

# EDMUND BURKE AND THE POLITICS OF CONQUEST\*

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*This article restores the context of political action to Burke's thinking about politics. It begins with the specific case of his interventions in the parliamentary debate over the Quebec Bill in 1774, and proceeds from this focal point to establish the centrality of the theme of conquest to his political motivation and understanding in general. Burke's preoccupation with conquest drove him to examine eighteenth-century British politics within a set of comparative historical frameworks. These frameworks encompassed the trajectories of both modern European and imperial politics and ancient historical development. The objective of Burke's politics of conquest was to overcome the destructive influence of the spirit of conquest. That objective involved deciding upon and justifying courses of action with reference to these comparative historical frameworks of understanding. Careful investigation shows that while Burke's approach to this task was powerfully influenced by Montesquieu, his arguments invariably entailed serious criticism of Montesquieu's conclusions. Properly understood, these criticisms show that Burke himself did not endorse the political principles that were later taken to constitute "Burkian conservatism". The article draws the conclusion that a thorough grasp of the politics of conquest in Burke's thinking will force us to reposition him in the history of political theory.*

## INTRODUCTION

One of the most perceptive Burke scholars of the last century has unfortunately written little on the subject of Burke's politics, and what he has written is more

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\* Much of the research for this article was undertaken under the auspices of a John Carter Brown Library Associates' Fellowship. I am grateful to the electors to that fellowship, without which access to many of the materials used here would have proved difficult. I would also like to acknowledge the assistance of the Arts and Humanities Research Council of the United Kingdom for an award that supported research leave during which I undertook academic work of which this article forms a part. Portions of the argument presented here were delivered as papers at the Université de Sorbonne, Paris IV; the University of Sussex; Harvard University; Edinburgh University; and Universität Bayreuth. I am grateful for the comments I received on each of these occasions. I am particularly grateful to the anonymous reviewers of this article for their scrutiny, to Ian McBride for his discussion of the underlying argument and to Nicholas Phillipson for his generous advice.

suggestive than conclusive. J. G. A. Pocock has published five essays on Burke's political ideas over the course of his career to date, and edited *Reflections on the Revolution in France*.<sup>1</sup> Each of these contributions has provided crucial insights into Burke's thinking, but it was Pocock's first piece, originally published in 1960, that came closest to setting out a framework for the analysis of his politics. There it was proposed that the kind of argument typically found in Burke does not belong to one tradition, or to a single idiom of thought. Instead, distinct political discourses are mobilized in the one corpus—sometimes even within a single work. Prominent among this medley was a form of political argument deriving from the tradition of common-law jurisprudence. But still other strands in Burke's thinking could be traced to Montesquieu and to Hume, while others again were indebted to various branches of natural law. How, then, was one to make sense of Burke's political theory, above all in connection with his political practice? Not, Pocock implied, by elucidating the fundamentals of his "philosophy" in the hope of thereby decoding his political messages. For Burke's utterances on political issues ought not to be seen as components of an all-encompassing architectonic structure; they cannot be explained in terms of a single philosophical system.<sup>2</sup>

Pocock's emphasis on Burke's use of arguments derived from the great seventeenth-century common lawyers was partly intended as a response to earlier attempts to situate him squarely within a natural-law tradition. But at the same time it was directed against the prevalent idea that the principles and beliefs that guide political thinking can best be explained by referring them to a canon of philosophical assumptions.<sup>3</sup> It is now generally accepted that, in both of these critical ventures, Pocock's case was justified. But we are still left with the problem of how to characterize Burke's politics. Since Pocock's first revisionist intervention

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<sup>1</sup> J. G. A. Pocock, "Burke and the Ancient Constitution: A Problem in the History of Ideas", in *idem*, *Politics, Language, and Time: Essays on Political Thought and History* (Chicago and London, 1971), 202–32; *idem*, "The Political Economy of Burke's Analysis of the French Revolution", in *idem*, *Virtue, Commerce and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge, 1985), 193–212; *idem*, "Josiah Tucker on Burke, Locke, and Price: A Study in the Varieties of Eighteenth-Century Conservatism", in *ibid.*, 157–91; *idem*, "Edmund Burke and the Redefinition of Enthusiasm: The Context as Counter-Revolution", in François Furet and Mona Ozouf, eds., *The French Revolution and the Creation of Modern Political Culture: The Transformation of Political Culture, 1789–1848* (Oxford, 1989), 19–43; *idem*, "The Fourth English Civil War: Dissolution, Desertion, and Alternative Histories in the Glorious Revolution", in Lois G. Schwoerer, ed., *The Revolution of 1688–1689: Changing Perspectives* (Cambridge, 1992), 52–64; Edmund Burke, *Reflections on the Revolution in France*, ed. J. G. A. Pocock (Indianapolis, 1987).

<sup>2</sup> Pocock, *Politics, Language, and Time*, 231–2.

<sup>3</sup> *Ibid.*, 204. For recent criticism of reductive attempts to place Burke in either a natural-law or utilitarian tradition see David Armitage, "Edmund Burke and Reason of State", *Journal of the History of Ideas* 61/4 (Oct. 2000), 617–34.

all those decades ago, this problem has increased rather than diminished. We are now in possession of a vastly expanded repertoire of “languages” that can readily be excavated from Burke’s writings. But it remains to be shown how these relate to one another, particularly as Burke deployed them in the field of political action. Thus, while it is helpful to be able to identify the latitudinarian and sceptical strands in his thought; to trace his debts to Cicero, to Montesquieu, and to Adam Smith; and above all to appreciate how historical science in the enlightenment guided his approach to political affairs, we are still left with the problem of convincingly elucidating how these idioms of thought actually determined his political practice.<sup>4</sup>

The effort to characterize Burke’s politics in terms of an overarching ideological purpose has not fared any better than attempts to brand them in terms of his debt to particular schools of thought.<sup>5</sup> Part of the problem to date with realizing this undertaking has been the temptation to transform Burke’s political statements into grand discursive abstractions. This tendency is understandable since it is based on the recognition that while Burke was an eighteenth-century politician, he was neither a simple nor a narrow-minded parliamentary operator who merely responded tactically to the exigencies of affairs. But if his arguments suggest a wide political vision, at the same time they were conceived as interventions. Whilst we therefore need to recover their theoretical significance, we also need to capture their strategic purpose.

However, we can only make sense of strategies by way of reference to their original field of action. Political strategies should accordingly be decoded in the context of political action.<sup>6</sup> Despite the evident reasonableness of this injunction, the history of political thought seldom concerns itself with the particular rhythms of political affairs. It rarely takes realistic account of the insistent pressures of political struggle on the thought of a political actor. The gains to be had from

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<sup>4</sup> On Burke’s latitudinarianism see F. P. Lock, *Edmund Burke II, 1784–1797* (Oxford, 2006), 573–6. On the character of Burke’s scepticism see Iain Hampshire-Monk, “Burke and the Religious Sources of Skeptical Conservatism”, in J. van der Zande and R. H. Popkin, eds., *The Skeptical Tradition around 1800* (Dordrecht, 1988), 235–59.

<sup>5</sup> Recent focused studies have been more successful, although these have largely been topical in their ambition, and make no claim to capturing Burke’s political purpose in general. In this category see especially Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, NJ., 2005); and Seamus Deane, *Foreign Affections: Essays on Edmund Burke* (Cork, 2005).

<sup>6</sup> For the claim that intellectual and political strategies can only be understood contextually see John Dunn, “The Identity of the History of Ideas” (1968) in *idem*, *Political Obligation in Its Historical Context* (Cambridge, 1980), 13–28; Quentin Skinner, “Meaning and Understanding in the History of Ideas” (1969) in *idem*, *Visions of Politics I: Regarding Method* (Cambridge, 2002), 57–89.

such an approach should be immediately clear, especially for understanding the thought of a politician. But it is important to avoid lapsing in the process into another reductive procedure: that of collapsing Burke's political career into a chain of actions and reactions and his arguments into a series of reactive adjustments to a train of circumstances—making a mockery, in short, of his political *thought*.

This article discusses Burke's preoccupation with the politics of conquest, and it does so in the belief that it played a defining role in shaping his political thought and practice. It begins with a particular problem that emerged in the midst of the American crisis—the problem of providing a settlement for the conquest of Quebec. It begins with a reconstruction of the events preceding the parliamentary debate surrounding the Quebec Bill in 1774, and then proceeds to analyse the terms of reference of the debate itself. The debate turned on questions about the rights and duties of conquerors regarding the acquisition of new territories, and the problem of concluding a just and durable settlement. The defining intellectual context of this debate has received no attention, while Burke's own contribution to the proceedings has been similarly neglected.<sup>7</sup> Political historians have fallen silent before the range of intricate legal and political arguments deployed in the debate by all politicians of all parties. At the same time, historians of political thought have not condescended to deal with the political facts. The net result is that Burke scholarship has failed to provide an adequate discussion of a significant episode, which holds vital clues for the interpretation of the general import of his thought.

In the later sections of this article I explore precisely why this episode is significant for an understanding of Burke's politics. That exploration will require securing a grasp of the pervasiveness of Burke's concern with the politics of conquest, extending from his earliest publications in the 1750s to his engagement with the themes of empire and revolution during the subsequent phases of his career. At that point I will indicate the formative significance of a concern with the relationship between the spirit and the politics of conquest in Burke's thinking. Here I will be building on some of my previous work on Burke in trying to show how his general approach to conquest, pacification and constitutional coordination can only be elucidated on the basis of an analysis of his understanding of the foundations of human subjection.<sup>8</sup> As we shall see, Burke's treatment of subjection included an account of the

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<sup>7</sup> Canada receives only passing treatment in F. P. Lock, *Edmund Burke. Volume I: 1730–1784* (Oxford, 1998), 356–8.

<sup>8</sup> See Richard Bourke, "Sovereignty, Opinion and Revolution in Edmund Burke", *History of European Ideas* 25 (1999), 99–120; *idem*, "Edmund Burke and Enlightenment Sociability: Justice, Honour and the Principles of Government", *History of Political Thought* 21/4

sources of the abuse of subordination as well. The recurrence of the theme of conquest in late eighteenth-century political controversies gave Burke the opportunity continually to refine his sense of the complex historical relations between pacification and constitutional settlement on the one hand, and between persecution and rebellion on the other. Herein lies his enduring claim upon our historical attention. But I turn first to the Quebec Bill in preparation for this later discussion.

## I. PRELUDE TO THE QUEBEC ACT

When Burke rose on 31 May 1774 to address the House of Commons on the provisions of the Quebec Bill, he was intervening in a debate that had failed to produce a result for almost a decade. Originally, with the final defeat of France at the close of the Seven Years War, an orderly cession of Canada to the victorious British Crown was expected to proceed without serious difficulty.<sup>9</sup> But by the spring of 1766, nine months into the first Rockingham administration, after Burke had been appointed as private secretary to the First Lord of the Treasury and later returned to Parliament as a member for Wendover, a comprehensive set of proposals was being transmitted to the ministry for imposing some kind of order on the morass of judicial confusion that had come to surround the establishment of civil government in Canada in the period since it had fallen to the British. The confusion had arisen in the aftermath of conquest.

In the Proclamation of February 1763, which formally set out the terms in which Britain's new acquisitions in North America were to be governed, it was declared that Quebec—together with Grenada, East Florida and West Florida—were to be made the beneficiaries of English law and recipients of representative assemblies.<sup>10</sup> But, in the case of Quebec, the delivery of the policy was almost immediately undone by a series of complications on the ground.<sup>11</sup> The proposals, which reached Rockingham from the ministerial lawyers in April 1766, had been

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(2000), 632–55; *idem*, “Liberty, Authority and Trust in Burke’s Idea of Empire”, *Journal of the History of Ideas* 61/3 (Summer 2000), 453–71.

<sup>9</sup> The relevant key documents have been collected in Adam Shortt and Arthur G. Doughty, eds., *Documents Relating to the Constitutional History of Canada, 1759–91*, 3 vols. (Ottawa, 1918), hereafter cited as *Canada Documents*. The full ministerial and parliamentary records relevant to the Quebec Act are available in R. C. Simmons and D. G. Thomas, eds., *Proceedings and Debates of the British Parliaments Respecting North America, 1754–1783*, 7 vols. to date (New York, 1982–).

<sup>10</sup> *Canada Documents*, 1: 182–3.

<sup>11</sup> See R. Coupland, *The Quebec Act: A Study in Statesmanship* (Oxford, 1925), 29–35. Cf. Philip Lawson, *The Imperial Challenge: Quebec and Britain in the Age of the American Revolution* (Buffalo, Montreal, 1989).

deliberately designed to overcome these complications. However, before any new arrangement could be implemented by the government, Rockingham and his ministers were dismissed by George III, to be replaced by an administration under William Pitt, now Earl of Chatham. It was Lord Shelburne who then inherited responsibility for the colonies in his capacity as Secretary for the Southern Department. But the situation in Quebec was still allowed to drift. Soon the Privy Council was advising Chatham's government that information on the preferences of the colonists should be sought, thus ensuring that an agreed solution would be deferred for even longer. The result was that legislative action to resolve the Canadian question was delayed until the summer of 1774.<sup>12</sup>

Burke's first intervention came during the second reading of the bill on 31 May 1774. Some weeks earlier, on 2 May, while the Commons were debating the Massachusetts legislation drafted in the period following the Boston Tea Party, the government's proposals had been submitted before the Lords for the first round of parliamentary scrutiny. When the bill finally reached the Commons on Thursday 26 May, Burke happened to be absent from the chamber, and so missed the debate. His first opportunity to contribute to the discussion did not therefore arrive until the following Tuesday. It was at that point that he proclaimed, in terms that were by then already familiar, that he would "never be induced to consider government in the abstract". He went on, "The government under which the people have flourished most, that is the best government"<sup>13</sup> Burke's fully developed proposals for a settlement in Canada complicate this elementary assertion. We soon learn that to "flourish" under a system of constitutional slavery cannot be construed as an index of consent. This point entails a rejection of the principle of prescription, and forms a basis for Burkean arguments in favour of reform. It is by the application of intelligent reform that a process of conquest can be "perfected" and so converted into a legitimate and permanent possession.

The immediate occasion for Burke's assertion was supplied by a motion put down by the member for Cardiff, Herbert Mackworth, calling for more information to be made available to the House so that criticism of the bill could be sharply formulated. "I do not remember that I at any time came here with

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<sup>12</sup> For the sequence of events see B. Donohue, *British Politics and the American Revolution: The Path to War, 1773–75* (London, 1969), 105–26.

<sup>13</sup> *Debates of the House of Commons in the Year 1774, on the Bill for making more effectual Provision for the Government of the Province of Quebec, Drawn up from the Notes of the Right Honourable Sir Henry Cavendish*, ed. John Wright (London, 1839), 86. Hereafter cited as *1774 Debates*. John Wright's edition of the *Debates of the House of Commons in the Year 1774* contains much, though not all, of the material transcribed by Sir Henry Cavendish in connection with the Quebec debates into the "Parliamentary Diary of Sir Henry Cavendish, 1768–1774", Egerton Manuscripts, British Library, 215–62, 263, 3711. Material has been collected from both sources for use in this article.

so little information given me”, Burke declared in support of the motion.<sup>14</sup> The need for information was genuinely felt. After all, there were five immediate issues to be tackled: first, the boundary of Quebec still had to be settled; second, the demography of the colony entailed specific complications; next, the religion of the colonists posed a challenge to the British Empire; then, the character of the colonial government was a potential source of controversy; and finally, the establishment of a system of law acceptable to the local population had at the same time to be acceptable to British parliamentary opinion.

While each of these challenges was novel when viewed from the perspective of routine political life, none of them was without precedent in recent history. Taken together, they covered the typical range of problems that accompanied the politics of conquest. Many of them were already familiar to Burke while others would soon engage his attention as a student of British politics since the middle of the 1750s obliged to consider the prospects for political settlements in various settings—including Ireland in the aftermath of 1691, India since the victory of Clive in 1756 and France in the wake of 1789.

According to the Proclamation of 1763, the province of Quebec was to be carved out of the conquered colony of Canada and confined to an area extending from just north-east of Montreal to Quebec City in the lower St Lawrence valley. But ultimately the western territories north and south of the Great Lakes came to be marked by North’s ministry for incorporation into the province, provoking in the process a series of boundary disputes together with some alarm among the opponents of westward settlement about the wisdom of colonial expansion. The alarm was a result of a long-standing anxiety to maintain the integrity of British civility as colonial subjects settled beyond the jurisdiction of the empire. But in addition to parliamentary controversy over the territorial limits of Quebec there was unease about the way in which it was to be governed.

With a mixed Canadian population comprising about 65,000 French settlers and 500 British colonists, any constitutional settlement for the colony had to find the means of dealing with a majority Catholic population living alongside a minority of Protestants under the ultimate authority of the Hanoverian regime. Back in September 1765, early in the administration of the Marquis of Rockingham, Lord Dartmouth’s Board of Trade had explicitly accepted the view of the Crown’s law officers to the effect that, as a clear implication of the relevant clauses of the Peace of Paris, the Catholic inhabitants of the colony would not be subjected to the disabilities imposed by law on Catholics in Britain and Ireland. However, North’s government in 1774, in accordance with a report prepared two years earlier for the ministry by the Solicitor-General, Alexander

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<sup>14</sup> 1774 *Debates*, 85.

Wedderburn, proposed an arrangement which went beyond the provision of simple toleration by recommending the establishment of a Catholic clergy in Quebec legally entitled to the receipt of benefices.<sup>15</sup>

This proposal was to provoke some intemperate responses in succeeding debates: “It is a Bill to establish the Popish religion—to establish despotism”, declared William Burke in the House of Commons on 8 June 1774.<sup>16</sup> His remark not only reveals the controversial terrain into which the government had ventured, it also demonstrates the relative crudity of William Burke’s political principles in comparison with the tenets espoused by his “cousin”, Edmund Burke: “There is but one healing, Catholic principle of toleration which ought to find favour in this House”, Edmund had insisted.<sup>17</sup> But while Edmund Burke thus supported the government’s measure for establishing a Catholic clergy in this part of North America, he protested against the proposal to withdraw the original offer of a representative assembly for Quebec: “it is a violation of the faith of Great Britain held out to the Canadians”, as he put it. He then rounded on the bill in all its aspects: “It does not give to Canada the benefit of an English assembly, an English jury, or any valuable English laws, except only the criminal law, which is a restraint of the benefit”.<sup>18</sup>

The idea of providing for a representative assembly in Quebec had been finally rejected by the North ministry on 7 June 1771. By contrast, in the mid-1760s, the British government had been prepared to contemplate the creation of an elected body for which Catholics would be entitled to vote but in which they would not be allowed to sit. However, in due course, succeeding administrations were to fix upon the impracticality of the proposal together with its unpopularity among the French nobility of Canada. In the end it was decided that the province would be administered by a council of between seventeen and twenty-three appointed members obliged to act with the consent of a provincial governor. This political arrangement was to be complemented by a judicial administration that would combine French civil with English criminal law.<sup>19</sup>

Unsurprisingly, these proposals divided opinion in the Commons. Consideration of the measures should be guided by “reason” and “authority”, Burke now argued. By *reason* he meant the support of legal reasoning, and by *authority* the authority of fact.<sup>20</sup> Both criteria appeal to established principles

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<sup>15</sup> The “Report of Solicitor General Alex. Wedderburn” of 6 Dec. 1772 appears in *Canada Documents*, 1: 424–32.

<sup>16</sup> *1774 Debates*, 251.

<sup>17</sup> *Ibid.*, 223.

<sup>18</sup> *Ibid.*, 213.

<sup>19</sup> The Quebec Act in *Canada Documents*, 1: 570–81.

<sup>20</sup> *1774 Debates*, 88.

and prejudices. But as things transpired Burke made his stand on the claims of neither. For precisely this reason his position cannot be explained in terms of his tactics; his reliance on a historical theory of the progress of government comes into play. This theory affected how he proposed to reason about the facts. The main fact to be established was the attitude of the Canadians. On 31 May Burke had contended that their preferences were unknown: “as yet we have no evidence that the people do not like our laws”. On 8 June he was still sticking to this tack: it was not certain that the Canadians did not approve of trial by jury.<sup>21</sup> But at the same time Burke had been arguing that their complaints need not much matter. As the aftermath of 1688 in England proved, it took time for incipient preferences to supplant inherited prejudice. Yet, in the end, any resistance to a new dispensation would be overcome by the direct experience of tangible benefits as these began to register among colonial subjects.<sup>22</sup>

The benefits in question were the privileges of English law secured under an English constitution. The progress of popular enlightenment would in the end confirm the advantages that were to be had under such a system, thus dispelling the effects of blind presumption based on ignorance.<sup>23</sup> In this way, Burke pleaded the authority of a counterfactual improvement against political attachments founded on habit. But he could also draw on the authority of jurisprudence to justify his case. Legal opinion offered ample support to the argument for extending the benefits of a conquest to the conquered. However, legal authorities could also be cited in support of the opposite conclusion, namely that an established right should take precedence over the right of a new establishment. On the basis of this reasoning, the customs of the conquered held an advantage over those of the conqueror by virtue of the fact that they already enjoyed support.

Historical argument could clarify the terms of the disagreement, but it could not resolve the substance of the dispute. It was possible to cite examples from the Greeks and the Romans in support of either policy, so this was scarcely a means of bridging the division in opinion. Nonetheless, the ministerial lawyers and the opposition speakers resorted to their preferred historical examples, girding themselves with an assortment of jurisprudential authorities ranging from Sir Edward Coke and Hugo Grotius to Sir John Davies and Thomas Leland. Burke defended the legitimacy of legitimate conquest, as we shall see. But his defence involved more than this apparently tautological claim. To recover the substantive

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<sup>21</sup> Ibid., 87–8, 235.

<sup>22</sup> Ibid., 88, 288–9.

<sup>23</sup> Edmund Burke, “Speech on Quebec Bill”, in *The Writings and Speeches of Edmund Burke II: Party, Parliament, and the American Crisis, 1766–1770*, ed. Paul Langford (Oxford, 1981), 473.

implications of Burke's contribution, we need to reconstruct the intellectual context in which it occurred together with the specific ingredients and objectives of his analysis. I begin with the local intellectual context.

## II. THE INTELLECTUAL CONTEXT OF THE QUEBEC ACT: PLINY, GROTIUS, COKE

The immediate context of the debate over a settlement for Quebec encompassed at once legal and historical examples. These embraced both modern precedent and ancient history. Burke's aim was to improve upon government proposals for the constitution of Canada by substituting French regulations with English laws insofar as such a measure could be introduced without provoking a reaction that would undermine the very purpose of the reform. Advancing his case in terms of the intellectual framework employed by the participants in the debate, Burke accepted the proposals associated with Sir John Davies in urging that the execution of a legitimate conquest ought to aim at "perfection". We shall soon see what perfection actually meant. The parliamentary discussion advanced toward establishing the implications of this tenet indirectly: concrete recommendations for what ought to be done were approached via debate over the legitimacy of what had already been done. Accordingly, controversy first arose over the status of the Proclamation, published by George III in 1763, setting out the government's planned arrangements for Quebec. Since the Proclamation had been issued without the consent of Parliament, the opportunity existed for calling its validity into doubt. This would enable a debate over fundamentals to begin.

It was one of the members for Middlesex, Mr Serjeant Glynn, who first raised the issue of the legitimate source of legislation to be applied to Canada. The king, declared Glynn, "has no absolute power to prescribe what set of laws or what form of government he pleases". He then continued,

he may, if he thinks proper, when the time comes to make it expedient that the inhabitants of the conquered country should be united with the rest of his subjects, determine then that the old laws should have an end, and that they should be governed by the laws of England.<sup>24</sup>

As was soon to be made clear, Glynn's point here was derived at least in part from Sir Edward Coke, from the fourth part of the *Institutes* in particular: an English monarch could annul the laws of territories recently conquered but could not apply a new legal framework of his own without the consent of Parliament.

The fourth part of the *Institutes of the Common Laws of England* is concerned with the jurisdiction of the courts, including the high court of Parliament.

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<sup>24</sup> 1774 *Debates*, 46.

In the early sections of the work, Coke set out the historic entitlements and modes of parliamentary procedure, beginning with the arrival of William the Conqueror. In the process, he claimed that in 1066 a foundational treatise in English jurisprudence—the *Modus tenendi Parliamentum*—was “rehearsed and declared before the Conquerour . . . and by him approved for England”. This ritual acknowledgment on the part of the conqueror purportedly demonstrated that the title to dominion within the realm was founded on agreement and consent rather than on the naked fact of conquest.<sup>25</sup>

But it was relevant in this context to recall that the situation regarding Ireland had been different. As Coke had described the position of that kingdom in his Report on Calvin’s Case in 1608, although Ireland was its own “distinct Dominion” since the title to it had been conferred on the English Crown by conquest, Irish jurisdiction could legitimately “be bound by the Parliaments of England”.<sup>26</sup> So while the laws of England derived their authority from a mixture of native custom and parliamentary consent, the laws of Ireland were ultimately subject to superintending regulation by the superior right of the English parliament.<sup>27</sup> Glynn sought to apply this argument to Quebec: as had occurred with the conquest of Ireland, so also in the case of Canada the introduction of English laws, and not the maintenance of foreign legal customs, was obligatory on the government of the conquering country.<sup>28</sup> A claim such as this carried two implications. It underlined the entitlement of Parliament to resolve the debate, but it also aligned this parliamentary privilege with the more radical course of action that aimed to impose a completely new constitution on the Canadians.

The Solicitor-General, Alexander Wedderburn, challenged exactly this implication. He wondered how far Glynn expected the right of conquest might reasonably extend: “The learned gentleman says, that the right of the conquering country, generally and indefinitely, is, to give the laws of the conqueror to the

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<sup>25</sup> Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (London, 1644), 1–52. On Coke’s view of the immemorial rights of the parliament of England see J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century* (Cambridge, 1957), 42. For the legacy of the historical myth supporting Coke’s claim see Quentin Skinner, “History and Ideology in the English Revolution”, in *idem*, *Visions of Politics III: Hobbes and Civil Science* (Cambridge, 2002), 238–63.

<sup>26</sup> Edward Coke, *The Seventh Part of the Reports of Sir Edward Coke* (London, 1608), 601. For the treatment of Ireland in the *Institutes* see Coke, *Fourth Part of the Institutes*, 349–61.

<sup>27</sup> On the authoritative bases for both statutory and common law in Coke’s thinking see Alan Cromartie, *Sir Matthew Hale, 1609–1676* (Cambridge, 1995), 11–29.

<sup>28</sup> 1774 *Debates*, 59.

conquered”.<sup>29</sup> But were the aspirations of the population subject to this procedure really of no account whatever? This question was pivotal since the French nobility in Canada had already voiced their objections to the imposition of trial by jury. Burke would argue that the claims of justice demanded the institution be imposed. To this extent he was happy with the general thrust of Glynn’s intervention. But the government lawyers had already worked out the general lines of their defence.

In posing his question to Glynn, Wedderburn was developing an argument with which his colleague Edward Thurlow, the Attorney-General, had opened the proceedings: “My notion is, that it is a change of sovereignty. You acquired a new country; you acquired a new people; but you do not state the right of conquest, as giving a right to goods and chattels”.<sup>30</sup> Thurlow was maintaining a position that he had originally formulated one and a half years earlier. At the start of 1773, drawing upon Grotius as his guide, he had insisted that military defeat did not mean that the laws of the conquered should automatically be repealed. In fact, it was possible to contend that the most usual understanding of English law, together with widespread usage under the law of nations, dictated that right acquired by conquest was little more in practice than a “right of empire” which in and of itself did not licence interference in the established liberties and customs of a newly subject people.<sup>31</sup>

This kind of concession was perfectly common under the Roman Empire during the Principate. Philo had noted, as Grotius was to remind his readers, and as Thurlow was therefore in a position to note, that Augustus extended the same protection to devolved constitutional governments under his ultimate control as he had to the laws of the Roman people themselves. The government of Bithynia was an instance of the practice. Around 110 AD, the younger Pliny in his capacity as *legatus* had informed the Emperor Trajan of his intention to inspect the public finances of Apamea, a city in the province of Bithynia-Pontus. The citizens were happy to assent to this in principle, although no senatorial governor had previously taken this initiative since the city, as a Roman colony, enjoyed the “long-standing custom and privilege” of confining the management of its internal affairs to its own citizens and administrators.<sup>32</sup>

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<sup>29</sup> Ibid., 50.

<sup>30</sup> Ibid., 30.

<sup>31</sup> ‘Report of Attorney General, Edward Thurlow’ (22 Jan. 1773), in *Canada Documents*, 1: 440.

<sup>32</sup> Pliny the Younger, *Epistularum libri decem*, ed. R. A. B. Mynors (Oxford, 1963), bk X, xlvii: “habuisse priuilegium et uetustissimum morem arbitrio suo rem publicam administrare”. Both this example and the reference to Philo appear in Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck, 3 vols (Indianapolis, 2005), 3: xv, 10 n.

Both the researches of Hugo Grotius and the experience of Pliny could be invoked to underline the wisdom of maintaining local custom. But what did these examples mean in practice? Thurlow endorsed the view, which he took to be a maxim of the common law, that it was the right of a conquered people to “retain their ancient customs till the conqueror shall declare new laws”. The application of this rule in the context of Quebec implied a policy of gradual improvement, but one by which the situation that had unfolded since 1763 would be regularized in accordance with local preferences and expectations. Thurlow therefore considered it appropriate that the English criminal law should continue in its operation and that the civil law of France as it had been adapted to local needs should equally be retained throughout the province. “To change at once the laws and manners of a settled country, must be attended with hardships and violence”, he commented. Therefore, he concluded, “wise conquerors having provided for the security of their dominions proceed gently, and indulge their conquered subjects in all local customs”<sup>33</sup>

Wedderburn, also responding to Glynn, was to confirm Thurlow’s approach. However, he invoked neither Coke nor Grotius to stake out his territory. “My authority is Sir John Davis’s State of Ireland”, he informed the members, “which I take to be a more correct one than Lord Coke’s, in his fourth Institute”<sup>34</sup> On the basis of Davies’s authority, at least as Wedderburn understood this, a gradual fusion with existing arrangements rather than a sudden overhaul of the old laws was to be recommended. Yet Glynn claimed Davies’s testimony in support of an opposing scheme that proposed the swift anglicization of Canada, also curiously on the model of the conquest of Ireland. As a result of this collision between distinct views of the same object, the debate came down to rival accounts of the substance of Davies’s case.

### III. THE INTELLECTUAL CONTEXT OF THE QUEBEC ACT: LIVY, DAVIES, LELAND

Sir John Davies had published his *Discoverie of the True Causes Why Ireland was never Entirely Subdued* in 1612, towards the end of his period as Attorney-General in Ireland. He had undertaken the work following on from his involvement in the plantation of Ulster during the aftermath of what he himself assumed would stand as the final conquest of the island. Davies’s reputation as an eminent English lawyer had survived intact into the middle of the eighteenth century, but in 1774

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<sup>33</sup> ‘Report of Attorney General, Edward Thurlow’ (22 Jan. 1773), in *Canada Documents*, 1: 441–2.

<sup>34</sup> 1774 *Debates*, 60.

his name carried an additional resonance given the publication the previous year of the acceptance speech which he had delivered as speaker in the Irish House of Commons back in 1613. The speech was printed by a friend of Edmund Burke's—Thomas Leland, then a fellow of Trinity College Dublin—as an appendix to the second volume of his *History of Ireland*. Burke, naturally enough, owned a copy of Leland's *History*. More surprisingly, Wedderburn and Glynn both claimed to have read it.<sup>35</sup>

Davies's *Discoverie* was concerned with how the conquest of Ireland had been “perfected”—or with how the country had been finally “subdued and reduced to Ciuilitie” after an extended period of trial and error which had lasted over an expanse of four hundred years.<sup>36</sup> The relevance of this process to debates about the British Empire in the late eighteenth century was immediately apparent to contemporaries. But the publication of his speech was invested with a further significance still. In his address, Davies had insisted that there had always subsisted a “reall unyon of both these kingdomes” since the earliest English lordship over Ireland. This meant, in Davies' view, that Ireland had from the start been “unyted and annexed to the imperial crowne of the realm of England”. So, while it might reasonably be categorized as a distinct dominion, it had nonetheless always been a dependent kingdom.<sup>37</sup>

For Leland, this reading of the relationship was relevant to the ambition behind his *History* as a whole. It showed in point of detail what he wished to demonstrate more generally in opposition to the infamous argument advanced by William Molyneux at the end of the seventeenth century to the effect that Irish parliaments could not be absolutely bound by English laws.<sup>38</sup> While Ireland did indeed exist as an unincorporated kingdom, there was certainly no separate “regality” of Ireland, as Leland put it: the devolution of authority to a parliament in Dublin was not a basis for truly independent action on its part.<sup>39</sup>

This argument, which Burke accepted, was to have an important bearing on the interpretation of the rights of the Irish parliament in the final decades of the century—first when substantial autonomy was conceded to the Dublin legislature

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<sup>35</sup> 1774 *Debates*, 59, 60.

<sup>36</sup> Sir John Davies, *A Discoverie of the True Causes Why Ireland was never Entirely Subdued, nor Brought under Obedience of the Crowne of England, untill the Beginning of His Majesties Happie Raigne* (London, 1612), 3.

<sup>37</sup> Sir John Davies, “A Dissertation on the Progress and Constitution of the Legislature of Ireland” (1613), in Thomas Leland, *The History of Ireland from the Invasion of Henry II. With a Preliminary Discourse on the Ancient State of that Kingdom*, 3 vols. (London, 1773), 2: Appendix, 491.

<sup>38</sup> This was the main import of William Molyneux, *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated* (Dublin, 1698).

<sup>39</sup> Leland, *History of Ireland*, 2: 507 n.

in 1782, and then again when it was incorporated into the British parliament in January 1801. But the case against Molyneux acquired up-to-date relevance during debate over the entitlements of the British legislature in connection with the American colonies after 1765.<sup>40</sup> By 1774 its pertinence was even more starkly manifest. Yet recourse to debate about the rights of British sovereignty was another way of addressing what British power ought to do. As Glynn, Wedderburn and Thurlow realized, and as Burke himself appreciated, the justification of British sovereignty could not finally be separated from the objectives that it set itself to accomplish.

For Burke the goal of British power was immediately clear: policy should aim to secure the civilization of Canada. It is in relation to this ambition that the significance of Davies becomes most apparent. Understanding the process of civilization resulted from scrutinizing the past. Davies had endeavoured to illustrate how the study of Ireland offered the best means for understanding how the cause of civilization could be made to progress. The process of study not only revealed differing stages of historical development. It also demonstrated how a combination of military and legal intervention could propel an inferior stage of social organization towards embracing the achievements of a more advanced civilization.

Davies began by recounting how Henry II first introduced English power into Ireland with a view to achieving the subjugation of the island as a prelude to seducing its inhabitants out of barbarism and into obedience.<sup>41</sup> However, from 1171 down to the death of Queen Elizabeth, this project of civilization had been consistently undermined in Davies's estimate. It had been thwarted, in the first place, because neither the size of the military commitment nor the structure of command had ever been adequate to the task of subjugation. But the miscarriage of the enterprise had political causes too, notably the English failure to model their scheme of conquest on the approach that had been adopted by the Romans: "the *Romaine* State", as Davies observed, "which conquered so many Nations both barbarous and ciuill; and therefore knewe by experience, the best and readiest way of making a perfect & absolute conquest, refused not to communicate their Lawes to the rude & barbarous people, whom they had Conquered".<sup>42</sup>

In the eighth book of his *Ab urbe condita*, Livy describes how in 338 BC the consul Camillus, having secured the final conquest of the Latins after a bitter

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<sup>40</sup> See, for example, the comments by Charles Yorke during the debates on the Rockinghamite Declaratory resolutions on 3 Feb. 1766 in "Ryder Diary", *Camden Miscellany* XXIII (1969), 264.

<sup>41</sup> This sovereignty was more notional than real, Davies duly contended. See Davies, *Discoverie*, 14–15.

<sup>42</sup> Davies, *Discoverie*, 124–5.

and protracted struggle, addressed the Roman senate on the fate of the defeated. The victors were now in a position to devastate all Latium or to extend to the vanquished the benefits of civilization: was it to be complete annihilation, Camillus enquired, or “do you wish to magnify the republic in accordance with established precedent by admitting those who are vanquished into citizenship?”<sup>43</sup> It was Davies’s opinion that the English should have admitted the vanquished Irish into English civility. In the first instance he based his recommendation on the approach of Julius Caesar, but he based it more extensively on the achievements of Agricola as recorded by his son-in-law, Cornelius Tacitus.<sup>44</sup> The coarse, unsettled Britons (*dispersi ac rudes*), permanently ready to do battle (*in bella faciles*), were pacified by distractions (*voluptates*) and made pliable by culture (*humanitas*).<sup>45</sup>

However, circumstances in Ireland conspired against a repetition of this success. The chief obstacle in the way of a durable pacification was the fraught relationship between the native Irish septs or clans and the waves of newly planted population. At first Anglo-Norman, and subsequently English, colonial settlers were subjected to perpetual harassment in the form of border skirmishes upon their marches. Alternatively, the colonists were lured into a process of degeneration in emulation of the mores practised among the Irish clans. As a result of the impact of both these situations, settlements were either disestablished, or they gradually deteriorated into pre-civil decadence, or they floated like semi-autonomous islands in a sea of angry barbarism. The task of policy in Davies’s opinion ought therefore be to educate, cultivate and improve the Irish natives by extending to them the benefits of English law, thereby uniting both populations under a common system of justice that secured at once landed property and the mode of its transmission.<sup>46</sup>

This last point was essential in Davies’s mind. During the process of colonial settlement, the newcomers had seized the fertile districts of the plains, while the natives had taken to the woods and mountains as launch-pads for renewed attacks, forcing them to resort to pasturage and hunting for survival.<sup>47</sup> In Davies’s judgement, the Irish Brehon laws had in any case militated against any process of agricultural improvement by entrenching insecurity of tenure in legal practice.<sup>48</sup>

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<sup>43</sup> Titus Livius, *Ab urbe condita*, ed. R. W. Ogilvie, 6 vols. (Oxford, 1974), 2: bk VIII, chap. xiii, 16: “Voltis exemplo maiorum augere rem Romanam victos in civitatem accipiendo?”

<sup>44</sup> Davies, *Discoverie*, 125–6.

<sup>45</sup> Cornelius Tacitus, *De vitae Agricolae*, ed. R. M. Ogilvie and I. Richmond (Oxford, 1967), 21: “namque ut homines dispersi ac rudes eoque in bella faciles quieti et otio per voluptates adulescerent . . . idque apud imperitos humanitas vocabatur, cum pars servitutis esset”.

<sup>46</sup> Davies, *Discoverie*, 119–21.

<sup>47</sup> *Ibid.*, 160.

<sup>48</sup> *Ibid.*, 171.

By this neglect, as Davies saw it, the arts of peace and plenty failed to prosper among the Irish, disposing them to belligerence by lowering the costs of hostility. Much like the inland Britons described by Caesar in his *Gallic War*, Davies gave the impression that the bulk of the native Irish depended for subsistence on flocks and herds, “living by the Milke of the Cowe, without Husbandry and Tillage”.<sup>49</sup>

Anecdotal accounts of the habits of tribes of barbarian militants, inclined to aggression in proportion as they neglected the cultivation of landed property, have played an important role in advancing a historical understanding of human societies since the earliest descriptions of nomadic cultures in Homer and Herodotus.<sup>50</sup> But what attracted Alexander Wedderburn and Serjeant Glynn to Davies’s rehearsal of the conquest of Ireland was not so much his analysis of the encounter between pastoralists and agriculturalists as the outstanding fact that he treated head on the complications that attended securing a perfect conquest. The treatment of political conflict in Davies’s study focused on the sheer difficulty of achieving a union of minds in the face of the animosity that suffuses warring communities. The goal of conquest, or pacification, was the creation of a common civil discipline. But the method of proceeding was in tension with the objective. Assimilation could only be brought about by a complete transformation of existing political arrangements, but this transformation would have to progress by way of military subjugation. The resulting problem seemed stark, if not insurmountable: while subjugation compromised attempts at assimilation, assimilation would falter in the absence of the necessary transformation.

Burke responded to these proposals in a number of different settings. His reactions were diverse, depending heavily on the occasions. A consistent approach to the basic dilemma can nonetheless be discerned. In the notes to his second American Conciliation Speech of November 1775, he cited with horror, as a dire warning, what “Davis says of Ireland” regarding the need to break a culture before it can be properly reformed. His intention was to underscore the ease with which a British ministry could be tempted into emulating the spirit of conquest: even an affluent and enlightened empire like that of Britain in the eighteenth century was

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<sup>49</sup> Ibid., 160. Cf. Julius Caesar, *The Gallic War*, trans. H. J. Edwards (Cambridge, MA, 1917), bk V, 14.

<sup>50</sup> Samuel Pufendorf, *Of the Law of Nature and Nations . . . Done into English by Basil Kennett . . . To which are added All the Large Notes of Mr Barbeyrac . . . Fourth Edition . . . To Which is Now Prefixed Mr Barbeyrac’s Prefatory Discourse, Containing An Historical and Critical Account of the Science of Morality*, 2 vols. (London 1729), II, 2, ii, cites Strabo, Lucretius, Horace, Diodorus Siculus and Euripides as contributors to the genre, before commenting, “the Condition of Men had been most deplorable and base, if no Societies had been set on Foot, but every one had reign’d a separate Prince in his own Family”.

susceptible to the imperiousness associated with petty Jacobean pride.<sup>51</sup> However, just over six months earlier, the merits of Davies's analysis were being extolled by Burke in his first Conciliation Speech: "Your standard could never be advanced an inch before your privileges", he told the Commons. "Sir John Davis shews beyond a doubt, that the refusal of a general communication of these rights, was the true cause why Ireland was five hundred years in subduing".<sup>52</sup>

By implication, it was the spirit of benefaction that ought to guide the British government in relation to her colonies at this critical juncture in 1775. But as we have seen, just one year earlier Burke had been pressing for the imposition of English laws on the Canadians in the name of this same policy of benefaction. Nonetheless, it is clear that Burke was in little doubt as to the difficulty involved in sustaining such an approach: "benefaction" was hard to reconcile with the procedures of "imposition". Nearly twenty years later, in the course of his *Letter to Sir Hercules Langrishe*, he alluded to this very problem in connection with Davies: while Davies boasted "of the benefits received by the natives, by extending to them the English law . . . the appearance of things alone was changed".<sup>53</sup> However, in the case of Quebec an opportunity had arisen to advance beyond mere appearance. In this instance imposition would surely be received as a benefaction, enabling the objectives of civilization to progress.

In the report of his Speech on Quebec delivered on 10 June 1774 as carried by the *General Evening Post*, Burke is presented as rising at a point when the ministry's supporters were just arriving into the House after their dinners: being now "full of English meat", Burke quipped, he was sure that they would be ready to champion the cause of "English law".<sup>54</sup> He had complained since the beginning in his capacity of agent for New York about the extent to which the proposed territorial extent of Canada intruded into the boundaries of its southern neighbour. It seemed choice that this aggrandisement would spearhead the extension of French constitutional principles into a colony settled under British laws.<sup>55</sup> Burke's defence of the British constitution was intended as a criticism of the French. His focus was not on the

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<sup>51</sup> Edmund Burke, "Second Speech on Conciliation" (1775), in *The Writings and Speeches of Edmund Burke III: Party, Parliament, and the American War 1774–1780*, ed. Warren M. Elofson (Oxford, 1996), 204.

<sup>52</sup> Edmund Burke, "Speech on Conciliation with America" (1775), in *ibid.*, 140.

<sup>53</sup> Edmund Burke, *Letter to Sir Hercules Langrishe* (1792), in *The Writings and Speeches of Edmund Burke IX: The Revolutionary War and Ireland*, ed. R. B. McDowell (Oxford, 1991), 615. For a discussion of the context of Burke's doubts about Davies see Séan Patrick Donlan, "'Little Better than Cannibals': Property and Progress in Sir John Davies and Burke", *Northern Ireland Legal Quarterly* 54/1 (2003), 1–24.

<sup>54</sup> The report in the *General Evening Post* is reproduced as "Speech on Quebec Bill", in *Writings and Speeches II*, 471–3.

<sup>55</sup> 1774 *Debates*, 189, 239.

content of any French laws in particular but on the political and legal order on which they were based. The deficiencies of this order had a divisive impact on social harmony of a kind that Burke expected to be replicated in Quebec.

When Burke addressed the proposal to retain French civil law in Canada on 31 May 1774, he did not lose the opportunity of capitalizing on the wider imperial crisis: “When that country cannot be governed as a free country, I question whether this can”. The proposals for Quebec could be made to fit a wider pattern as the situation in the colonies lurched towards crisis: “When we are sowing the seeds of despotism in Canada, let us bear in mind that it is a growth which may afterwards extend to other countries”.<sup>56</sup> Burke took aim at Lord North’s intention to retain the customary law of France for the regulation of property in Quebec. The plan to retain French customary law in reality entailed establishing the *coutume de Paris*, introduced into New France under Louis XIV, as subsequently modified during the course of the legal administration of the province. This undertaking might well be justified in terms of prescription. Nonetheless, in Burke’s view it would entail an impoverishment of legal civilization: it would entrench an inferior judicial establishment that was in any case prone to corruption under a degenerate constitution.

Burke’s hopes for reforming judicial arrangements in Canada hung on a particular constitutional principle that formed the basis of English liberty: the equal right to trial by a jury composed of civilian peers. In its absence, French civil law would lack any credible principle of correction or improvement. Burke moved to establish this point by first stirring suspicion against French custom. Towards this end he was first obliged to cast doubt upon the doctrine of prescription. He conceded that it was legitimate to fall back on a presumption in favour of prescription in the absence of any other available method of assessment. However, it happened that another criterion was to hand. The security of English liberty under British laws and the constitution was evident to every member of the Commons. On the other hand, detailed knowledge of the Paris code as modified in Canadian practice was wholly lacking among the members of the British legislature. Forced to guess its content, they would have to assume the worst: it was a child of the “Germanic” laws of France, “unmitigated” by the civil law of the metropolis.<sup>57</sup> Burke’s argument was precise, but Janus-faced: in one direction it conspired against the authority of prescription, in the other it campaigned against the legal order left behind by the French.

Burke perfectly accepted that property could be rendered secure in Quebec under the civil law of Canada. His real criticism meant to target a judicial system

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<sup>56</sup> Ibid., 89

<sup>57</sup> Ibid., 85–6.

that failed to provide the means of mitigating the severity of laws whose origins lay in an era of Gothic barbarism. The most effective method of amelioration would be to introduce the system of trial by jury. “In order to make Canada a secure possession of the British government”, Burke pleaded on the final day of the debate, “you have only to bind the people to you, by giving them your laws”. Conferring the benefit of English laws should at the least extend to the provision of trial by jury. Without conferring this advantage on the Canadian “judicature”, the ascendancy of the *noblesse* could be made an instrument of their domination. The conquering spirit of arrogant nobility might gain a colonial foothold within the British system of mixed commercial monarchy.<sup>58</sup> In identifying French Canadian judicial practice with “Germanic” antiquity, Burke was drawing on historical arguments that he had originally read in Montesquieu, but he was also keen to criticize Montesquieu’s conclusions.<sup>59</sup> It was vital to recognize, as Montesquieu had evidently failed to do, that the legal privileges of a feudal nobility could never offer comprehensive security against the abuse of authority. Indeed, such privileges unavoidably militated against social cohesion and would upset the balance in any mixed constitution.

On 7 June 1774, after two weeks of debate over the implications of the Quebec Bill, Burke announced that he regarded the “right of conquest so little, and the right of human nature so much, that the former has very little consideration with me”.<sup>60</sup> In his judgement, the comparative advantages of distinct systems of government should be assessed in the light of the facts of human nature. But they should also be evaluated with reference to the likely pattern of the adaptation of human nature as it was moulded under pressure of changing circumstances. The dependence of Burke’s argument on Montesquieu at this point is more obvious in the manuscript notes for his contributions than in the various public records of his interventions. Opposed to the right of conquest was the “Right of Nature”, he again insisted. While the former rested on force, the latter was based upon the “inviolable charter of Mankind”. In arguing this he was happy, he confessed, to follow “Montesquieu[’]s opinion” in asserting that the aim of conquest should be to set up a form of dominion which would secure to any population conquered “Liberty—Property—[and] always their Religion”.<sup>61</sup> But while he supported the general principle of generosity in conquest, he had his own view as to what this principle should provide for.

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<sup>58</sup> Ibid., 286–9. Cf. Edmund Burke, “Speech on Quebec Bill”, in *Writings and Speeches II*, 473.

<sup>59</sup> For an understanding of the central importance of Montesquieu’s contribution in this connection I am indebted to Michael Sonenscher, *Before the Deluge: Public Debt, Inequality, and the Intellectual Origins of the French Revolution* (Princeton, NJ, 2007).

<sup>60</sup> 1774 *Debates*, 223.

<sup>61</sup> Edmund Burke, “Canada Bill”, Sheffield MS, bk 6, 6.

Burke is referring here to the discussion of religion in book twenty-four of *The Spirit of the Laws*. In the third chapter of that book, dedicated to explaining the suitability of Christianity to the maintenance of moderate governments, Montesquieu commented on one of the consequences of this fit for the conduct of the laws of nations among modern European states: “This right of nations, among ourselves, has the result that victory leaves to the vanquished these great things: life, liberty, laws, goods, and always religion, when one does not bind oneself”.<sup>62</sup> Burke admired the ambition in Montesquieu to secure a moderate political order. He endorsed his commitment to the principle of toleration too. But there was a basic problem. The practical conclusions of *The Spirit of the Laws* undermined its fundamental objective, as Burke saw this. An intermediary social order with its roots in the feudal past was incompatible with the spirit of a moderate constitution. The French nobility of Canada was an obvious case in point. Their watchword was corporate privilege; correspondingly, their dominant disposition was exclusion.

By 10 June the argument for replacing civil law with common law was in reality a lost cause. But an amendment to introduce the English jury system offered a last opportunity to plead the case for planting English liberty. Burke seized the chance. Aristocratic opposition to the uses of juries in civil cases was plainly based on a misunderstanding of the true interests of the *noblesse*, Burke asserted. A jury system would act as a restraint upon their ambition, thus reconciling the many to the ascendancy of the few.<sup>63</sup> Without such reconciliation, no polity could reasonably be expected to endure. Unrestrained ambition was in fact a recipe for implosion. It bred arrogance and chauvinism, which together generated social division. Division led to suspicion, suspicion to persecution, and persecution ended in bitterness and rebellion.

Burke’s judgement here was partly based on his sense of the basic characteristics of human beings. But it was further based on his understanding of the historical modification of those characteristics. He had originally sought to deepen his grasp of human nature with his early historical researches into the primitive societies of the New World. What fascinated Burke was the very possibility of conquest. How was it that human creatures, who were so evidently disposed to pride, could be prompted to capitulate to subjection? It is time now to consider this basic element in Burke’s thinking. This takes us beyond the specific case of providing a settlement for Canada, but it will further illuminate the principles that underpinned his judgement on Quebec.

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<sup>62</sup> Montesquieu, *Spirit of the Laws*, pt V, bk 24, chap. 3, 461–2.

<sup>63</sup> Edmund Burke, “Speech on Quebec Bill”, in *Writings and Speeches II*, 471–3.

Submission was the first principle of political order in society, but it was also the foundation of oppression. Modern European history presented the extraordinary spectacle of the steady alleviation of the severities of subordination. However, the pattern of improvement was unevenly distributed, with the result that liberty in Britain surpassed conditions in neighbouring France. This differential outcome of a common process of civilization was replicated in the colonial constitutions in the New World. The complications that beset the acquisition of Canada were a consequence of this differential process of development. Below I attempt to reconstruct Burke's theory of subjection. Then finally I turn to his account of its historical amelioration.

#### IV. CONQUEST, SUBORDINATION AND HUMAN NATURE

Burke took the spirit of conquest to have its basis in human nature. But so too in his opinion did the means of its control. The task of political organization was to capitalize on this possibility. In the final section of this article, we shall see how Burke took modern European history to have disciplined the spirit of conquest with the instruments of civilization. Some attempts along the way had been more credible than others. The more bogus efforts were better seen as pretexts of civilization. But the question remained of how this pretence had been possible. This section aims to throw new light upon Burke's answer to that question. In *The Spirit of the Laws*, Montesquieu included the Christian justification of conquest in terms of the propagation of faith among an assortment of dubious pretexts by which the institution of slavery had been justified: "It is this way of thinking that encouraged the destroyers of America in their crimes".<sup>64</sup> Having exposed this justification along with a range of others he elected to treat, Montesquieu announces that it "is time to seek the true origin of the right of slavery", insisting that the normative basis for an institution of this kind "should be founded on the nature of things".<sup>65</sup> It should be explained in terms of the *facts* of human behaviour given the relevant circumstances, and not in terms of a notional *right* appended to the exercise of power. As we shall see, this was the model of analysis that Burke himself adopted.

Political struggle is fraught with moral ambiguity not merely on account of the seductions of power, but also as a result of the temptations of subjection. Together, these allurements circumscribe the spirit and the politics of conquest. As Burke had already recognized in the later 1750s, both types of allurement could

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<sup>64</sup> Montesquieu, *Spirit of the Laws*, pt III, bk 15, chap. 4, 249. The surrounding discussion, including chaps. 2, 3, 5 and 7, seeks to expose the right of slavery based, respectively, on the doctrines of mercy, cultural supremacy, economic necessity and natural inferiority.

<sup>65</sup> *Ibid.*, pt III, bk 15, chap. 6, 251.

be observed in the adventures of Columbus. Work on *An Account of the European Settlements in America*, written jointly by Edmund Burke and his lifelong friend and collaborator, William Burke, but revised and charged with philosophical purpose by Edmund in particular, provided the opportunity for an examination of each. In the midst of a protracted rehearsal of the voyages of Columbus, the *Account* presented a meditation on the foundations of the rights of conquest, dominion and enslavement. That the analysis is Edmund Burke's can hardly be doubted. The indebtedness to Montesquieu is equally clear: "In truth", as Burke proclaimed, subjection "has its principle in human nature".<sup>66</sup> It is grounded on the reality of human aptitudes and dispositions, and not on inherent entitlement or the privilege of divine favour.

The most obvious source for the life and adventures of Columbus available to the Burkes for the purpose of collating materials to be included in their *Account* is the version provided by John Campbell in his *Navigantium atque Itinerantium* from the 1740s, which itself relies on available translations of the histories by Oviedo, Peter Martyr, Francisco López de Gómara, Antonio de Herrera and Fernando Colón.<sup>67</sup> But the biography by Colón, Columbus's illegitimate son, was itself readily available in two separate translations in the eighteenth century. One of these had already been through four folio editions by mid-century.<sup>68</sup> In it we are informed at length of the miraculous facility with which admiral Columbus subjugated a multitude of aggravated natives who had revolted from the discipline to which he had subjected them before embarking upon the discovery of Cuba and Jamaica. In the original encounter with the pacific inhabitants of Hispaniola, Columbus and his men had been received as if—quite literally—they "were come down from heaven".<sup>69</sup> But subsequent dissensions within the colony of "the Nativity" had gradually spilled over to implicate the natives. In time, hostility

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<sup>66</sup> Edmund and William Burke, *An Account of the European Settlements in America, in Seven Parts*, 2 vols. (London, 1757, rev. edn 1760), 1: 32. *An Account* is variously catalogued as a work by Edmund, by William, or by both. The standard bibliography of Burke's works, William B. Todd, *A Bibliography of Edmund Burke* (London, 1964), proposes that this text should be accepted at the least as a jointly authored work. I follow F. P. Lock, *Edmund Burke: 1730–1784*, 125–7, in the assumption that the philosophical contributions to the history belong to Edmund.

<sup>67</sup> John Campbell, *Navigantium atque Itinerantium Bibliotheca: Or, a Compleat Collection of Voyages and Travels, Consisting of above Six Hundred of the Most Authentic Writers*, 2 vols. (London, 1744–8).

<sup>68</sup> Fernando Colombo, *The History of the Life of Adm. Christopher Columbus, and of the Discovery of the West Indies, Call'd the New World, Now in Possession of His Catholick Majesty*, in A. and J. Churchill, *A Collection of Voyages and Travels, Some Now First Printed from Original Manuscripts*, 2 vols. (London, 1704, 1732, 1744, 1752), 2: 479–604.

<sup>69</sup> Colombo, *Life of Adm. Christopher Columbus*, 2: 507.

between the Christians and the infidels broke out, which was only pacified by the final intercession of Columbus. The admiral, now humbled by his own achievement, mused: how astonishing that a mere two hundred men—”half-sick and ill-armed”—could work such wonders in the face of an angry mob, not only overpowering their rebellion but ultimately winning their goodwill.<sup>70</sup>

In the biography by Fernando Colón, this astounding feat of securing willing submission from a recently rebellious population before a numerically inferior band of Christian interlopers is attributed to the beneficence of the Almighty: “such miraculous victories, and the subduing of nations are his gift, and not the effect of our power or conduct, or of their want of courage.”<sup>71</sup> Edmund Burke strenuously disagreed. Columbus was an innovator, an enlightener, a “projector”. He was a wilful virtuoso, yet an artful manager of men, happy to trade on the superstition of others. His subjugation of the Indians was not a product of divine favour but a consequence of his ability to capitalize on the inclination of human beings to subject themselves to deference and respect.<sup>72</sup>

Earlier in the *Account* Burke had already commented on how, during the period in which Columbus undertook his explorations, “few people doubted the power of the pope to convey a full right to any country he was pleased to chalk out”. But papal donations of this kind were obviously spurious from the start. Not much later, with the advent of the Reformation, this practice began to lose ground to another mode of justification no less spurious in its basic premise—”the idea of the dominion of grace, which prevailed with several, and the effects of which we have felt amongst ourselves.”<sup>73</sup> What these dubious doctrines systematically occluded was the tangible, pragmatic character of submission—its foundation, as Montesquieu had argued, in “the nature of things”, which, given the specific creatures for whom submission is an issue, meant “human nature”, as Burke was to emphasize.

Burke followed Montesquieu again in remarking upon the advantages that accompany Muslim conquests—“the Mahometan great merit is to spread the empire and the faith”. And he follows him, too, in commenting on the parochialism of Aristotle’s arguments on account of their dependence on the theory of natural slavery.<sup>74</sup> But while neither of these defences of enslavement appeared to Burke to be at all believable, it was still the case that obsequiousness

<sup>70</sup> Ibid., 2: 542.

<sup>71</sup> Ibid., 2: 542.

<sup>72</sup> This is not to suggest that Burke does not credit Providence, but that Providence can only be invoked as an explanation after the fact.

<sup>73</sup> Colombo, *Life of Adm. Christopher Columbus*, 1: 31.

<sup>74</sup> Burke and Burke, *An Account*, 1: 31. For the points raised by Montesquieu see *Spirit of the Laws*, pt V, chaps. 3–4 on Islamic conquest, and pt III, chap. 7 on the failure of Aristotle to prove his case.

was made possible by the presence of credulity within the human frame. At the same time, it was evident that the mental anguish that accompanies subordination could be palliated by the effects of admiration.<sup>75</sup>

Without these basic aptitudes and dispositions, the antagonistic contest between conquest and rebellion would exhaust the range of possible political relations. But while the achievement of accommodation can undoubtedly be secured through an ameliorating process of pacification, the credulity (or prejudice) and admiration (or deference) by means of which an amiable reckoning can take place are themselves psychological variables that are easily disturbed by a change in circumstance. The sentiments which support authority, like trust and emulation, can therefore readily lapse into suspicion and resentment, as evidenced by the original revolt of the natives of Hispaniola from the discipline under which Columbus had first placed them.

The story of Columbus among the tribes of Hispaniola could be drawn upon to encapsulate the dynamics of subordination. For Burke the tale exemplified the fact that submission could be as agreeable to human beings as the activity of election. Its moving principle was admiration, not abject slavishness. But it was open to manipulation, which cleared the ground for oppressive subjection. Yet corrupt forms of subjection were also open to improvement. Burke's interventions in the Canada debate are an illustration of that assumption. He came by that assumption on the basis of experience and confirmed it by historical research.

The experience was comparative in nature. Burke had first begun to think about politics in the context of the comparison between the divergent political societies of Britain and Ireland in the eighteenth century.<sup>76</sup> What this comparison afforded Burke was a live contrast between the defused state of political hostility in post-Revolutionary Britain and the persistent bitterness which suffused relations in Ireland after the Williamite conquest. The confirmation of possible improvement drew upon the example of European history. A proper analysis of Europe's past revealed how enlightenment and civilization had successfully disciplined the spirit of domination. The content of Burke's analysis is the subject of the following section.

## V. THE SPIRIT OF CONQUEST AND THE POLITICS OF CONQUEST

It has been shown in this essay that two fundamental commitments often presumed to play a defining role in Burke's thinking have been misrepresented

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<sup>75</sup> Burke, *An Account*, 1: 32.

<sup>76</sup> For the importance of Ireland to Burke's development see Thomas Mahoney, *Edmund Burke and Ireland* (Cambridge, MA, 1960); and, more recently, Séan Patrick Donlan, ed., *Edmund Burke's Irish Identities* (Dublin, 2007). For the Irish context itself see Ian McBride, *Eighteenth-Century Ireland: The Isle of Slaves* (Dublin, forthcoming).

in standard commentaries on his work. First, it was shown that his commitment to the doctrine of prescription was overridden by his acceptance of more basic principles of justice. Second, it was shown that he did not regard aristocratic privilege as in itself laying the foundation for a legitimate social order. With the fall of these two pillars of Burke scholarship, the common notion of Burkean conservatism necessarily falls as well since it is these two elements that are usually taken to constitute the essentials of his conservative position. I suggest that scholarship abandon its fixation with the origins of conservative ideology in Burke, and turn instead to examine the political issues that actually concerned him.

This article has focused on one such issue. But it has also tried to make plain how Burke's engagement with the topic of Canada drew upon a wider-ranging preoccupation with the theme of conquest. At bottom Burke's concern was with the politics of conquest. Politics had to be brought to the aid of the experience of conquest since it provided the only method of progressing beyond that raw and embittered condition. Politics should, to begin with, facilitate the achievement of pacification, but beyond that it should enable a constitutional settlement to be secured. A political order ought first to channel and then to displace the spirit of conquest. The spirit of conquest, as this was commonly understood in the eighteenth century, entailed the militant pursuit of political objectives. Its antithesis was enlightened political judgement. The politics of conquest looked towards the transcendence of militancy, and with this the institution of progressively enlightened accommodation.

Progress was both complicated and relative, however. Submission to elective chieftainships among American savages or Saxon tribes, or among Irish septs as imagined by Davies or barbarian clans as recorded by Tacitus, might plausibly be described as more concessive than the extremes of subjugation under the yoke of feudal lordship. But the eighteenth-century monarchies of France and Spain were evidently an advance on the oppressive system of subordination that typified a feudal oligarchy of nobles. Britain in the same period was yet a further improvement over the Continent.

Enlightened accommodation in the European context had been achieved over the course of a complex process of development spanning the trajectory of modern civilization. Burke viewed contemporary British and colonial politics precisely within this larger formative context of post-classical and post-feudal European history. The post-feudal development of Britain had to be distinguished from the histories of Continental monarchies like Portugal, France and Spain. Germany was yet another story. Notwithstanding these medium- and long-term divergences, Burke started from the premise that the course of both British and Continental history was conditioned by their shared experience of the European-wide conquests that overturned the empire and settlements of the Romans. In this

he was building on the analyses pioneered by Montesquieu and John Dalrymple. But he dissented from various of their conclusions.

Burke accepted their assumption that the common pattern of barbarous conquests that accompanied and succeeded the fall of Rome justified the idea of a shared European history.<sup>77</sup> However, he importantly departed from both of them in rejecting the claim that the roots of modern civilization could be traced back directly to the genius of the “northern” Germanic nations.<sup>78</sup> The year in which Burke began work on his *Essay towards an Abridgment of English History*, Dalrymple published his *Essay towards a General History of Feudal Property in Great Britain*, in which he contrasted the Asiatic, Hebraic, Roman, Timariot, Greek and Carthaginian conquests with the unique character of feudal subjection in the post-Roman European order: a socio-political structure based on hereditary tenures held on condition of services rendered was a development without precedent in previous world history.<sup>79</sup> Like Hume and Smith, Burke was to insist that feudalism proper arrived much later on the scene—until then, the legal provisions of “gavelkind” and “tanistry” formed the basis of settled Germanic social and political organization.<sup>80</sup> But he also shared with them an eagerness to explain the decline of feudal aristocracy in Europe together with the triumph of mixed monarchy in Britain. It was this triumph that distinguished Britain from its Continental rivals, but this very distinction was a reminder of the good fortune that secured it.

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<sup>77</sup> For the wider context in which Dalrymple was arguing see N. T. Phillipson, “Lawyers, Landowners and the Civic Leadership of post-Union Scotland”, *Juridical Review*, New Series, 21 (1976), 97–120; R. B. Sher, *Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh* (Edinburgh, 1985).

<sup>78</sup> Edmund Burke, *An Essay towards an Abridgment of English History* (1757–?) in *The Writings and Speeches of Edmund Burke I: The Early Writings*, ed. T. O. McLoughlin and James T. Boulton (Oxford, 1997), 430.

<sup>79</sup> John Dalrymple, *An Essay towards a General History of Feudal Property in Great Britain* (London, 1757), 2–7.

<sup>80</sup> For Burke’s argument on this score see *Essay towards an Abridgment*, 432–4. For Hume’s perspective see David Hume, *History of England from the Invasion of Julius Caesar to the Revolution of 1688*, 6 vols. (London, 1754–62), 1: 141–63. It seems that Burke was in a position to make use of Hume’s contribution for his late revisions to the manuscript of *Essay towards an Abridgment*. Also relevant in this context is Henry Home Lord Kames, *Essays upon Several Subjects Concerning British Antiquities* (London, 1749). On Kames in relation to Dalrymple see Michael Lobban, “The Ambition of Lord Kames’s Equity”, in Andrew Lewis and Michael Lobban, eds., *Law and History: Current Legal Issues*, vol. 6 (Oxford, 2003), 97–121. The important treatment of this topic handed down to us in Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael and P. G. Stein (Indianapolis, 1982), 244–66, was not available to Burke.

The triumph of liberty in England after the ordeals of the mid-seventeenth century was recognized by Burke as a precarious achievement. It was threatened by each of the constitutive “powers” that together made up the constitutional framework ensuring established liberty in Britain against servitude and anarchy. Before the climax of the American crisis, Burke located the predominant threat to liberty in the domestic and imperial ambitions of George III. But after 1780 the emphasis switches: now the “spirit of freedom” itself is assumed to pose the gravest danger. These distinct fears, which dominate the first and second halves of Burke’s career respectively, have encouraged commentators to cast him in the role of an obsequious apologist for undeserving aristocracy—an enemy of equality, in short. But this familiar characterization involves enormous simplification. In the late 1750s Burke described a pure aristocracy as “the worst imaginable government”—it was a continuation of conquest by other means.<sup>81</sup> The application of this insight during the debate over Quebec obliges us to rethink how we ought to represent his positions. It forces us above all to reconsider his reaction to the momentous events of Revolutionary France. But that is a subject for a longer investigation.

## CONCLUSION

In the early eighteenth century, in the city of Lima, the Peruvians held a festival commemorating the death of the Inca emperor, Atahualpa, at the hands of Francisco Pizarro in 1533. In the other great towns of the country, on the day of the nativity of the Virgin Mary, the Indians staged an elaborate reconstruction of the violent dissolution of their old regime. In the capital itself, at the climax of the proceedings, the chief descendent of Atahualpa appeared upon an elevated balcony in order to receive the Spanish viceroy in a mock display of obeisance: mounted on a ceremonial horse trained to genuflect three times before the leading representative of the Incas, the viceroy symbolically honoured his current-day inferior in a gratifying representation of a reversal of fortune.

By means of this fake homage, the festival re-enacted the sixteenth-century conquest and switched the roles of the protagonists by way of theatrical compensation. This provided, by any reckoning, only sorry comfort. Burke was made aware of the staging of the spectacle by the description of it that appears in Amédée Frézier’s *Relation du voyage de la Mer du Sud*, where we are told how, on account of this poignant ritual, the destruction of the sovereignty of the Inca emperors was commemorated “par une grimace”: “Les Indiens ne l’ont pas oublié; l’amour qu’ils avoient pour leurs Rois naturels, leur fait encore pousser

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<sup>81</sup> Burke, *Essay towards an Abridgment*, 547.

des soupirs pour ces temps”<sup>82</sup> The *Account* presents the Peruvian celebrants at Lima as “bowed down with the common sense of bondage of prince and people”, and then proceeds to puzzle over the impact of such an event on the morale of both the conquerors and the conquered. Would exposure to this melancholy scene, indicative from an Inca perspective of a strain of punishing cruelty among their oppressors, not intensify the Indian sense of being subject to the most unbearable of tyrannies? But equally, as the authors of the *Account* surmised, “it is not impossible that those vents . . . may carry off a spirit, that might otherwise break out in a much more fatal manner”<sup>83</sup>

The description of the Spanish Empire in the *Account* betrays a fascination on the authors’ part with the durability of its political arrangements in the midst of so much hatred. This fascination is all the more notable given that the *Account*’s characterization of the system of Spanish rule is a virtual replica of the government of the seraglio as presented in Montesquieu’s *Persian Letters*. The natives of old Spain despised the Creoles of new Spain, while the Creoles resented the insolence of the Spanish; both insulted the dejected Indians with impunity; the imported slaves and the Indians held each other in disdain. As the Burkes summarized the situation, hatred and resentment were used as imperial instruments of divide and rule.<sup>84</sup>

Perhaps it was this strategy, aided by devices like the festival of obeisance, that permitted such an overbearing despotism to endure. But its endurance was nothing if not insecure. The popular sense of injustice would threaten the authority of power given the first opportunity for concerted action. Although the regime was protected against rebellion by the existence of intermediary objects of resentment interposed to draw antagonized constituencies away from fruitful combination, nonetheless the earliest chance that fell to an aggrieved party to unleash revenge against vindictiveness would topple the whole edifice to the ground. Burke recognized that *The Spirit of the Laws* had sought to provide a solution for the kind of bitter divisiveness that reigned in regimes of fear such as Montesquieu had earlier anatomized in the *Persian Letters*. The case of Canada illustrates the reasons he thought that Montesquieu had failed.

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<sup>82</sup> Amédée François Frézier, *Relation du voyage de la Mer du Sud aux côtes du Chili et du Perou, fait pendant les années 1712, 1713 & 1714* (Paris, 1716), 249. An eighteenth-century translation exists under the title of *A Voyage to the South-Sea, and along the Coasts of Chili and Peru, In the Years 1712, 1713, and 1714, Particularly Describing the Genius and Constitution of the Inhabitants, as well Indians as Spaniards: Their Customs and Manners; their Natural History, Mines, Commodities, Traffick with Europe, &c* (London, 1717). The Burkes refer to Frézier in Burke and Burke, *An Account*, I, 251.

<sup>83</sup> Burke and Burke, *An Account*, 1: 258–59.

<sup>84</sup> *Ibid.*, 258.

The practical implication of failure to alleviate social hostility was the persistence of the spirit of conquest in political affairs. Burke was no stranger to the cycle of oppression and rebellion that drove the spirit of conquest in the absence of a sustainable political reprieve. He had grown up to discover that the massacre of Irish Protestants in 1641 had cast a shadow of alarm over seventeenth-century Ireland, only to be resuscitated after 1691 as a pretext for legal precautions against Catholic insurrection which were greeted by their targets as a form of persecution. For Burke this experience illustrated that the spirit of conquest would always thrive where chance combined with poor political design to permit the human weakness for either perfidy or resentment to get the better of trust and moderation. The best that one could hope for from human skill was the contrivance of a science of legislation that would prescribe systematic arrangements by which exposure to such hazards could be reduced.

Burke's contributions to the debates over Quebec were circumscribed by the requirements of the moment. But they were also consistent with a general ambition to reduce the hazards of political oppression, as he at least understood this. Canada would remain vulnerable to oppression from its *seigneurs* if no attempt were made to check the reign of aristocratic "pride" and "arrogance". The *noblesse* were, in Burke's opinion, "ambitious of lording it over their brethren".<sup>85</sup> To exempt the great from the discipline of trial by jury was equivalent to indulging rather than curtailing their ambition. Undisciplined pride in a commercial age was sure to provoke suspicion and resentment. Ascendancy would then be interpreted as severe subjection, pitting the few against the many and sewing the seeds of dissension. Faction would then resuscitate the spirit conquest and elude every attempt at pacification.

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<sup>85</sup> 1774 *Debates*, 286.