revolutionaries and some Englishmen who praised the Revolution. Burke gave little credence to the idea that man’s free choice is the touchstone of every civil or social obligation. There are duties ordained by the natural law that are not incurred by the process of “free election” of the individual bound; parental duties, for example. “Much the strongest moral obligations are such as were never the results of our option.” The revolutionary notion that man must shake off his chains of duty simply because he chooses not to be bound is, for Burke, destructive to all society. To paraphrase Burke’s classic example: we do not congratulate the criminal who has escaped from jail on his restoration of liberty. To Burke, society is founded upon individual rights, which create voluntary institutions that knit together the web of social relations. However, with the rights of society come corresponding duties that one is not free to shirk if society is to serve its function. Burke was in agreement with Hume that society is prescriptive. It is not a Lockean voluntary pact, revocable at each member’s will.

Burke posited liberty and morality as indispensable partners. His eloquent treatment of these interwoven concepts stands as the classic conception of ordered liberty in Anglo-American thought:

> Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites,--in proportion as their love to justice is above their rapacity,--in proportion as their soundness and sobriety of understanding is above their vanity and presumption,--in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. Society cannot exist, unless a controlling power upon will and appetite be placed somewhere; and the less of it there is within, the more must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters.”

Burke, in another of his essays, tied liberty to morality, humanity, religion, and those restraints placed on the passions by the virtues. That is, rights wed to duties. Government, therefore, should cede ground to morality in the day to day regulation of human conduct. Law in no way can be a complete substitute to the morality necessary

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230 Letter to a Member of the National Assembly, supra note 24, at 29. Burke criticizes here the tendency of French Jacobins, patterning after Rousseau (who fathered 5 children he never cared for), to treat the paternal obligation as artificial and therefore void.
231 Appeal from the New to the Old Whigs, supra note 146, at 165.
232 Reflections, supra note 5, at 148.
233 Letter to a Member of the National Assembly, supra note 24, at 51-52.
234 Letters on a Regicide Peace, supra note 26, at 99.
235 Reflections, supra note 5, at 230 (detailing how a people devoid of morals and will use the instruments of government at their disposal for the satisfaction of their own will—will being the opposite of law); Letter to a Member of the National Assembly, supra note 24.
to make societal cooperation possible. Even with posited law in place, depravity and society do not make good partners.

Society relies for its existence upon concrete liberty. Man must be free to pursue his notions of the good and his own self-betterment without fear of substantial impingement from government. Recall Burke’s adoption of the classical notion of rights, which allows government to constrain man only insofar as is absolutely necessary to prevent his trespassing on others. To allow the subject such a sphere of freedom should be the goal of all law. On the other hand, Burke saw nothing but hypocrisy in the revolutionists’ claim of liberty, which involved the destruction of that moral order that generates society’s happy dependencies and its meaningful liberties.

B. True Equality versus the Leveling Principle

If there be a moral, a political equality, this is the desideratum in our Constitution, and in every constitution in the world. 236

In setting forth his conception of rights as the sum total of all advantages bestowed by society, Burke recognized an equality of security of these rights; “the common advantages of society”237 or “common right.”238 However, he stopped short of endorsing an equality of outcomes—there is no right to “an equal dividend in the product of the joint stock” or an equality of power in the state’s allocation of authority.239 Man is not naturally or politically entitled to equal wealth or property, and Burke criticized such a revolutionary leveling principle that sought to undo institutions in its name.240 A prudent legislator is to recognize that not all people in society are similarly situated. Burke notes that “an attempt towards a compulsory equality in all circumstances, and an exact practical definition of the supreme rights in every case, is the most dangerous and chimerical of all enterprises. The old building stands well enough, though part Gothic, part Grecian, and part Chinese, until an attempt is made to square it into uniformity.”241 Burke rejected leveling schemes as foolhardy and destructive of society—productive only of “uniformity of ruin.”242 This principle applies especially to tax policy. Out of respect for the circumstances of each case, he argued against taxation of the colonies for revenue, and against direct taxation in Ireland, despite the fact that both are done in England. In modern parlance, societies of people, like individuals, should not be governed by “one size fits all” policy.

Though law should take into account the natural inequality of man, it should not generate an artificial inequality for the purposes of the unequal administration of

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236 Speech on Reform of Representation, supra note 10, at 98.
238 Id. at 212.
239 Reflections, supra note 5, at 197.
240 Thoughts on French Affairs, supra note 25, at 323. Burke wages a criticism on the French revolutionary concept of national power pretending to “equal representation,” which abolishes all establishments, local ties, diversities in condition, “every species of nobility,” and all magistracies.
241 Observations, supra note 75, at 368.
242 Id.
There are common rights, derived from natural rights in the enjoyment of which all are equal, that cannot be denied to anyone. But privileges exist in every society, and are by their nature not the entitlement of everyone. Some, for instance, are privileged to govern, but as a practical matter all cannot be.

Burke, as a Christian, did recognize the moral equality of all people under the natural law. It is this divine equality that should be the cause of man’s political equality, and not logic or reason. Burke recognized the forfeiture of natural equality occasioned by artificial political power, which is why political power should be exercised for the common good. Further, there is nothing in nature that dictates man’s equality and it is not the product of scientific calculation.

While liberty is the desiderata of Burke and others who hold a positive philosophy of civil society, enemies of society have for as long as humans have reflected on politics used real or imagined inequality against an established civil order. But true equality is the equal-applicability of the advantages of society to each of its members. Law should not shut out anyone from what might honestly accrue to him in the absence of such a disability. Political inequality, which is the result of artificial distinctions among men created by government and is not a natural product of society, is remedied by the removal of these unjust legal impediments and not by positive ameliorative action.

VI. The Popular Basis of Constitutions

[The English Constitution] is the result of the thoughts of many minds in many ages. It is no simple, no superficial thing, nor to be estimated by superficial understandings. An ignorant man, who is not fool enough to meddle with his clock, is, however, sufficiently confident to think he can safely take to pieces and put together, at his pleasure, a moral machine of another guise, importance, and complexity, composed of far other wheels and springs and balances and counteracting and cooperating powers.

It may seem strange to anyone familiar with Burke for one to emphasize the popular basis of constitutions, let alone of the English Constitution, in a discussion of his views. For even a superficial student of Burke knows that he was not a democrat or a firm supporter of republican government as such. But it is not to say that Burke was a...

244 Id. at 213. The great dichotomy in Burke’s treatment of equality is the equality of common rights (which is an aspiration of legislation) and the equality of “favors, privileges, and trusts” (which is not an aspiration of legislation).
245 STANLIS, supra note 6, at 191. See also RUSSELL KIRK, THE CONSERVATIVE MIND, FROM BURKE TO SANTAYANA 8 (1953) (tracing the conservative conception of moral equality to Burke). “The only true equality is moral equality; all other attempts at leveling lead to despair, if enforced by positive legislation. Society longs for leadership, and if a people destroy natural distinctions among men, presently Buonaparte [sic] fills the vacuum.”
246 Speech on Mr. Fox’s East India Bill, supra note 12, at 291 (“[A]ll political power which is set over men, and [ ] all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much a derogation of the natural equality of mankind at large, ought to be in some way or other exercised ultimately for their benefit.”).
247 Appeal from the New to the Old Whigs, supra note 146, at 209.
democrat to hold that he believed that a constitution—any constitution—derives its legitimacy by its being tailored to the people over whom it governs. This is because a constitutional order is formed on the basis of both formal political agreements and tacit societal consent. The popular basis of a constitution does not mean that the constitution must pass a simple referendum. In fact, it does not necessarily carry with it the elective principle at all. Instead, a constitution is tested against the great referendum of generations of substantial social harmony under its care. Civil society depends upon the regulation of government by fundamental laws. Said laws enable society by disabling government from enacting imprudent or unjust measures, or measures that transgress the frame of constitutional order upon which man relies. A sound theory of constitutional development does not consider the constitution to be the whimsical product of a day. Instead, like the society within it, the constitutional order is the spontaneous generation of random human contrivance, divine providence, and the social life that underlies it. Thereby, it conforms itself to society rather than asks that society conform itself to its visions and schemes. That it conforms itself to man in society rather than undertaking to change his fundamental nature is how a constitution rests on a popular basis. This section will examine Burke’s views of the various properties and purposes of the English constitution, as well as the principles animating any sound constitution, in light of the foregoing. It will also show Burke’s attitudes toward what he considered to be illegitimate constitutional schemes and theories he saw around him.

A. On the Nature of Fundamental Law

To Burke, the constitution of any society must rest on a balance, with spheres of authority separately delineated. “The constituent parts of a state are obliged to hold their public faith with each other…[o]therwise competence and power would soon be confounded, and no law would be left but the prevailing force.” This restates the general principle of a balanced constitution that hearkens back to Greek political thought and to Burke’s favorite philosopher, Cicero. Burke saw that this tendency was fully prevented against in the English Constitution—and resisted any scheme of alteration that would destroy this equipoise. These interests to be balanced span the breadth of the Empire. Burke’s emphasis on constitutional balance means that he could be all things to all people, as the occasion dictates. When supporting the rights of the House of Commons against external threats, he was a democrat. When supporting the monarchy against Jacobinism, a monarchist. When supporting the Lords, an aristocrat. To assert the claims of one at a particular time is not to denigrate the rest, nor is it inconsistent, despite this typical charge against Burke.

Burke cared far more for the moral basis of the constitution than with the formal arrangements of the constitution, so long as these arrangements reinforce the moral basis against ulterior schemes. After all, the constitution is merely the earthly means of giving content to the natural law: “Constitutions furnish the civil means of getting at the natural…” The formal arrangements serve a functional purpose, that is, “to promote

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248 Omitting any discussion of the judicial aspects of the constitution, which are discussed supra in II(A).
249 Reflections, supra note 5, at 160.
250 See Appeal from the New to the Old Whigs, supra note 146, at 93-94.
251 Letters on a Regicide Peace, supra note 26, at 100.
the moral principles of government, and the keeping desperately wicked persons as the
subjects of laws and not the makers of them....

The constitution and liberty are indistinguishable. The constitution exists to
protect liberty, and to minimize the possibility of bad laws. "All the ancient, honest,
juridical principles and institutions of England are so many clogs to check and retard the
headlong course of violence and oppression. They were invented for this one good
purpose, that what was not just should not be convenient." Our Constitution is like
our island, which uses and restrains its subject sea; in vain the waves roar. In that
Constitution, I know, and exultingly feel, both that I am free, and that I am not free
dangerously to myself or to others."

Burke recognized a concept of fundamental law, or law that binds all future
government action. He considered the Magna Charta as fundamental because of
legislative statements throughout the centuries declaring it as such. The same is true of
the religious settlements promulgated in the reigns of William III and Queen Anne. At
one point, Burke made a distinction between fundamental and regulatory law: "I cannot
allow that all laws of regulation, made from time to time, in support of the fundamental
law, are of course equally fundamental and equally unchangeable. This would be to
confound all the branches of legislation and of jurisprudence." Burke, therefore,
recognized two classes of posited law: fundamental law and all other law enacted to
support and give effect to the fundamental law.

Burke fully acknowledged that there were provisions of the Constitution that did
not tend toward individual liberty. However, these provisions must, in conjunction with
the individual liberty provisions, stand and fall together. One cannot systematically
purge the constitution of all provisions of authority, all entitlements of nobility, or its
hereditary incidents without destroying the structure on which individual liberties rest.
All have evolved together to produce a balance of liberty and authority essential for the
existence of civil society. To change the constitution to a "complete system of liberty"
would require a man willing "to aim at such improvement by disturbing his country and
risking everything that is dear to him." Burke wagered that none would hazard such a
course of action, considering that the quantity of liberty protected by the constitution was
too much to risk losing. In other words, as the quantity of liberty goes up, the desire of
the subject to seek more liberty diminishes. Rational people do not overthrow good
governments.

B. Parliament

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252 Id. at 62.
253 Letter to the Sheriffs of Bristol, supra note 33, at 141.
254 Speech on Reform of Representation, supra note 10, at 100-101.
255 Letter to Sir Hercules Langrishe, supra note 160, at 266-267.
256 Id.
257 Id.
258 Id. at 268.
259 Id. at 268.
260 Id. at 170. ("[T]he more and better stake of liberty every people possess, the less they will hazard in a
vain attempt to make it more.")
The Constitution must rest on popular, or general, consent. For Burke, Parliament is the great depository of popular liberty and the public trust. Burke did not advocate popular election of crown ministers, but he is a forceful advocate of Parliamentary control over the ministry. Parliamentary control over the administration is the equivalent of direct accountability of the ministry to the people. To him “it is the first duty of Parliament to refuse to support government, until power was in the hands of persons who were acceptable to the people, or while factions predominated in the court in which the nation had no confidence.” Burke used this as the basis for an elaborate disquisition on the nature of constitutional balance; the Parliament deliberated and made laws, subject to the negative of the king. The king put forward ministers of state, subject to Parliamentary assent. This scheme renders government accountable to the people, keeping “ministers in awe of Parliaments, and Parliaments in reverence with the people.”

The origin of government is entirely from the people, not just their representatives in Parliament. But Parliament has the distinctive duty of giving effect to popular sentiment. “A popular origin cannot therefore be the characteristical distinction of a popular representative. This belongs equally to all parts of government and in all forms. The virtue, spirit, and essence of a House of Commons consists in its being the express image of the feelings of the nation.” For this reason, Burke was a consistent champion of extending the franchise; the vote ensures the voter his place in the British Constitution. The franchise connects the ordinary subject to the Constitution, in the interest of social harmony. Other parts of the constitution, however, should check this popular control in order to avoid popular excess. Burke would not have the democratic organ of government trespass on equally-vested, non-democratic interests.

Burke came down in favor of majority rule. In one of Burke’s best letters on constitutional matters, he writes:

I most heartily wish that the deliberate sense of the kingdom on this great subject [Parliamentary reform] should be known. When it is known, it must be prevalent. It would be dreadful indeed, if there was any power in the nation capable of resisting its unanimous desire, or even the desire of a great and decided majority of the people. The people may be deceived in their choice of an object; but I can scarcely conceive any choice they can make to be so very mischievous as the existence of any human force capable of resisting it.

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261 Second Letter to Sir Hercules Langrishe, in _Works_, __. Since this is the case, all citizens are deserving of representation.
262 Thoughts on the Cause of the Present Discontents, supra note 132, at 472.
263 Id. (emphasis taken away).
264 Id. Burke saw this happy system erode with the infiltration of the “King’s Friends” in Parliament in the 1760’s.
265 Id. at 492.
Parliament should reflect the people’s sense, and not suppress it. But, as noted above, the principle of majority rule must not be taken to abrogate natural law. The natural law limitation on Parliament led Burke to reject any superseding criterion for legislation, such as popular will.

C. The King and Ministry

Burke placed the monarchy at the heart of the Constitution. “[W]e owe our whole Constitution to the restoration of the monarchy.” The fundamental laws of England “suppose a monarchy.” So much of the constitutional order of England developed around the idea of the king as the font of justice and the basis of order. Burke was fully aware that monarchs are not always good or just, but they are essential to the European order as reflected in the public law of Europe. Monarchy is the basis of peace, liberty, and all other orders of government. Burke perceived this to be especially true of France, which is why he abhors the way that King Louis XVI was treated by the revolutionary mob. Burke saw monarchy “as a thing perfectly susceptible to reform, perfectly susceptible to a balance of power, and that, when reformed and balanced, for a great country is the best of all governments.” However, the king rules by prescriptive right and not divine right. The natural law protects the prescription by which the king holds his title—he is divinely ordained to rule only in this sense.

For Burke not even the king is above the law. The constitutional balance consists of each repository of power respecting the province of all others. The pre-existent natural law, and Britain’s constitutional adaptation of it, dictates that all elements respect the harmony of interests necessary for man’s fulfillment. Burke also realizes that the constitution is only as great as the ministers that comprise it. In his great treatise on ministerial responsibility, Thoughts on the Present Discontents, Burke made clear that under the constitution “the prudence and uprightness of ministers of state” must supplement the reach of enacted law. Otherwise, the constitution is nothing more than a scheme on paper. This mirrors the assertion by Burke that individual morality regulates individual liberty.

The law and the executive arm cannot be at odds. The spirit of the law must also accord with the spirit of those charged with its enforcement. The most benevolent purpose of the most benevolent law may be negated by its improper enforcement, and where the ruling power is averse to all law. The “black-letter of any statute” is worthless of its own force; there must be rulers who love the liberty of the people in order to effectuate the purposes of good law.

269 Letter to a Member of the National Assembly, supra note 24, at 36.
270 Id. at 38.
271 Reflections at 177 (noting the institutional chaos that ensued after Louis was deposed).
272 Appeal from the New to the Old Whigs, supra note 146, at 106.
273 Reflections at 162-163, 165. Burke posits that if the prescriptive nature of the monarchy is disrespected, prescriptive rights soon shall be too.
274 Thoughts on the Cause of the Present Discontents, supra note 132, at 469.
275 Id. at 470.
276 EB, Letter on the Affairs of Ireland, in 6 WORKS 415, 422.
D. The Anglican Establishment

We know, and what is better, we feel inwardly, that religion is the basis of civil society, and the source of all good and all comfort.277

The above-quoted passage is a capsule summary of Burke’s views on religion and society, and of his eloquent testament to the Anglican Establishment provided in his Reflections. To him, the Anglican Establishment served not to satisfy the superstition of certain people, but to check the worldly impulses of those who administer the government. The church “revive[s] and enforce[s]” the “sublime principles which ought to be infused into persons of exalted situations.”278 The established church is a check on power: “all persons possessing any portion of power ought to be strongly and awfully impressed with an idea that they act in trust: and that they are to account for their conduct in that trust to the one great Master, Author, and Founder of society.”279 Far from an imposition on the freedom of the subject,280 the church enhances their liberty by checking the powerful appetites of the rulers. The ruler must have some reference to a higher standard of leadership merely than his own will and purposes.

It is no exaggeration to state that Burke considered the established church the bedrock of English jurisprudence. In a famous passage, he places religion above the law, and at the same time rejects any notion of coerced belief:

Religion, to have any force in men’s understandings, indeed to exist at all, must be supposed paramount to laws, and independent for its substance upon any human institution—else it would be the absurdest thing in the world, an acknowledged cheat. Religion, therefore, is not believed because the laws have established it, but it is established because the leading part of the community have previously believed it to be true.281

As in the case of other aspects of the moral order, the constitution should suit the religious sensibilities of the people, rather than impose some alternative (and hitherto unrecognized) standards of right conduct on them. Burke claimed to speak for the people

277 Reflections, supra note 5, at 226. Burke in another instance places all English laws and institutions on the base of the Christian religion; “that scheme is supposed in every transaction of life....” “Letters on a Regicide Peace,” supra note 26, at 112. Burke’s point is that even an alliance with Revolutionary France would undermine this base.
278 Id. at 228.
279 Id. at 229.
280 For a fine discussion of Burke’s reconciliation of the Establishment with the liberty of the subject, see Michael W. McConnell, Establishment and Toleration in Edmund Burke’s ‘Constitution of Freedom,’ 1995 SUP. CT. REV. 393. For Burke’s best essay on reconciliation of establishment and toleration, see generally Speech on the Act of Uniformity, supra note 228.
281 Tract on the Popery Laws, supra note 15, at 222. Burke stated that “the ground for legislative alteration of a legal establishment is this, and this only.--that you find the inclinations of the majority of the people, concurring with your own sense of the intolerable nature of the abuse, are in favor of change.” Speech on the Act of Uniformity, supra note 228, at 10.
of England in stating that the establishment is “essential to their state; not as a thing heterogeneous and separable; something added for accommodation; what they may either keep or lay aside, according to their temporary ideas of convenience. They consider it the foundation of their whole constitution, with which, and with every part which, it holds an indissoluble union.”

To Burke, church and state are not merely “allied,” they are inextricably intertwined, one in the same. Anyone who would think otherwise, and not accept the generous toleration accorded him under the constitution of church and state, is foolish. “No wise man…would tyrannically set up his own sense so as to reprobate that of the great prevailing body of the community, and pay no regard to the established opinions and prejudices of mankind, or refuse them the means of securing a religious instruction suitable to those prejudices.”

As much as Burke venerated the Anglican Establishment, he did not seek to deprive non-adherents of their civil liberties. The established religion, as the popular religion, is not in such a need for support that it must depend for its existence on the oppression of all outside it. Proscribing entire religions from the benefits of the constitution, Burke did not believe, “to be politic or expedient, much less necessary for the existence of any state or church in the world.”

When the church comes to depend on depriving large classes of people of civil liberties, the Constitution would be at its breaking point. The power of the magistrate is over the external ceremonies of the church and not a man’s heart and soul, or his “interior religion.”

And, as a matter of prudence, it is never possible to oppress someone into adopting a particular religious belief. In a sense, the establishment depends upon toleration, not oppression, for its existence.

Burke extended civil toleration to Jews, Muslims, “and even Pagans,” but drew the line at atheism. Burke supported the Anglican Establishment as a necessary prop to public virtue; it can coexist with free conscience so long as the subject has some

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282 *Reflections*, supra note 5, at 235.
283 Speech on the Petition of the Unitarians, *supra* note 19, at 43.
284 *Id.*
285 Letter to Richard Burke, *supra* note 82, at 424-425. Free conscience receives an unqualified endorsement from Burke: “It is not permitted to us to sacrifice the temporal good of any body of men to our own ideas of the truth and falsehood of any religious opinions.” *Id.* at 424.
287 *Id.* at 269. For Burke’s best elaboration on the point, see, generally “Tract on Popery Laws,” *supra* note 15, *passim*.
289 Letter to Sir Hercules Langrishe at 299. Burke claimed that he was “totally averse” to prosecution for conscientious difference of opinion. *See* Speech on the Act of Uniformity, *supra* note 228, at 10.
290 Burke considered toleration as part of the establishment, and as part of Christianity itself. *See* Speech on the Relief of Protestant Dissenters, *supra* note 34, at 25.
291 *Id.* at 36.; Letter to William Burch (1775), *in speeches and writings* 58, 60 (“I would give full civil protection, in which I include an immunity from all disturbance of their publik [sic] religious worship, and a power of teaching in schools, as well as temples, to Jews, Mahometans, and even Pagans; especially if they are already possessed of any of those advantages by long and prescriptive usage; which is as sacred in this exercise of rights, as in any other.”). Burke in another instances notes that if the Christian religion is thrown off “the mind will not endure a void…[and] some uncouth, pernicious, and degrading superstition might take the place of it.” *Reflections*, *supra* note 5, at 237
substitute basis for conformity with the natural law. Burke did not consider atheism as a sufficient substitute for Christian belief in a morally-balanced scheme of liberty, and later came to locate the atheistic roots of the disorder in France. Liberty of conscience does not mean liberty from all moral impulse. "No man, under the false and hypocritical pretense of liberty of conscience, ought to be suffered to have no conscience at all." This is precisely what Burke saw happening in France with the advent of an "aggressive atheism." When the necessary and beneficent prop of public virtue—either by legal establishment or private conscience—is gone, chaos ensues, overarching political power is not thwarted, and the basis of all justice is subverted. Anyone whose "religious" aim is a zealous overthrow of the established religion of the community, and to replace it with some coerced substitute basis for morals (or no basis at all), does not deserve toleration.

Burke, finally, viewed the various religious beliefs in society as a barrier to ideology. He asked those who would maintain the disabilities of religious minorities throughout Britain instead to make common cause with people of all sects against the "new fanatical Religion…of the Rights of Man," which rejected everything that all people of established religions hold dear. There must be some overarching regulator of society’s mores in aid of legal rules. Either this regulation will emanate from the organic, religious habits of the people, or from the state in the form of ideology.

1. The Irish Penal Laws

Burke’s view of toleration under the constitution of England is most fully illustrated in the case of Ireland. Burke was a lifelong critic of the Irish Penal laws, which imposed stringent disabilities on Catholics in Ireland. The code altered the rules of property law so as to speed the dissolution of Catholic estates, while at the same time made it nearly impossible for the Catholic, and his heirs, to accede again to any wealth or high station because of the disabilities. Catholics could not be educated in the established universities or enter into any professions. Burke considered the Penal Code as a system of perfect oppression, "well fitted for the oppression, impoverishment, and degradation of a people, and the debasement in [the laws] of human nature itself, as ever proceeded from the ingenuity of man." Many of Burke’s sentiments of religious toleration arise out of his writings relating to the oppression of his homeland. While it might seem inconsistent with Burke’s conservatism that he would support the complete...
abolition of the code, his opposition to the laws was as a preservative—any restoration of
the ancient constitution of liberty would uproot all laws abridging the liberty of worship,
a principle Burke dated back to the Magna Charta. Likewise, abolition of the code
would restore the traditional rights of property enjoyed at common law; primogeniture,
for example, and the Catholics’ right to bear arms. The Penal Code was an innovation in
injustice design to punish those who adhered to, and sought to preserve, the religion of all
England’s forefathers. The Code did not encourage any system of religious belief, it
simply punished adherence to Catholicism, thereby proving no utility to the people of
Ireland. This being the case it did not for Burke qualify as “law” at all, and he was
perfectly consistent with his principle of reform in calling for the Code’s abolition.

E. The Unwritten Constitution

The heart of Burke’s constitutional thought is that the constitutional order of any
society is dependent on a finely-wrought web of custom and convention, integrating
through time and accretion a “chain of being” linking the dead, the living, and those yet
unborn. It is useless to discuss the formal arrangements of power, for they will evolve
and change according to the needs of society, without recognizing the permanent
principles that exist behind them. The unwritten constitution of any society is this body
of custom and convention that is incapable of being positively established by law or
constitution. The unwritten constitution takes into account the prejudice of its people—
prejudice not as bigotry but more specifically the temper and disposition of the people.
Burke’s entire philosophy suggests an unwritten constitution underlying the positive
constitution. Dr. Kirk locates six articles in Burke’s unwritten constitution: “reverence
for the divine origin of social disposition; reliance upon tradition and prejudice for public
and private guidance; conviction that men are equal in the sight of God, but equal only
so; devotion to personal freedom and private property; opposition to doctrinaire
alteration.” There are, indeed, elements to the unwritten constitution of any civilized
society.

A constitution is any society’s adaptation of the natural law to suit particular
needs and circumstances. This adaptation comes about by the mediating agency of man,
in the exercise of his “right reason,” or Aquinas’s practical reason. Right reason is not
the province of any on person alone, but is a corporate attribute that reveals itself slowly
through the historical development and continuity of society. This underlies any positive
institution of government. Professor Stanlis explains:

The spirit of constitutional law is infused with prudence,
which in its most general meaning is simply the ultimate
and constant consideration which every statesman is
morally obliged to give, under the Natural law, to the

301 On this point see McConnell, supra note 275, at 418-419.
302 Reflections, supra note 5, at 232. See also id. at 314 (noting with astonishment that the French
Revolutionary constitution makes no reference to the people it purports to govern).
303 See, e.g., Letter to a Noble Lord, supra note 23, at 511(noting that the prejudice or “inveterate opinion”
found in the old nobility cannot be made de novo by a posited constitution)
304 KIRK, supra note 244, at 15.
A constitution, like legislation promulgated under it, must take into account the 
spirit of the people living under it. Burke generally resisted queries by his French 
correspondents to put forward a new plan of government for France; however, his general 
recommendation is that France follow the principles of the English constitution, subject 
to improvement by the slow course of history, the exigencies of the times, and the present 
state of the community. Burke criticized the National Assembly for taking Rousseau 
as its guide and attempting “a regeneration of the moral constitution of man.” Burke 
saw this as nonsense, and contrary to the first maxim of law and politics—that the law 
take men as it finds them. Burke, later in life, reminded a correspondent, in discussing 
religious persecution, that law cannot detach a man from his old prejudices and bind him 
to new ones. Such an endeavor was beyond all human power.

The constitution of any country is the product of slow growth; the French 
Revolutionaries were foolish to write a constitution of France in such a short period of 
time, based not upon the unwritten constitution of France but on their own theories. The 
unwritten constitution, and not abstract theories, provides the underlying moral basis 
of the formal one.

F. The Imperial Constitution

Burke lived and wrote in a time in which Britain began to enjoy a prosperous 
overseas empire. Much of his business as a legislator dealt with matter of imperial law 
and policy. Burke’s theory of empire, according to two historians, rested on three 
essential foundations. These are the natural law limitations on government, respect for 
the chartered rights of imperial constituents and of their traditional course of dealing with 
the Crown and Parliament, and the preservation of basic British constitutional rights for 
imperial subjects. In his imperial theory, as in all other aspects of his jurisprudential 
thought, he eschewed general theories, and abstract reasoning and arguments.

In his Speech on American Taxation, Burke set forth his view of the American 
colonies and the form of government taking shape there. Burke considered the imperial 
constitution as something distinct from the British Constitution, because the former arose

305 STANLIS, supra note 6, at 111; Appeal from the New to the Old Whigs, supra note 146, at 80-81 
(“Prudence is not only the first in rank of the virtues political and moral, but she is the director, the 
regulator, and the standard of them all.”)
306 Letter to a Member of the National Assembly, supra note 24, at 47.
307 Id. at 28, 30. Burke, in this letter, provides a devastating critique of Jean-Jacques Rousseau and his 
philosophy.
308 Tract on the Popery Laws, supra note 15, at 222 (arguing that Ireland should be governed according to 
its particular conditions).
309 EB, Letter to William Smith, Esq. on Catholic Emancipation, in 4 WORKS 361, 368.
310 Letters on a Regicide Peace, supra note 26, at 61.
311 Bruce P. Frohnen and Charles J. Reid, Jr., Diversity in Western Constitutionalism: Chartered Rights, 
Federated Structure, and Natural-Law Reasoning in Burke’s Theory of Empire, 29 MCGEORGE L. REV. 27, 
31 (1997).
312 Speech on Conciliation with America, supra note 43, at 109 (rejecting any discussion of abstract views 
of right).
out of distinctive practices and policies more suited to overseas dominions than the homeland. First, Burke recognized that the sovereignty of Parliament takes on a dual role. At one instance Parliament regulates matters of domestic concern. However, it also sits atop a great empire, in what Burke called Parliament’s “imperial character.” In this capacity Parliament directs the local legislatures of the colonies, as it “guides and controls them all without annihilating any.”313 While Burke agreed with Blackstone that Parliament’s power in this regard is and must be “boundless,” he also believed that these local legislatures should have an area of prerogative insulated from Parliamentary control contingent upon their being “equal to the common ends of their institution.”314 For instance, colonial legislatures had the right to levy taxes.315 During the American War, Burke (on behalf of the Rockingham Whigs, his political party) wrote to the King that Parliament cannot deprive all colonies of local power without destroying Parliament. Parliament cannot possibly collect facts and gather information in a way to provide adequately for all local contingencies. “To leave any real freedom to Parliament, freedom must be left to the colonies.”316

This local power is not limitless—it cannot, for example, abrogate the right of the subject to appeal to the Privy Council in London.317 All local power must be exercised consistently with the principle that citizens of the British Empire are of a “common naturalization”318 and enjoy the rights of Englishmen. Burke truly saw London as the center not only of the empire, but of justice for all Englishmen, and the farther away from London the Englishmen resides the more likely he will be subject to an abuse of local power.319 The liberty of all colonial subjects is protected by a liberal right to petition, which, for Burke, should include a right to declare to the government that it has exceeded its powers.320 Only the most hard-hearted tyrants would refuse to allow such a petition.

In the interest of empire, Parliament is to be sovereign. The actual exercise of this sovereignty is a separate question. Burke knew that direct representation of the American colonies would not be feasible, but believed firmly that the Americans should not be taxed for revenue purposes.321 Burke forecasted the constitutional crisis such a course of action would provoke:

313 Speech on American Taxation, supra note 41, at 75-76.
314 Id. at 76. See also Speech on Conciliation with America, supra note 43, at 136 (“[T]he subordinate parts have many local privileges and immunities.”); Frohnen and Reid, supra note 311, at 61 “Burke envisioned a federated structure to the empire, in which Parliament possesses ultimate sovereignty, but in which the constituent members also enjoy autonomy that should not ordinarily be disturbed. Indeed, Parliament is to act only where subordinate legislatures are incapable (or refuse to) fulfill their responsibilities.”
315 Speech on Conciliation with America, supra note 43, at 163.
316 Address to the King, supra note 225, at 176.
317 EB, Letter to Sir Charles Bingham, in 6 WORKS 123, 124-5. “To what end is the ultimate appeal in judicature lodged in this kingdom, if men may be disabled from following their suits here, and may be taxed into an absolute denial of justice?” (emphasis in original).
318 Id.
319 Address to the King, supra note 225, at 166. “Abuses of subordinate authority increase, and all means of redress lessen, as the distance of the subject removes him from the seat of supreme power.” Cf. Frohnen and Reid, supra note 4, at 67 (arguing that Burke holds that the proper powers of government diminish as the group involved grows more distant and foreign).
320 Address to the King at 173.
321 Observations, supra note 75, at 356.
Taxing for the purpose of raising revenue had hitherto been sparingly attempted in America. Without ever doubting the extent of its lawful power, Parliament always doubted the propriety of such impositions. And the Americans on their part never thought of contesting a right by which they were so little affected. Their assemblies in the main answered all their purposes necessary to the internal economy of a free people, and provided all the exigencies of government which arose amongst themselves. In the midst of that happy enjoyment, they never thought of critically settling the exact limits of a power, which was necessary to their union, their safety, their equality, and even their liberty. Thus the two difficult points, superiority in the presiding state, and freedom in the subordinate, were on a whole sufficiently, that is practically, reconciled; without agitating those vexatious questions, which in truth rather belong to metaphysics than politics, and which never can be moved without shaking the foundations of the best governments that have ever been constituted by human wisdom.  

As to India, Burke recognized that its society was less pedigreed for the enjoyment of British liberties, but that was no cause for any government to refuse them the rights they had traditionally enjoyed. Burke found no support for the notion that Asian governments were historically unlimited and despotic so as to legitimize such a manner of rule there by the British. The dictates of natural justice recognized that Indians were not to be enslaved; their finely-wrought social order was a product of historical development no less profound than that of England. Far from abrogating it, England should preserve it and even derive benefit from it.

E. Reform and Revolution

Any state without the means of some change is without the means of its conservation.

Burke embraced reform as eminently constitutional, as a preservative. But Burke was careful to distinguish constitutional reform from constitutional change. Change alters the constitution substantially and ventures society into uncharted waters—it takes no notice of what is good that might be discarded in the process of innovation (a term

322 Id. at 385-6.
323 Speech on the Impeachment of Warren Hastings, supra note 140, at 396.
324 See P.J. Marshall, Burke and India, in IAN CROWE (ED.), THE ENDURING EDMUND BURKE: BICENTENNIAL ESSAYS 39, 42 (1997) (“A British empire in India must be on the preservation of Indian authority at every level. The British must respect the complete independence of the rulers allied to them and scrupulously preserve the rights of landowners and other subordinate authorities within their own provinces. The function of British government should be strictly limited to protection. Indians must above all be protected from the British themselves.”).
325 Reflections, supra note 5, at 161.
Burke uses synonymously with “change”). The process of innovation is sure to upset the balance that, before, had made for a happy society, and leaves the population worse off than before. Reform, however, is defined by Burke as “a direct application of a remedy to the grievance complained of,” and nothing more. Reform merely asks the legislator to rewrite or repeal a bad law so that government might be brought in harmony with the natural law. Burke catalogs four types of reforming statutes: 1) if a previous law is totally wanting, a new one replaces it (repealing); 2) a new law is passed to enforce an old, defective one (enforcing); 3) an old law that is avoided by power or fraud, a new one is passed declaring the old one (declaratory); and 4) an old law is rendered unclear or is controverted, and a new law must be enacted to explain the old one (explanatory).

Innovation asks of the legislator to remodel the constitutional order in hopes of remediying certain grievances. One scholar notes: “[N]othing was more delusive and pernicious, nor more in violation of prudence and the fulfillment of Natural law through historical prescription, than a radical attempt to reconstruct the social order on any abstract rational theory.” Burke succinctly captured the preserving aspect of reform: “A spirit of reformation is never more consistent with itself than when it refuses to be rendered as a means of destruction.” Innovation destroys, reform preserves.

Nothing in the Constitution should be considered beyond reform. “Whatever is most ancient and venerable in our Constitution, royal prerogative, privileges of Parliament, rights of elections, authority of courts, juries, must have been modeled according to the occasion.” One of the more significant issues in the justice system of Burke’s day was the power of the judge and jury in criminal prosecutions for libel. Unlike other crimes, juries in libel cases were not supposed to find the element of intent. They merely were to determine that the offending writing actually occurred; criminal intent was a matter of law for the judge. Burke supported efforts to bring libel in line with all other crimes in giving the jury a greater province over intent. He explained that “if the intent and tendency be left to the judge, as legal conclusions growing from the fact, you may depend upon it you can have no public discussion of a public measure; which is a point which even those who are most offended with the licentiousness of the press...will hardly contend for.” Those that supported the present allocation of power in libel trials had attempted to portray juries as untouchable by legislation. Burke would have none of this. He argued, that “[t]o suppose that juries are something innate in the Constitution of Great Britain, that they have jumped, like Minerva, out of the head of Jove in complete armor, is a weak fancy, supported neither by precedent nor by reason.” Burke alleged that he could point to at least forty-three statutory alterations of the power of the jury in the Parliamentary precedents.

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326 Letter to a Noble Lord, supra note 18, at 479. Burke engages in a bit of hyperbole in discussing the maladies of innovation, which detracts a bit from his otherwise sound point.
327 STANLIS, supra note 6, at 112.
328 EB, Speech on the Powers of Juries in Prosecutions for Libels, in 7 WORKS 107,121.
329 STANLIS, supra note 6, at 113.
330 Appeal from the New to the Old Whigs, supra note 146, at 112.
331 Speech on the Powers of Juries in Prosecutions for Libels, supra note 327, at 115.
332 Id. at 114.
333 Id. at 115.
334 Id. at 116.
Constitution, are not a work of chance, but a matter of institution and design by the slow process of legislation and judicial practice.\textsuperscript{335}

Burke, in his \textit{Tract on the Popery Laws}, applied a stricter test for the repeal of an old law than he does to the passage of a new one. A law should not be repealed simply because it is not perfect, or because it was passed by an imperfect institution.\textsuperscript{336} This may disrupt an otherwise sound legal regime. “[L]aws, like houses, lean on one another….\textsuperscript{337}” Burke’s test for repeal, like so much of his jurisprudence, was illustrated again by the case of the so-called Popery Laws. A law that transgresses common right and the ends of just government is a candidate for repeal. In fact, for Burke, such is not a law at all. It is not merely an imperfect law (which could be said of virtually any law), it is a law that is \textit{void ab initio}. Imperfect laws can be “circled” by equity.\textsuperscript{338} But perfecting, or supplementing through equity, a law that transgresses common right would be to allow its more effectual \textit{oppression} of the population, to render it more complete in its oppression, to the point where the law becomes “a national calamity.”\textsuperscript{339}

That Burke had a strong disposition for reform has already been discussed. Burke placed himself in the Whig tradition by recognizing a right to reject an oppressive constitutional order, sometimes referred to as the “right of revolution.” But for Burke the test was stringent, in terms he called “the last resource”:\textsuperscript{340}

The speculative line of demarcation, where obedience ought to end, and resistance must begin, is faint, obscure, and not easily definable. It is not a single act, or a single event, which determines it. Governments must be abused and deranged indeed, before it can be thought of; and the prospect for the future must be as bad as the experience of the past.\textsuperscript{341}

That test, for destroying an established government, was met, in Burke’s estimation, in the case of the East India Company. Burke admitted his reluctance: “I feel an insuperable reluctance in giving my hand to destroy any established institution of government, upon a theory, however plausible it may be.”\textsuperscript{342} Burke recounted the conditions on which government must be taken out of the hands of the Company: “1\textsuperscript{st}, The object affected by the abuse should be great and important. 2\textsuperscript{nd}, The abuse affecting this great object ought to be a great abuse. 3\textsuperscript{d}, It ought to be habitual, not accidental. 4\textsuperscript{th}, It ought to be utterly incurable in the body as it now stands constituted.”\textsuperscript{343} Furthermore, all of this must be made as visible as the light of the sun.\textsuperscript{344} The fact that the Company was “absolutely incorrigible” was reason to take power out of its hands, “on the same principles on which have been made all the just changes and revolutions of government

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\textsuperscript{335} \textit{Id.} at 115.
\textsuperscript{336} Id. at 115.
\textsuperscript{337} \textit{Tract on the Popery Laws, supra} note 15, at 212.
\textsuperscript{338} Id.
\textsuperscript{339} Id.
\textsuperscript{340} \textit{Id.} at 213.
\textsuperscript{341} \textit{Reflections, supra} note 5, at 170.
\textsuperscript{342} \textit{Id.} at 169.
\textsuperscript{343} \textit{Speech on Mr. Fox’s East India Bill, supra} note 12, at 293-294.
\textsuperscript{344} Id.
that have taken place since the beginning of the world.”

According to Frohnen and Reid, “[i]t is in this respect that the East India Company failed to execute its part of the bargain. In a sense, Burke argued, the Company broke its faith not only with Parliament, but with the Indian people. And having broken faith, the Company forfeited its prerogatives.”

Lastly, any overthrow of the constitutional order, the constitution’s “extreme medicine,” must only be in preparation of something better. As in England in 1688, but unlike France in 1791, every revolution must end in a better, happier settlement. Such a settlement must bring government more, and not less, into line with the purposes of its very existence. Burke did not place into the hands of the people a sovereign right to overthrow government at their pleasure. Rather, there is an original contract of society binding on posterity, “implied and expressed in the Constitution,” the fundamental subversion of which generates a right to revolt, as in 1688. The so-called Glorious Revolution is for Burke a second example of a justified revolution:

The people at that time reentered into their original rights; and it was not because positive law authorized what was then done, but because the freedom and safety of the subject, the origin and cause of all laws, required a proceeding paramount to them. At that ever memorable and instructive period, the letter of the law was superseded in favor of the substance of liberty.

When the fundamental laws have been subverted, revolution is not to create a new regime, but to restore an earlier relationship between ruler and ruled and repair to basic liberties. Revolution does not destroy the social order—it restores it after a time of unjust innovation or subversion. Revolution is a restoration, just as reform is a preservative.

Finally, one should be circumspect in locating distempers in the Constitution, and in applying remedies to these distempers. In discussing Parliamentary reform, Burke cautioned against reform at the first appearance of a constitutional problem, without careful consideration. While the admitted faults of the Constitution ought to be corrected, there may be things that appear as faults on the surface, but that work in perfect harmony with other provisions of the Constitution. The same rule obtains when applying a remedy—this should not be done piecemeal. If one aspect of a remedy may be enacted, but not another complementary aspect, the entire project should be given up until the time for change is ripe.

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345 Id. at 519.
346 Frohnen and Reid, supra note 4, at 38.
347 Appeal from the New to the Old Whigs, supra note 146, at 79-80.
348 Id. at 120-121. Later in the same essay, Burke puts forward two conditions for revolution: breach of the covenant by one party or consent to change by both parties; id. at 162.
349 Address to the King, supra note 225, at 178.
350 Burke laid out this and the preceding thoughts on Constitutional reform in his “Letter to the Buckinghamshire Meeting on Parliamentary Reform, April 13, 1780,” supra note 3, at 294. The chairmen of this meeting had asked Burke for his support for lengthening the duration of Parliaments. Burke declined.
For Burke, the constitution is a work of moral machinery suited to a moral order, by which the orderly promulgation of law and the administration of justice may take place. It must function to suit the ends of government itself—no constitution ought to be exalted above the happiness of man in society. The moral order, including the popular religion as well as substitute modes of belief, is not the product of the constitution, but it is to be reflected in the constitution. Due to its prescriptive and complex nature, the constitution guarantees that no measures inimical to the order may become or stay law. For Burke, simple engines of government as opposed to the complex, time-wrought constitution of England, are nothing but instruments for the headlong carrying out of schemes not tested against the wisdom of fundamental law, rendering whatever is unjust to be quite convenient.

VII. The Common Law

*I shall never quit precedents, where I find them applicable.*

The above quote, made regarding the treatment of the American Colonists, encapsulates Burke’s respect for the common law, a respect that is hardly surprising given his respect of history and tradition. A respect for the common law, a subject which Burke claims to have mastered, follows from his view of the continuity of society, his view of rights and legal institutions as a prescriptive inheritance, his view of the primacy of corporate rather than individual reason, and his understanding of liberty as a complex, social matter. As society is, by definition, the union of the living and the dead and the unborn, Burke could not reject the common law past. For him, freedom came from man’s “willing adherence to the just rules and restrictions of a particular civil society.” Burke would probably agree with Holmes that the life of the law has not been logic, but experience, but he would part company by noting that the life of the law should not be logic, but moral prudence, prescription, and man’s social nature. The logic of some person or group of people should not supplant corporate, intergenerational wisdom. Burke admired the common law not because of a worshipful veneration of the past, but because he knew that within the complexities of the law are bound up the liberties of Englishmen. While “[c]ases are dead things, principles are living and productive.” To Burke the forms in themselves mean nothing; it is the principle hidden behind them. “When any construction of law goes against the spirit of the privilege it was meant to

351 Speech on Economical Reform (1780), supra note 113, at 300. Burke here was talking about the forest lands still held by the crown, which Burke proposed to sell for the public benefit. Burke would not do this, however, without a strict regard for the property rights involved.

352 Reflections, supra note 5, at 274-275(discussing the uses of history).

353 STANLIS, supra note 6, at 35. Burke measured his usefulness to his country by his acquaintance with its laws. See Letter to a Noble Lord, supra note 23, at 484.

354 STANLIS, supra note 6, at 164.

355 Observations, supra note 75, at 290.
support, it is a vicious construction.”

To that end, Burke credited the use of legal fictions to evade unjust or ridiculous outcomes, giving the fiction “more sense and utility than the law which was evaded.” And, as noted above, the test of any law is whether its just purposes can be more fully effectuated by the use of equity, or whether its harsh consequences in particular cases may be so mitigated.

Burke revered the great common law jurists of England. He referred to Sir Edward Coke, who exalted the common law above any claims of sovereign right, as “the great oracle of our law.” He was similarly praiseful of Blackstone, who (among others) was “industrious to prove the pedigree of our liberties.”

As for Sir Matthew Hale and his times: “[T]o that age, and to all posterity, the most brilliant example of sincere and fervent piety, exact justice, and profound jurisprudence.”

Burke noted that the liberty-loving American Colonists had outdone Englishmen in purchasing copies of Blackstone’s *Commentaries* and makes a further point—that one schooled in law forms “a formidable adversary to government.” Such learning allows one to anticipate a grievance before it materializes and sensitizes him to the slightest impingement of liberty, “snuff[ing] the approach of tyranny in every tainted breeze.” He extolled the study of law as “one of the first and noblest human sciences,—a science which does more to quicken the wit and understanding than all the other kinds of learning put together….”

The common law (it is not difficult to imagine) is for Burke the greatest barrier to legislative or constitutional innovation that exists in the bailiwick of English jurisprudence. Its concrete rules are more readily applicable and less subject to dispute than the maxims of natural law, with the added virtue that and it is not posited by the same men or in the same manner as are constitutional provisions.

Burke also maintained that the common law is England’s adaptation of the natural law. To him the “spirit of the natural law was embodied in the rules of equity which governed English common law.” Burke saw the role of equity in mitigating the harsh consequences of law; any law not amenable to equitable modification—the process of furthering the pure purposes of law—is probably not suited to the common good in the first place and is thus void. Man is kept in obedience to the natural law by the force of custom and convention. Burke recognized the importance of evolutionary change, which is inherent in the common law method of analogy and adaptation to present-day cases. The common law of England provides an illustration of societal evolution at work. Burke made reference to “our ancestors, men not without a rational, though exclusive

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356 Thoughts on the Cause of the Present Discontents, *supra* note 132, at 505.
357 *Id.* at 506. Burke was discussing here, by way of example, the judicial evasion of the Statute of Westminster, a statute that allowed perpetuities. Burke did not want fictions incorporated in Parliamentary procedure, where the Parliament would be allowed to avoid the results of an election the way courts of law might avoid statutes.
358 *Reflections, supra* note 5, at 170
359 *Id.*
360 Letter to a Member of the National Assembly, *supra* note 24, at 13-14.
362 *Id.*
363 Speech on American Taxation, *supra* note 41, at 38.
364 STANLIS, *supra* note 6, at 38.
365 Tract on the Popery Laws, *supra* note 15, at 212. Burke’s point is that the more perfect an unjust law is made, the more injustice it is allowed to accomplish.
366 KIRK, *supra* note 175, at 148.
confidence in themselves,—who, by respecting the reason of others, who, by looking backward as well as forward, by the modesty as well as by the energy of their minds, went on insensibly drawing [the] Constitution nearer and nearer to its perfection, by never departing from its fundamental principles, nor introducing any amendment which had not a subsisting root in the laws, Constitution, and usages of the kingdom."

Despite the many criticisms of the common law put forward by the Utilitarians and revolutionaries, Burke posited that the complexities and fictions of “artificial law” were better than no law at all. For Burke, no law was far worse than bad law. Just as, to Burke, revealed religion was far superior to Bolingbroke’s “natural” religion, human institutions, with all their faults, are superior to so-called “natural” society. According to a leading Burke scholar: “Custom and usage, in fine, are firm ground for justice and for voluntary acceptance of necessary authority; pushing claims of abstract right upon metaphysical premises, and endeavoring to govern the commonwealth by notions of perfection, must end in setting interest against interest.”

Two Burkean concepts fortify a respect for the common law inheritance: prejudice and “the general bank and capital of nations and ages.” Both go hand in hand, as they refer to the product of society’s application of solutions to legal problems man in society encounters. Man is born into a developed society, where tradition and usage has sanctioned certain outcomes to the difficult problems of social existence. The received beliefs come with a strong presumption in their favor; they are the product of intergenerational wisdom, and their reasons need not be—and indeed cannot be—made manifest to all. One commentator notes:

The ‘bank and capital’ is not a chance accumulation. It is the fruit of experience and reflection. The beliefs that Burke calls prejudices have all, or nearly all…been produced by hard thinking; they are beliefs that men have acquired in the past by solving the problems life presented to them. But if every man had to solve all these problems for himself, mankind could never make progress; one of the conditions of progress is that men should accept ready-made most of the solutions offered to them.

But Burke did not conceive of the common law as a static body of timeless precepts: within the common law system lie the seeds of society’s slow growth and adaptation, allowing it to submit, by degrees, to the great law of change.

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367 Appeal from the New to the Old Whigs, supra note 146, at 213.
368 EB, A Vindication of Natural Society, in 1 WORKS 9, 57. Burke here writes satirically of the “expedition, simplicity, and equality of arbitrary judgments” and the “miseries derived from artificial law.” Burke’s “Vindication” was his attempt to point to the absurdities of “natural” versus artificial religion—to man, art is nature.
369 Id. at 64-65. Burke would, doubtlessly, consider natural society to be a redundancy. Society is for man, as a political animal, perfectly natural.
370 KIRK, supra note 175, at 57.
371 Burke addresses both concepts in a notable passage; see Reflections, supra note 5, 223.
372 PLAMENATZ, supra note 75, at 343-344.
A. Property and Social Improvement

While Burke recognizes the possession, enjoyment, and transmission of property to be a natural right, much of his discussion of property rests on a prudential, almost economic, basis. Burke shows a tremendous competence in the area of property law. Like so many of his day, he reveres property as the basis for intergenerational society. “The power of perpetuating our property in our families is one of the most valuable and interesting circumstances belonging to it, and that which tends most to the perpetuation of society itself.”373 He continues: “The possessors of family wealth, and of the distinction which attends hereditary possession…are the natural securities for this transmission.”374 Burke prefers primogeniture, the well-established course of descent at common law, to the division of one’s estate equally among heirs at death.375 The preservation and transmission of property suggests to Burke a continuity of society; a sentiment that surpasses the momentary considerations of a “thoughtless, loitering, dissipated life.”376 The law should encourage the long-term possession of property. Of course, the Penal Laws in Ireland had just the opposite tendency, provoking Burke to write: “A tenure of thirty years is evidently no tenure upon which to build, to plant, to raise inclosures [sic], to change the nature of the ground, to make any new experiment which might improve agriculture, or to do anything more than what may answer the immediate and momentary calls of rent to the landlord, and leave subsistence to the tenant and his family.”377

To Burke, property should form the basis of a portion of the representation of a state, in order that all interests in society be represented to a “due and adequate” extent.378 Burke’s respect for private property did not come from an undue veneration of wealth,379 but instead because of Burke’s property-like conception of individual rights. Rights, like property, partake of the characteristic of heritability, or prescriptive ownership, and of the reinforcing capacity of transmission through the ages.

Burke addressed the argument, made by revolutionary politicians, that the accumulation of property into a few hands was unjust. He countered this assertion by noting that it was in the nature of property to beget such an inequality. Property is “formed out of the combined principles of acquisition and conservation;” not all men are equally suited, by nature, to acquire property or maintain it.380 Conservation can only persist against those wishing to dissolve estates if property is adequately represented in the allocation of political authority. Of course, this is the function of the House of Lords, “the great ground and pillar to the landed interest, and that main link by which it is connected with the law and the crown….”381 Burke, on various occasions, praised the

373 Reflections, supra note 5, at 189.
374 Id.
375 Id. at 353.
376 Id. at 352.
377 Id. at 189.
378 Reflections, supra note 5, at 189.
379 Burke was careful not to rank himself among those he called “creeping sycophants” and “blind, abject admirers of power” who idolized hereditary wealth. Reflections at 190.
380 Id. at 189.
381 Appeal from the New to the Old Whigs, supra note 146, at 152.
law of primogeniture, even though it failed to comport with revolutionary notions of what is “natural.”

Law should not confine property into the hands of the few by restraints on alienation, however. Land should have free circulation through the community in order that society’s widespread industry is employed in making improvements. Property means profit, improvement, industry, and thereby, melioration of poverty. It is necessary to the existence of the good order of society. It is the fount from which education and well-being spring. Property allows for industry and improvement. Private property, apart from being a natural right, is highly useful to man and society—and laws made in furtherance of private property are of great utility to society.

Burke, the Whig, recognized that civil society is instituted to protect the property of individuals, a natural right. Such protection being one of the advantages of civil society, Burke can consistently consider security of one’s property a right. Prescription, which to Burke is the basis of good title to any of society’s advantages, likewise secures property against all claims. Burke called the prescriptive right to one’s property a fundamental part of the law of nature. Contrary to the assertions of Revolutionary leaders in France, Burke claimed that prescriptive rights to property are good not only in courts of justice but against acts of the legislature. Prescription provides “a title in which not arbitrary institutions, but the eternal order of things, gives judgment; a title which is not the creature, but the master of positive law…rooted in the law of Nature itself, and is indeed the original ground of all known property: for all property in soil will always be traced to that source, and will rest there.” In another instance Burke called prescription a “principle of natural equity.” This is entirely consistent with the purposes of civil society, by which the legislature is instituted—to protect property. The legislature is also powerless to alter the “rule[s] and maxim[s]” giving property its stability; presumably, to Burke, the law of prescription. One scholar links Burke’s respect for property to his natural law thought: “To Burke one of the great means of

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382 Id. at 153.
383 Tract on the Popery Laws, supra note 181, at 352.
384 Reflections, supra note 5, at 243. “[I]t is to the property of the citizens…that the first and original faith of civil society is pledged.”
385 Id.
386 Reflections at 243, 285-286 (noting in each instance that property is the preeminent right in society as against all government).
387 Letter to Richard Burke, supra note 82, at 438. Paul Lucas has attempted to show that prescription, absent good faith and just title, was not a part of classical natural law or the English common law. For this reason, the idea is novel in Burke. See Lucas, supra note 175, at 61-62. (“Burke’s prescription broke many old laws and I shall appeal to the old lawyers of all of them.”). Lucas concludes his survey: “But whatever was the relationship between prescriptive thought and movements in philosophy, it is clear that, in the late eighteenth century, prescription was becoming a new monism and a moral (as opposed to a legal) presumption rather in favour of rather than against any existing circumstance; for, when used as an argument, prescription no longer hinted at a tainted and illegitimate origin in the means by which a particular possession had been acquired, but appeared as a psychological basis for all titles, most of which were deemed probably vicious in their distant beginnings. …Prescription and inheritance by corporate succession, which were but two means of acquisition, became in Burke’s mind the quintessence of private property, with entail and primogeniture rendering the noble family a sort of quasi-corporation: the substance was subsumed under two of its modes, and property became in part an accumulation of time.”
388 EB, Speech on Dormant Claims of the Church, in 7 WORKS 139, 140.
389 Reflections at 286.
fulfilling the Natural law was through prescription, which maintained the law of social union by protecting the private property of men and institutions.” The common law of property is the perfect example of the relation of the positive to the natural.

In 1780, Burke put forward an ambitious program of reform of civil offices. The test for the continued existence an office was, for him, the usefulness of the office—does it serve the public good so as to outweigh the cost to the public treasury? But he stopped short of reforming the offices to be held for life tenure because they were held as a form of property. About these offices, Burke explained “[t]hey have been given as a provision for children; they have been the subject of family settlements; they have been the security of creditors.” As such, they were lawfully insulated from reform. He uses the opportunity to elaborate further on his respect for property:

> What the law respects shall be sacred to me. If the barriers of the law should be broken down, upon ideas of convenience, even of public convenience, we shall have no longer anything certain among us. If the discretion of power is once let loose upon property, we can be at no loss to determine whose power and what discretion it is that will prevail at last.

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More so than the fundamental laws or statutes, which have to be positively instituted, the common law guarantees the harmonious functioning of society. Due to its case-by-case nature and the relative predictability of its application, one may suitably regulate his own affairs with a guarantee that he is acting lawfully. A fixed rule of conduct, not subject to arbitrary and irrational reversal, is essential to the liberal, societal pillar of Burke’s reflections on the legal order. Fixed rules of property, moreover, guarantee the private and (at times) prescriptive possession, improvement, and transmission of property. Burke acknowledged the property basis of society and of civilized institutions.

The common law is a vital building block in the second and complementing pillar of the legal order. Ideology and the individual case method of divining law and meting out justice have never been good companions. The former seeks a regeneration of the moral constitution of man on a rationalistic basis and will observe no fixed rules or prior claims in the process of so doing; the latter reinforces man’s societal needs throughout the ages by working out a rule suitable—and only suitable—to his harmonious relations with his fellow man.

VIII. Regulatory Law

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390 STANLIS, supra note 6, at 75.
391 Speech on Economical Reform, supra note 113, at 329.
392 Id.
393 Reflections at 243.
No man living loves restrictive regulations of any kind less than myself; at best, nine times out of ten, they are little better than laborious and vexatious follies.  

A. Commerce and Society

Burke’s thinking on commerce was not markedly distinct from his principles relating to society itself. It recognized the limits of government action and arbitrariness that fits a pattern of his overall thought. Commerce, like society, depends upon a foundation of law and morals the absence of which turns commerce into plunder and society into chaos. It does not follow from that, however, that Burke posited intense regulation of commerce in the interests of morality. Rather, he would prefer that neither government nor revolutionaries outside of government erode the moral and institutional bases of sound, self-regulating commerce. A disruption of society by revolution threatens inherited codes of commercial usage, as well as the moral basis therefor, necessary even for self-regulating commerce.

Burke found many of the proponents of commerce in his own day to be at the same time the opponents of society. Burke believed that one can and should favor both, as the two are not at odds. They both depend upon the same thing. “Societies are complex entities…,” writes one intellectual historian in conjunction with Burke, “answering, however imperfectly, a multiplicity of needs, and their institutions are interconnected in ways not always apparent. The goods [of society] are fragile, and when they are destroyed, the result is human misery.”

Burke generally embraced the economic philosophy of Adam Smith, but his philosophy (like Smith’s) was not one of complete laissez-faire. Commerce, while it should generally be insulated from the “vexatious follies” of government, should never be paramount to the needs of society. Commerce exists to serve society (though not government), and where commerce tramples on social harmony, as in India, it no longer serves its prospering purpose and is indistinguishable from plunder. Commercial entities exist in society just as humans do, and must be bound by the same rules existing

394 Letter to Sir Charles Bingham, supra note 316, at 132.
395 On this point see Norman Barry, The Political Economy of Edmund Burke, in IAN CROWE (ED.), THE ENDURING EDMUND BURKE 104, 113 (1997). (“The point of [Burke’s] economics is that is advises statesmen of the limits of political action.”)
396 Reflections, supra note 5, at 374. Burke comments here on the acquisition of property and money by members of society: “In the settled order of the state, these things are not to be slighted, nor is the skill in them to be held of trivial estimation. They are good, but then only good, when they assume the effects of that settled order, and are built upon it.”
398 Burke observes, in Reflections, that France had made economic improvements prior to the Revolution, an “earnest endeavor towards the prosperity and improvement of the country” by correcting “abusive practices and usages that had prevailed in the state” and by a relaxation of royal power over the liberty and property of the subject. Burke goes on to note that the Revolution will disrupt if not halt this process, causing an emigration of nobility, confiscation of property, and he documents population decline and widespread unemployment in Paris. Reflections, supra note 5, at 266-267.
399 Id.
400 For Burke’s general indictment of the East India Company see Speech on Fox’s East India Bill, supra note 12.
to check individual and governmental behavior so as to guarantee social harmony. If commercial actors begin to pursue an interest outside the profit motive (motives actuating their very existence), they are trespassing on the societal good. But Burke recognized the self-regulating capacity of commercial activity; a commercial actor interested in profits would not want to plunder. “…[C]ommerce…flourishes most,” he observes, “when left to itself. Interest, that great guide of commerce, is not a blind one. It is very well able to find its own way; and its necessities are its best laws.”

Among the categories of jurisprudence, Burke noted that regulatory law was different from fundamental law. Unlike fundamental law, “the public exigencies are the masters of all such laws” according to the dictates of prudence. That is, the legislature is at liberty to alter regulatory laws without altering the constitutional order. Regulatory does not enjoy the presumption of legitimacy that fundamental law does, and they may be altered and repealed for any number of reasons. Regulation depends so heavily on prudence and circumstance and should therefore not be a permanent feature of the constitutional order.

At the heart of Burke’s respect for regulatory law was his advocacy of commerce not for its own sake but connected to virtue. It is this cardinal principle that leads Burke to reject the unregulated, untrammeled commercial monopoly of the East India Company. The Company had used its power for purposes of avarice and corruption, trampling on the rights of the inhabitants of India, and had clearly ceased to pursue a commercial purpose. Justice in conformity with natural law, defined by Burke as everyone doing as he pleases up to the boundary of the rights of others, is to reign supreme when pitted against complete economic freedom. As has been noted in discussing rights, Burke recognized no claim of “right”—natural or otherwise, for the East India Company to continue in its legislatively-sanctioned monopoly over Asiatic trade in order to pursue the purpose of perpetual trespass. Plunder is not among the natural rights of man.

Consistent with Burke’s appreciation of the positive, societal implications of commerce was his embrace of free trade with Ireland. This position was politically courageous for Burke, as he represented for a time the city of Bristol, which had an interest in preventing Irish imports. “Trade is not a limited thing,” he reminds his constituents in Bristol, “as if the objects of mutual demand and consumption could not stretch beyond the bounds of our jealousies.” According to Burke, God has placed upon the earth a liberal allowance for all people that the restrictive contrivances of

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401 Speech on Economical Reform, supra note 113, at 341.
402 Letter to a Noble Lord, supra note 23, at 486.
403 Id.
404 Speech at His Arrival at Bristol, supra note 211, at 87.
405 MULLER at 121 (noting that, in Burke’s estimation, the East India Company had long ceased to pursue a profit motive or any purpose that actuates commerce at all). See also “Speech on Fox’s East India Bill,” supra note 14, at 290 (noting that “[p]olitical power and commercial monopoly are not among the rights of man” and are more likely to violate the true rights of others).
406 Letter to Charles-Jean-Francois Depont, supra note 22, at 405.
407 Two Letters from Mr. Burke to Gentlemen in the City of Bristol on the Trade of Ireland, in SPEECHES AND LETTERS 184, 196.
government must not thwart. Burke saw that restrictions on trade transgressed the bounds of good government, in that they (like abusive legislation) benefited some portions of the population while harming others. It is in connection to trade that he wrote: “No government ought to own that it exists for the purpose of checking the prosperity of its people, or that such a principle is involved in its policy.”

B. Taxation

Burke, as a proponent of Parliamentary supremacy, had much to say about the Parliament’s use of taxation. However, it is not easily condensed into general principles because in taxation, as much as in anything else, he eschewed abstractions as to government power and individual right in favor of a practical reconciliation between government and subject. In other words, there is no ideal system of taxation, or ideal level thereof, except that may suit the paramount need of social harmony. If there is social harmony, revenue will follow. Burke found this ideal level present in the case of America prior to the Stamp Act, where the colonial legislatures provided sufficiently for the “internal economy” of the colonies. Early in his career Burke recognized the distinction made by the American colonists between internal and external taxes. Internal taxes raise revenue; external taxes regulate commerce. Burke drew upon longstanding colonial practice in arguing that the imperial constitution provides only that Parliament may only tax the colonists “as an instrument of empire, and not as a means of supply.” Burke ceded to the colonial legislatures the right to tax and argued that Parliament should not disrupt the happy system of local taxation to prove a constitutional point. All in all, Burke shunned constitutional questions when it came to taxes and grounded his argument in prudence. In his Speech on Economical Reform he asked rhetorically “[I]s it altogether wise to have no other bounds to your impositions than the patience of those who are to bear them?” Tax policy must be based on the feelings of those who will bear it, and not on any foregone theory. All taxation must be based on consent, not as the colonists formulated consent, but the consent that comes through a social support—a societal reconciliation—to the government’s impositions.

For this reason, Burke recognized the English tax structure to be the fairest in Europe, especially when contrasted to that of France. He found the feudal incidents of land law in France to be particularly unjust, and this was coming to a disastrous head. Government should be especially delicate in its policy of taxation, considering that overreaching tax law does more harm to the public revenue than good—tyranny being a poor provider. Unjust taxation might very well be noxious to the public harmony, as it was in the case of the American colonists.

408 Id. (“...I am persuaded that no man, or combination of men, for their own ideas of their particular profit, can, without great impiety, undertake to say that [man shall not eat his bread by his labor]; that they have no sort of right, either to prevent labour, or to withhold the bread.”).
409 Id.
410 This spirit animates all of Burke’s speeches on American policy, in particular see Speech on Conciliation with the Colonies, supra note 43, in passim.
411 Speech on American Taxation, supra note 41, at 77.
412 Speech on Economical Reform, supra note 113, at 272.
413 Observations, supra note 75, at 332.
The ultimate regulation of commerce is the salutary protection of society. Burke, the supposed conservative, did not resist the fundamental feature of the liberal order—that commerce can and will bring about social change. This was happening in his own day and before his own eyes, as the landed aristocracy was slowly yielding to the new commercial gentry. Any healthy, harmonious society, will observe the “great law of change.” If society is generally left to itself, as Hayek would later formulate, the freedom of exchange among its members will lead to its spontaneous growth and development. Where Burke saw the need for legal rules is in the laying those foundations of social harmony necessary for commerce “to find its own way.” Government should not check the rightful aims of commerce. Rules are prior to society but, primarily through the interaction of common law and commerce, are adapted to society such that they may be deemed products of society and social relations. In his fragmentary Essay Towards an History of the Laws of England, Burke remarked in a striking passage how English law had developed into “a very mixed and heterogeneous mass” which had “compounded, altered, and variously modified according to the various necessities which the manners, the religion, and the commerce of the people have at different times imposed.”

Those legal foundations of society have been the subject of this article. The first pillar of the legal order favoring positive society and social harmony likewise fosters a robust commerce among its members.

IX. Conclusion

Edmund Burke’s legal philosophy might be disjointed to the casual reader of his works. It is easy to see why Bredvold and Ross’s THE PHILOSOPHY OF EDMUND BURKE is a collection of Burke’s quotes about particular topics of political theory. He wrote here and there, in response to world-changing events as they faced him in his political career. There is simply no other way to derive and interpret the entirety of his legal thought than to abstract his views on law out of the substantial mass of his writings and then look for common threads. Once that is done (I maintain), it is impossible to ignore the “society” element of Burke’s thought, or to conclude that Burke has nothing more profound to say about the legal order except to furnish an apologia for all its arcane, feudal trappings.

To stitch his thought together into the context of a pro-civil society, pro-social harmony patchwork casts new and (one hopes) interesting light onto Burke’s ideas, rendering him serviceable to those who want to employ the traditional categories of jurisprudence in preserving or restoring a fundamentally liberal legal order. Burkan jurisprudential thought may be said to have both a sword and shield dimension; affirmative in favor of true liberty and justice, reform, toleration, social harmony and civil society; defensive against dogma, theory, lawlessness, plunder, and tyranny. His

414 Letter to Sir Hercules Langrishe, supra note 160, at 301.
415 Raeder, supra note 8, at 71 (comparing Burke’s and Hayek’s views of spontaneous societal growth).
416 See supra note 400.
shield protects the society and liberty bound up in his positive pillar, as he knew that revolutionary dogma is detrimental to society and liberty, and would only destroy and never establish them. So much is made of the supposed reactionary turn in his thought that his work is truly, and I believe sadly, overlooked as one of the greatest pro-society philosophies of law and liberty at our disposal.

Perhaps Burke’s greatest service in the advancement of the idea of society was to cast the language of the law in its purest, most classical sense. He furnished what he saw as proper, positive definitions of concepts such as “liberty,” “equality,” “rights,” “justice,” and even “law” itself against radical redefinition. The revolutionaries wished to couch their reordering of society in the comfortable language of the past, but Burke would have none of it. The negative pillar of Burke’s thought, or what Burke was against, involves a rejection of the improper rendering of the terms of jurisprudence so as to be subservient to anti-social dogma. This paper has in part been dedicated to showing Burke’s emphasis on properly-defined jurisprudential concepts in service of civil society.

The idea of society serves as the focus of all that Burke said and wrote on law and jurisprudence. The positive, civil society pillar of his overall thought likewise informs the negative, anti-theoretical thrust of his works. What are the legal ingredients necessary for societies to develop? Once society is developed, how are its jurisprudential components recognized, defined, and qualified so that they are not put into service of anti-social attitudes and policies? These will always be vexing questions to those who concern themselves with the idea of liberal society and the legal order. I hope I have shown that Burke is a solid beginning point—though he would himself admit not the ending point—in answering these enduring questions.

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418 Friedrich Hayek noted that a redefinition of these exact terms was the primary focus of totalitarian propaganda, but he does not in this instance trace the defense against redefinition to Burke. See THE ROAD TO SERFDOM 158-159 (1945).