



Establishment and Toleration in Edmund Burke's "Constitution of Freedom"

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ESTABLISHMENT AND TOLERATION IN  
EDMUND BURKE'S "CONSTITUTION  
OF FREEDOM"

The most memorable voices in American Founding-era debates over relations between church and state were raised in support of disestablishment and full and equal freedom of conscience. Statesmen such as James Madison and Thomas Jefferson, as well as evangelical leaders such as John Leland and Isaac Backus, made arguments against establishment and in favor of full and equal rights of religious conscience in terms of enduring principles of civil and religious liberty. Their words continue to inspire and guide our consideration of these weighty and contentious questions. There were, of course, other voices. Some patriotic and revered leaders, such as George Washington and Patrick Henry, thought full disestablishment a dangerous course for a republic in need of every support for public virtue. But their arguments have had little effect on the course of church-state affairs in the United States.

A parallel debate proceeded in Great Britain at the same time (the 1760s to the 1790s), but it took on a different character and reached a different conclusion. In those debates, the outstanding figure was Edmund Burke. Burke presents a profound alternative

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to the American resolution of the church-state problem—but one equally grounded in liberal constitutionalism. At a time when the American constitutional principles of nonestablishment and free exercise are thought by many to be mired in a contradiction that the Supreme Court seems unable to resolve, it is instructive to see how Burke sought to reconcile the principles of establishment and toleration, and how he understood both to fit into the wider framework of his “constitution of freedom.”<sup>1</sup>

Burke is best known for his views on representation, party politics, the French and American Revolutions, and the value of tradition. His contribution to the church-state question has received relatively little scholarly attention.<sup>2</sup> Yet establishment and toleration occupied Burke’s attention throughout his forty years as a statesman and man of letters, and arguably were the most important elements in his understanding of British constitutionalism. His first published work, *A Vindication of Natural Society*,<sup>3</sup> was a satirical defense of revealed religion against the attacks of Lord Bolingbroke, and his last, the *Letters on a Regicide Peace*,<sup>4</sup> traced the enormities of the French Revolution to the aggressive atheism of the *philosophes*.

<sup>1</sup> The term “constitution of freedom” comes from Burke’s great speech to his disgruntled constituents at Bristol, in which he defended his support for the Catholic Relief Act in the wake of the anti-Catholic Gordon riots. Edmund Burke, *Speech at Bristol, Previous to the Election* (Sept 6, 1780), in 2 *The Works of the Right Honorable Edmund Burke* 365, 416 (Little, Brown, 9th ed 1889) (“*Works*”).

<sup>2</sup> To date, there has been no comprehensive study of Burke’s principles in the field of religion and government. The most comprehensive study of Burke’s political theology is Francis Canavan’s *Edmund Burke: Prescription and Providence* (Carolina, 1987), but Canavan addresses the constitutional issues of toleration and establishment only in passing. A useful analysis of Burke’s theory of establishment may be found in John MacCunn, *The Political Philosophy of Edmund Burke* 122–43 (Arnold, 1913), reprinted as *Religion and Politics* in Daniel E. Ritchie, ed, *Edmund Burke: Appraisals and Applications* 183 (Transaction, 1990). As this article went to press, Norman Ravitch published an instructive essay, *Far Short of Bigotry: Edmund Burke on Church Establishment and Confessional States*, 10 *J Church and State* 365 (1995). Ursula Henriques devotes a chapter of her *Religious Toleration in England 1787–1833* 99–135 (Toronto, 1961) to Burke’s role in the development of British church-state doctrine, as does J. C. D. Clark, *English Society 1688–1832* 247–58 (Cambridge, 1985), but neither attempts to reconcile Burke’s twin principles of toleration and establishment. Clark, indeed, treats Burke as an unreconstructed “champion of the Anglican aristocratic-monarchical regime,” dismissing his advocacy of a broad toleration as evidence of an “early radicalism” abandoned by the mature Burke. *Id.* at 250. As will become clear, I think this interpretation is untenable.

<sup>3</sup> Edmund Burke, *A Vindication of Natural Society* (1756), in 1 *Works* 1.

<sup>4</sup> Edmund Burke, *Three Letters to a Member of Parliament on the Proposals for Peace with the Regicide Directory of France* (1796–97), in 5 *Works* 231 (“*Letters on a Regicide Peace*”);

Burke offers a sharp contrast to the Americans. Whatever the differences among the various American approaches to church-state issues, all stress the dangers and incapacities of government and the primacy of individual conscience, and most see problems in the inherent divisiveness of religion. Burke had a more benign view of government, a more institutional view of religious experience, and a greater awareness of the potential of organized religion to serve as a corrective to extremism and abuse of power.

Most striking is the difference over church-state separation. While Americans disagree over such issues as the conduct of the public schools, the participation of religious groups in government-funded programs, and the accommodation of religious minorities, almost every school of thought in America now adheres to one version or another of church-state “separation.”<sup>5</sup> Burke, by contrast, maintained that “in a Christian commonwealth the Church and the State are one and the same thing, being different integral parts of the same whole.”<sup>6</sup> The established church, he said, is “the foundation of [the] whole constitution.”<sup>7</sup>

At the same time, Burke was in the forefront of efforts to achieve a broader toleration for Roman Catholics and other Dissenters from the established church. He stated that “[i]f ever there was anything to which, from reason, nature, habit, and principle, I am totally averse, it is persecution for conscientious difference in opinion.”<sup>8</sup> This was not just talk. For the cause of toleration, Burke suffered frequent political calumny, lost his seat in Parliament, and was even threatened by a mob of anti-Catholic rioters. The cause of toleration inspired some of his most moving oratory and some of his most persistent and persuasive correspondence.

Are these twin attachments—to toleration and to establishment—incompatible? From the American perspective, it would seem so, and scholars have attributed these positions to different

Edmund Burke, *Fourth Letter on the Proposals for Peace with the Regicide Directory of France* (1795–97), in 6 *Works* 1.

<sup>5</sup> See Carl H. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 *BYU L Rev* 371; Steven D. Smith, *Separation and the “Secular”*: *Reconstructing the Disestablishment Decision*, 67 *Tex L Rev* 955 (1989).

<sup>6</sup> Edmund Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 43.

<sup>7</sup> Edmund Burke, *Reflections on the Revolution in France* 87 (Hackett, 1987) (J. G. A. Pocock, ed) (originally published 1790) (“*Reflections*”).

<sup>8</sup> Edmund Burke, *Speech on the Acts of Uniformity* (Feb 6, 1772), in 7 *Works* 1, 10.

periods of Burke's career.<sup>9</sup> But Burke did not see it that way. For him the establishment was not an instrument of intolerance or oppression, but of moderation, restraint, and even toleration. "Zealous as I am for the principle of an establishment," he proclaimed in his *Speech on a Bill for the Relief of Protestant Dissenters*, "so just an abhorrence do I conceive against whatever may shake it. I know nothing but the supposed necessity of persecution that can make an establishment disgusting. I would have toleration a part of establishment, as a principle favorable to Christianity, and as a part of Christianity."<sup>10</sup> Indeed, he considered the religious establishment not antithetical to, but an integral part of, England's system of civil liberty—much as he saw the monarchy and the nobility as integral to England's system of political liberty.

His instincts were confirmed when the revolutionaries in France simultaneously disestablished the Church and persecuted religious believers, and when the persecution of Catholics in Ireland drove that essentially conservative nation into Jacobinesque rebellion. He perceived that both establishment and toleration were obstacles to revolutionary tyranny, and that both were necessary elements of England's balanced constitution.

It is Burke's understanding of the symbiosis between establishment and toleration—so antithetical to the disestablishmentarianism of America—that most interests me here. Where it is helpful, I will compare Burke's ideas to doctrines and controversies in the American treatment of church and state; but this should not be taken to imply that Burke's ideas should—or even could—be transported to these shores. For Burke, moral and constitutional questions are always contextual, not to be governed by "abstractions and universals."<sup>11</sup> He advocated keeping the established church only "in the degree it exists, and in no greater,"<sup>12</sup> and based his support in large part on the dispositions and attachments of the people of England. The English obviously differ in these respects from the more diverse and sectarian Americans. On Burkean

<sup>9</sup> See Clark, *English Society* at 250 (cited in note 2).

<sup>10</sup> Edmund Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 25.

<sup>11</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 41. See also Edmund Burke, *An Appeal from the New to the Old Whigs* (1791), in 4 *Works* 57, 109.

<sup>12</sup> Burke, *Reflections* at 80.

principles, America could not have an established church. Burke's analysis of the issues nonetheless may help us to appreciate the complexities—even the paradoxes—of these difficult issues.

## I. BURKE, THE MAN AND THE STATESMAN

### A. BURKE'S RELIGIOUS BACKGROUND AND BELIEFS

Burke was born in 1729 in Ireland of Catholic stock, at a time when the Penal Laws kept the Catholic majority in submission to the Protestant minority, called the "Ascendancy." Burke's mother, a nominal convert to the established church, was a practicing Catholic; Burke's beloved wife, Jane, was the same. Burke's father, a lawyer, converted to Anglicanism as a young man, seven years before Edmund's birth, apparently to enable him to practice his profession, which was at that time closed to Catholics.<sup>13</sup> Edmund himself never had to face that wrenching choice between his faith and his civil liberty, for he was baptized and raised in the (Anglican) Church of Ireland. He attended a rural Catholic school as a boy, a Quaker school in his youth, and institutions of the established church (Trinity College, Dublin, followed by the Inns of Court) for higher education. As an adult, Burke came to epitomize and to champion the English nation, the Anglican Church, and the Whig Party—the party of the Protestant settlement in 1688. That was his public face. But through his ties to the despised race of Irish Catholics, Burke had personal experience of religious persecution. His most recent biographer, Conor Cruise O'Brien, speculates that Burke's commitment to Catholic emancipation in Ireland (as well as his fight "against abuse of power in America, in India, and, at the end, above all, in France") was inspired by "the humiliating discovery of his father's having conformed, out of fear" and "the realisation that his own achievement would be based on the consequences of that act of conforming."<sup>14</sup>

There is little doubt that Burke was a committed and devout Christian. His editor J. G. A. Pocock calls him "the pious Burke,"<sup>15</sup>

<sup>13</sup> It is not certain that the "Richard Burke" who converted to Anglicanism in 1722 was the same Richard Burke who was Edmund's father, but the evidence, which is presented in Conor Cruise O'Brien, *The Great Melody: A Thematic Biography and Commented Anthology of Edmund Burke* 3–6 (Chicago, 1992) ("*The Great Melody*"), seems compelling.

<sup>14</sup> Id at 13–14.

<sup>15</sup> J. G. A. Pocock, *Editor's Introduction*, in Burke, *Reflections* at vii, xviii.

and O'Brien says he was a "devout Christian."<sup>16</sup> Burke fervently believed that "atheism is against, not only our reason, but our instincts,"<sup>17</sup> and his speeches and writings are filled with references to the divine order and judgment. In a letter to his fourteen-year-old son, Richard, who was studying in France, Burke urged him to keep himself "constantly" in the presence of God. "Remember [h]im first, and last, and midst."<sup>18</sup>

Although suspected of secret Catholicism for most of his life (political cartoons usually depicted Burke in the robes of a Jesuit, and at critical junctures in his political career Burke's enemies accused him of being a Jesuit and a Jacobite<sup>19</sup>), most evidence suggests that he loyally adhered to the Anglican faith adopted, however opportunistically, by his father.<sup>20</sup> He faithfully attended Anglican services, he regularly took sacraments from Anglican priests, his library was filled with orthodox Anglican theological works, and his writings on the role of church and providence in the life of the nation were deeply imbued with Anglican theology. In the *Reflections on the Revolution in France*, he declared: "We [the English] are Protestants, not from indifference, but from zeal."<sup>21</sup>

But Burke's faith was not at all sectarian. In his own words, to a friend: "I am attached to Christianity at large; much from conviction; more from affection."<sup>22</sup> In this letter—his most explicit

<sup>16</sup> O'Brien, *The Great Melody* at 588 (cited in note 13). Similarly, Burke's nineteenth-century biographer, Thomas MacKnight, described him as "sincerely attached to the principles of the Christian religion." Thomas MacKnight, 3 *History of the Life and Times of Edmund Burke* 164 (London, 1860) ("Life and Times"). Accord MacCunn, *Political Philosophy of Burke* at 187 (cited in note 2) (calling Burke "[r]everently religious"). The most comprehensive study of Burke's theology is in Canavan (cited in note 2). It places him in the mainstream of the Anglican tradition, with influences from high Medieval Catholic thought. Some scholars, however, suggest that Burke was a hidden skeptic. See, for example, Harvey Mansfield, Jr., *Burke on Christianity*, 9 *Studies in Burke and His Time* 864 (1968).

<sup>17</sup> Burke, *Reflections* at 80.

<sup>18</sup> *Letter from Edmund Burke to Richard Burke, Jr. and Thomas King* (Feb 4, 1773), in 2 *The Correspondence of Edmund Burke* 419, 421 (Chicago, 1960) ("Correspondence").

<sup>19</sup> *Id.* at 50; MacKnight, 1 *Life and Times* 202–03, 422–23 (cited in note 16).

<sup>20</sup> See Canavan, *Burke: Prescription and Providence* at 71–74, 79–81 (cited in note 2). There have been rumors that Burke converted to Catholicism at the time of his marriage, O'Brien, *The Great Melody* at 37–38 (cited in note 13), and that he sought last rites as a Catholic on his deathbed, *id.* at 590. There is no concrete evidence in support of these supposed conversions (which, if they had occurred, would have been kept closely secret), and in public life Burke conducted himself as a faithful member of the Church of England.

<sup>21</sup> Burke, *Reflections* at 79–80.

<sup>22</sup> *Letter from Edmund Burke to an Unknown Person* (Jan 20, 1791), in 6 *Correspondence* 214, 215.



discussion of denominational affiliation—he explained his adherence to the Anglican church in terms utterly devoid of spiritual, emotional, theological, or intellectual conviction:

I have been baptised and educated in the Church of England; and have seen no cause to abandon that communion. When I do, I shall act upon my conviction or my mistake. I think that Church harmonises with our civil constitution, with the frame and fashion of our Society, and with the general Temper of the people. I think it is better calculated, all circumstances considered [sic], for keeping peace amongst the different sects, and of affording to them a reasonable protection, than any other System. Being something in a middle, it is better disposed to moderate.<sup>23</sup>

This suggests a certain skepticism on Burke's part that individual religious conscience is able to grasp religious truth, which on many points "Providence" has "left obscure."<sup>24</sup> For the most part, Burke is content to accept religious doctrine that "seems to me to come best recommended by authority."<sup>25</sup> Indeed, Burke suggests that interpretation of scripture by the unaided efforts of the individual believer is likely to lead to "dangerous fanaticism."<sup>26</sup> This did not mean that Burke was willing to countenance persecution or repression of individual religious conscience; but, unlike the evangelical supporters of religious liberty in America, he thought that spiritual truth and harmony would be more likely achieved through authority and tradition than through individual conscience and scripture. This emphasizes the essential Englishness of Burke's position: a constitutional arrangement based on these premises could hardly flourish in a country, like newly independent America, inhabited by the spiritual descendants of Luther and Calvin.

Burke was especially concerned to minimize the differences between Anglicanism and the faith of his fathers (and mother, and wife, and cousins). "The Catholics of Ireland," he claimed, "have the whole of our *positive* religion: our difference is only a negation

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<sup>23</sup> Id.

<sup>24</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in *7 Works* 21, 29.

<sup>25</sup> Burke, id at 28.

<sup>26</sup> Burke, *Speech on the Acts of Uniformity* (Feb 6, 1772), in *7 Works* 3, 19. See also Ravitch (cited in note 2), at 373.



of certain tenets of theirs.”<sup>27</sup> Indeed, in the *Reflections*, Burke made the remarkable claim: “So tenacious are we [the English] of the old ecclesiastical modes and fashions of institution that very little alteration has been made in them since the fourteenth or fifteenth century. . . .”<sup>28</sup> Considering the doctrinal and ecclesiological tergiversations that the English church had undergone during that period, Burke’s observation evinces an uncommonly powerful desire to obliterate the differences between the Catholic and Anglican communions. This ecumenical spirit, always present in Burke, became even more powerful after the Revolution in France, when militant atheism became a challenge to all religion. He wrote in 1795 that “[a]ll the principal religions in Europe stand upon one common bottom. The support that the whole or the favored parts may have in the secret dispensations of Providence it is impossible to tell. . . .”<sup>29</sup>

Some hints of Burke’s personal theology can be gleaned from his letters and public statements. These sources convey an impression that Burke understood religion almost exclusively as a source of a moral code, of hope and consolation on earth, and of rewards and punishments in the life to come. In his private notebook, Burke wrote that “The Principle of Religion is that God attends to our Actions to reward and punish them.”<sup>30</sup> Notably lacking in Burke’s extensive speeches and writings about religion is any reference to the central tenet of mainstream Christianity: the vicarious atonement of Jesus Christ and redemption through faith in Him.<sup>31</sup>

<sup>27</sup> Edmund Burke, *Letter on the Affairs of Ireland* (1797), in 6 *Works* 413, 425 (italics in original).

<sup>28</sup> Burke, *Reflections* at 87.

<sup>29</sup> *Letter from Edmund Burke to William Smith, Esq., on the Subject of Catholic Emancipation* (Jan 29, 1795), in 6 *Works* 361, 368. See also *Letter from Edmund Burke to Richard Burke, Esq. on Protestant Ascendancy in Ireland* (1793), in 6 *Works* 385, 400 (“I do not pretend to take pride in an extravagant attachment to any sect.”). Significantly, Burke participated in Presbyterian worship services at the time of his investiture as Lord Rector of Glasgow University—evincing an ecumenism rare for his day. MacKnight, 3 *Life and Times* at 76 (cited in note 16).

<sup>30</sup> Edmund Burke, *Religion of No Efficacy, Considered as a State Engine*, in H. H. F. Somerset, ed., *A Notebook of Edmund Burke* 67 (Cambridge, 1957) (“*Notebook*”). The *Notebook* was apparently written between 1750 and 1756, but not published. Compare Burke, *Reflections* at 140 (“The body of all true religion consists, to be sure, in obedience to the will of the Sovereign of the world, in a confidence in his declarations, and in imitation of his perfections. The rest is our own.”).

<sup>31</sup> In his *Notebook*, Burke articulates a theology of works righteousness that is decidedly unorthodox from a Protestant point of view. “[O]ur Performance of our Duty here,” he writes, “must make our fate afterwards.” Somerset, *Notebook* at 72 (cited in note 30).

Indeed, Burke never mentions Christ (though he frequently mentions God), and he rarely quotes the Bible.<sup>32</sup> On the other hand, Burke did not move in the direction of rational religion, so attractive to many of his contemporaries. That would be the religious equivalent of the metaphysics and abstraction that he so deplored in politics. He was critical of clergy who, “shamed and frightened at the Imputation of Enthusiasm, endeavour to cover Religion under the Shield of Reason, which will have some force with their Adversaries.”<sup>33</sup> Instead, Burke adhered to fundamentals of the faith, and was willing to “take that which seems to me to come best recommended by authority.”<sup>34</sup>

#### B. BURKE'S EARLY EXPERIENCE IN IRELAND

Toleration was Burke's central preoccupation in his first public office. In 1759, he was appointed private secretary to William Gerard Hamilton, who served as Chief Secretary for Ireland from 1761 to 1764. In that capacity (officially powerless but in practice influential), Burke embarked upon a detailed study of the Penal Laws—the laws for the suppression of Roman Catholicism in Ireland—and began what was to be a lifelong campaign for reform. Writing in 1795, Burke recalled that he had begun to work against the Penal Laws in Ireland “four or five and thirty years ago” and that he had been “ever since, of the same opinion on the justice and policy of the whole and of every part of the penal system.”<sup>35</sup>

The Irish Penal Laws in Burke's day were harsh and oppressive. Burke claimed that they were worse than “any scheme of religious persecution now existing in any other country in Europe, or which has prevailed in any time or nation with which history has made

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<sup>32</sup> A rare exception is his quotation of *Matthew* 18:22–23, in a rebuke to certain Protestant dissenting clergy who opposed the extension of toleration to a wider category of Dissenters. Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 30. In the *Reflections* he quotes passages from *Ecclesiasticus*, while carefully and explicitly maintaining agnosticism about the canonicity of the book. Burke, *Reflections* at 43 n 10.

<sup>33</sup> Burke, *Religion of No Efficacy, Considered as a State Engine*, in Somerset, *Notebook* at 67 (cited in note 30).

<sup>34</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 28.

<sup>35</sup> *Second Letter from Edmund Burke to Sir Hercules Langrishe on the Catholic Question* (May 26, 1795), in 6 *Works* 375, 383–84.

us acquainted.”<sup>36</sup> All monks, friars, and priests not then actually in parishes were banished from the kingdom under Queen Anne, on penalty of death if they should return, with rewards for apprehending them and penalties for harboring them. “As all the priests then in being and registered are long since dead,” Burke commented, “and as these laws are made perpetual, every Popish priest is liable to the law.”<sup>37</sup> In addition, the Catholic people of Ireland were subjected to severe civil disabilities, among them: denial of the vote; exclusion from public office, military service, higher education, and the practice of law (even as a clerk); denial of the right to bear arms even in self defense; susceptibility to search without warrant; denial of the right to buy or lease real property for any period exceeding thirty-one years; denial of the right to devise property by will or by primogeniture; insecurity of property (if children of Catholic property owners converted, they could seize their parents’ property and leave only the life estate); destruction of parental rights in the event a Catholic’s spouse converted; and prohibition of teaching. Any child who was educated in a Catholic school in another country was stripped for life of any right to legal capacity or property ownership, and so were the persons who sent or maintained them, unless the child abjured the Catholic faith within six months of return. Enforcement of these restrictions was by trial before Protestant magistrates and juries, often with the burden of proof shifted to the Catholic defendant.<sup>38</sup>

By Burke’s day, anti-popery laws were little enforced in England and Scotland. Blackstone, an apologist for the Penal Laws, observed that they “are seldom exerted to their utmost rigour: and, indeed if they were, it would be very difficult to excuse them.”<sup>39</sup> They inflicted more indignity than actual hardship. But in Ireland, the Penal Laws were not anachronisms. Although enforced with less severity than in the previous century, the laws continued to serve the political and economic interests of the dominant Protes-

<sup>36</sup> Edmund Burke, *Tract Relative to the Laws against Popery in Ireland* (circa 1761), in 6 *Works* 299, 318 (“*Tract on the Popery Laws*”).

<sup>37</sup> *Id.* at 317.

<sup>38</sup> See *id.* at 302–17. The Irish Penal Laws and various Catholic Relief Acts of the period are reproduced in excerpted form as appendices to Thomas H. D. Mahoney, *Edmund Burke and Ireland* 325–42 (Harvard, 1960) (“*Burke and Ireland*”).

<sup>39</sup> William Blackstone, IV *Blackstone’s Commentaries on the Laws of England* 57 (Callaghan, 3d rev ed 1884).

tant minority, which had exclusive control of Irish Parliament, administration, court, and juries. The Protestant Ascendancy was not willing to give up its tools of legal domination without a struggle.<sup>40</sup>

It was during this period that Burke wrote (but never published) his *Tract Relative to the Laws Against Popery in Ireland*.<sup>41</sup> In the *Tract*, he argued that the Penal Laws were both unjust (“these politics are rotten and hollow at bottom, as all that are founded upon any however minute a degree of positive injustice must ever be”<sup>42</sup>) and ineffective as an instrument for the spread of the Protestant religion. “Ireland, after almost a century of persecution, is at this hour full of penalties and full of Papists. . . . We found the people heretics and idolaters; we have, by way of improving their condition, rendered them slaves and beggars: they remain in all the misfortune of their old errors, and all the superadded misery of their recent punishment.”<sup>43</sup>

Burke’s sympathy for the oppressed, even then, could not be divorced from his essentially conservative theory of government, which in later life would cause Burke to oppose the designs of revolutionaries and innovators with the same vigor that he opposed the tyranny in Ireland. All power—whether monarchical or democratic—must be restrained by the enduring truths of what Burke called “original justice,”<sup>44</sup> which reveals itself only slowly, with experience, over time. Accordingly, the persecution of Catholics in Ireland held for Burke a peculiar horror. Whether erroneous or not, Catholicism in Ireland drew its strength from long-standing practice and belief—precisely the same prop that supports and constrains legitimate government. Thus, he warned the English that “you punish them [the Catholics of Ireland] for acting upon a principle which of all others is perhaps the most necessary for preserving society, an implicit admiration and adherence to the establishments of their forefathers.”<sup>45</sup>

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<sup>40</sup> See *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 252–53. This was even more true in the 1760s, when Burke first addressed the issue.

<sup>41</sup> Published in 6 *Works* 299. Unfortunately, all that survives is a substantial fragment, some of which is taken from a rough draft.

<sup>42</sup> *Id* at 337.

<sup>43</sup> *Id* at 334, 341.

<sup>44</sup> *Id* at 323.

<sup>45</sup> *Id* at 337.

Those scholars who purport to see a fundamental shift in Burke's principles—from a liberal, tolerant, whiggish beginning to a conservative, establishmentarian, tory conclusion<sup>46</sup>—have given insufficient attention to this early *Tract*, in which he grounded his argument for liberal reform in the same principles that later would inspire his essays decrying the Revolution in France. “It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society,” Burke wrote in the *Tract*, “than the position, that any body of men have a right to make what laws they please.”<sup>47</sup> Later, he would deploy the same argument in his attack on the French Revolution: “Neither the few nor the many have a right to act merely by their will.”<sup>48</sup> In Ireland as in France, Burke invoked age-old experience both for the preservation of society and as the means of resistance to arbitrary government.

Despite his work on the Penal Laws and the general liberality of Hamilton's administration in Ireland, little progress toward toleration was made during Burke's tenure in office. The Penal Laws themselves were untouched. Much of Burke's attention was devoted to a defensive reaction to what were called the “Whiteboy” disturbances (after the participants' practice of wearing white shirts over their clothes, to distinguish one another at night). These uprisings, which Burke attributed to economic deprivations, were blamed by Protestant landlords on Jacobite and French sedition and used as an excuse to crack down on Irish Catholic dissent. A number of suspected Whiteboys were hanged by local authorities. When the administration refused to treat the Whiteboy disturbances as sectarian or political in nature, Protestant gentry were angered, and the cause of systemic reform rendered impossible.<sup>49</sup>

Burke made one other modest attempt toward toleration. In the first public position of his career, he won support from the Privy

<sup>46</sup> See Clark, *English Society* at 250 (cited in note 2). This charge of inconsistency had frequently been leveled against Burke by his critics, including Thomas Paine, Mary Wollstonecraft, and (later) Charles James Fox, and was answered by him in *An Appeal from the New to the Old Whigs* (1791), in 4 *Works* 57, 92 et seq.

<sup>47</sup> Burke, *Tract on the Popery Laws* (circa 1761), in 6 *Works* 299, 322. Compare Burke, *Reflections* at 82–86; Burke, *An Appeal from the New to the Old Whigs* (1791), in 4 *Works* 57, 120–21.

<sup>48</sup> Burke, *An Appeal from the New to the Old Whigs* (1791), in 4 *Works* 57, 162.

<sup>49</sup> See O'Brien, *The Great Melody* at 44–46 (cited in note 13). Burke later described these events in his *First Letter to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 254–55.

Council to allow six regiments of Catholic Irish to be formed to defend England's ally, Portugal, at Portuguese expense. It was thought that this would help to dispel the persistent suspicion that the Catholic majority were disloyal to Britain, and serve as a bridge toward enlargement of civil capacities. But even this small step was defeated in the Irish Parliament, because of fears that arming the Catholics could prove dangerous.<sup>50</sup>

Nothing more was to be accomplished. Hamilton was dismissed from his Irish post in 1764. With him, Burke returned to England. The following year the two men had a falling out, caused—at least in part—by differences over the Catholic question (as well as over money). Burke thought Hamilton insufficiently energetic in his efforts on behalf of Catholic emancipation. Hamilton, for his part, called Burke “a Jew and a Jesuit.”<sup>51</sup>

#### C. BURKE'S EARLY PARLIAMENTARY CAREER

Burke soon acquired a more lasting and satisfactory patron, through whom he entered Parliament and rose to become one of its most influential figures. In July of 1765, he became private secretary to the Second Marquess of Rockingham, the leader of the most prominent faction of the Whig Party, who was then forming a government.<sup>52</sup> Later that year, Burke was elected to Parliament from Wendover, a pocket borough belonging to a Rockingham ally. Unfortunately for Burke, the Rockingham government fell the next year, its one significant achievement being repeal of the Stamp Act. For the next sixteen years Burke was but a member of the opposition. His talents, however, were such that, despite his inauspicious background as an Irishman and suspected Catholic, Burke became a formidable power in English politics, generally regarded as the intellectual leader and spokesman of the Rockingham Whigs.

Early in his career, Burke was forced to confront one of the

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<sup>50</sup> For an account of this episode, see Mahoney, *Burke and Ireland* at 14–15 (cited in note 38).

<sup>51</sup> O'Brien, *The Great Melody* at 47–48 (cited in note 13).

<sup>52</sup> Burke's appointment was almost forestalled by the circulation of rumors that he was a Catholic and a Jesuit. Rockingham approached Burke to ask about the rumors, and Burke's response must have been satisfactory. Id at 48–49; Carl B. Cone, *Burke and the Nature of Politics: The Age of the American Revolution* 71–72 (Kentucky, 1957).

most vexing and persistent issues of eighteenth-century politics: the rights of Protestant Dissenters. In theory, “penal laws” punished the open practice (though never mere belief) of religion outside the Church of England, “disability laws” (notably the Test Act and the Corporation Act) excluded Dissenters from public (and some forms of private) office, and the “Act of Uniformity” prescribed Thirty-Nine Articles of Faith to which all clergy were required to subscribe.<sup>53</sup> Since the Glorious Revolution in 1688, however, Protestant Dissenters had enjoyed a significant degree of toleration. Under the Act of Toleration, enacted in the first year of the reign of William and Mary, the penalties of certain of the penal acts would not apply to Protestant Dissenters, and Protestant dissenting clergy were permitted to conduct religious worship services provided they adhered to 36 and part of one other of the Thirty-Nine Articles (omitting those that related to church governance and infant baptism).

The Act of Toleration was celebrated as a cornerstone of Protestant liberty, but we should not forget its limitations. As a formal matter, it lifted penalties only, leaving the legal requirements of conformity theoretically in place, and it extended only to trinitarian Protestants (primarily Presbyterians, Independents, and Baptists), thus excluding not only Catholics, Jews, and other non-Christians, but also the increasingly visible “Rational Dissenters”: deists, Socinians, Arians, and Unitarians of various sorts who criticized orthodox Christianity as irrational, unscientific, and oppressive.<sup>54</sup> Moreover, the Act of Toleration did not affect the Test and Corporation Acts, which limited public and corporate office to those who participated in the Anglican sacrament. Repeated efforts were made between 1727 and 1739 to repeal the Test and Corporation Acts, but these were unsuccessful—though annual Indemnity Acts were passed after 1727 to suspend the penalty of the Test Laws, and the practice of “occasional conformity” enabled Dissenters to evade the laws by occasional, insincere participation

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<sup>53</sup> See Blackstone, 4 *Blackstone's Commentaries* at 53–58 (cited in note 39). These restrictions help to explain the structure of the provisions of the United States Constitution relating to religion. The Free Exercise Clause prohibits enactment of laws similar to the Penal Laws; the Test Oath Clause of Article VI prohibits disability laws; and the Establishment Clause prohibits laws similar to the Act of Uniformity.

<sup>54</sup> See generally Michael R. Watts, *The Dissenters: From the Reformation to the French Revolution* 371–82, 464–78 (Clarendon, 1978).



in the Anglican sacrament. As a result of these measures (as well as informal nonenforcement), the penal and disability laws had far less practical consequence than their formal provisions would suggest. Burke called the Test Act “hardly anything more than a dead letter.”<sup>55</sup> Dissenters were elected to municipal corporate office and even to Parliament, and it was not unusual for clergy within the Anglican Church to question some of the doctrinal tenets of the Thirty-Nine Articles. Nontrinitarian churches were generally able to conduct services without legal molestation.<sup>56</sup>

The Dissenters pursued a two-course strategy of urging greater “comprehension” within the established church (meaning relaxation and liberalization of the liturgical and doctrinal requirements specified by the Act of Uniformity) and greater toleration of Dissenters outside the church. In these efforts, they generally received the warm support of the Whigs and the opposition of the High Church and Tory parties. Burke, however, treated these two proposed lines of reform as different in principle. In his treatment of two proposals in 1772 and 1773 we can see the foundation of his understanding of the relation between establishment and toleration.

In 1772, some 250 Anglican clergymen signed a petition (called the “Feathers Tavern” petition) asking Parliament to abolish the requirement of subscription to the Thirty-Nine Articles of Faith of the Church of England, and replace it with a simple affirmation of the Bible as the source of divine truth.<sup>57</sup> The petition was supported by most of Burke’s friends and allies in the Whig Party,<sup>58</sup> who saw it as a step toward a more tolerant and rational church. To their surprise, Burke spoke against the petition. He began by distancing himself from the High Church position, and from what

<sup>55</sup> *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 264.

<sup>56</sup> See generally Henriques, *Religious Toleration* at 5–17 (cited in note 2); Clark, *English Society* at 316 (cited in note 2).

<sup>57</sup> The petition also sought similar relief on behalf of students of civil law and medicine at Oxford and Cambridge, who had to subscribe to the Articles in order to receive their degrees. Both sides in the parliamentary debate agreed on the justice of this aspect of the measure. When it came up for separate consideration the next year, however, Burke was out of the country, and the measure was defeated. Cone, *Burke and the Nature of Politics* at 219 n 22 (cited in note 52).

<sup>58</sup> See *Letter from Edmund Burke to the Countess of Huntingdon* (ante Feb 6, 1772), in 2 *Correspondence* 298, 299.

he considered to be erroneous grounds for opposition to the petition. He explained that “[i]f ever there was anything to which, from reason, nature, habit, and principle, I am totally averse, it is persecution for conscientious difference of opinion.”<sup>59</sup> But, he said, the petition “does not concern toleration, but establishment”—the right of the people of England to maintain a church in accordance with their own theological principles.<sup>60</sup> Those who “do not like the Establishment . . . have free liberty to assemble a congregation of their own.”<sup>61</sup> It is an essential right of any church, however, to determine its doctrines and require conformity from its clergy; in this respect the Church of England enjoys the rights of any church or voluntary society. “If you will have religion publicly practised and publicly taught,” he noted, “you must have a power to say what that religion will be which you will protect and encourage.”<sup>62</sup> If you allow the clergy “the power of taxing the people of England for the maintenance of their private opinions,” he said, “you take away the liberty of the elector, which is the people, that is, the state.”<sup>63</sup> The complaint, therefore, he said derisively, “is not toleration of diversity in opinion, but that diversity in opinion is not rewarded by bishoprics, rectories, and collegiate stalls.”<sup>64</sup> The bill was defeated, and subsequently a significant body of Anglican clergy resigned their livings and joined the ranks of the Rational Dissenters.

The following year, a group of dissenting clergy sought repeal of the requirement that they adhere to any part of the Thirty-Nine Articles. This requirement was not generally enforced, and some members argued that it was therefore no serious grievance, but should be maintained as an essentially symbolic reminder of the exclusive character of the establishment. The repeal legislation easily passed the House of Commons, but, with royal intervention, was defeated in the House of Lords.

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<sup>59</sup> Burke, *Speech on the Acts of Uniformity* (Feb 6, 1772), in 7 *Works* 3, 10.

<sup>60</sup> *Id.* at 15.

<sup>61</sup> *Id.* at 12. In this, Burke was expressing his opinion, rather than accurately stating the law. Technically, all clergy were required to subscribe to the Thirty-Nine Articles (or at least to the subset specified in the Act of Toleration). Burke supported efforts to repeal this limitation.

<sup>62</sup> *Id.* at 16.

<sup>63</sup> *Id.* at 12, 16.

<sup>64</sup> *Id.* at 15.

On this occasion, Burke supported the Dissenters, making what might seem to be the obvious distinction between the right to preach and the right to preach as a clergyman of the Church of England. At the time, most observers regarded this as a reversal of position, because for most the battle lines were drawn between supporters of the establishment and advocates of theological change. For Burke the two positions were entirely consistent.

Burke addressed his remarks to an “honorable gentleman” who had argued that “establishing toleration by law is an attack on Christianity.”<sup>65</sup> Burke, by contrast, was “persuaded that toleration, so far from being an attack upon Christianity, becomes the best and surest support that possibly can be given it.”<sup>66</sup> “I may be mistaken, but I take toleration to be a part of religion.”<sup>67</sup> Burke did not base his argument so much on the importance of individual conscience, but on the value of religion—even of dissenting religion. “Do not promote diversity,” he said, but “when you have it, bear it; have as many sorts of religion as you find in your country; there is a reasonable worship in them all.”<sup>68</sup> The real struggle, he argued, is not among the various religions, but between religion and atheism.

One thing had changed between the two petitions: Burke had gone to France and spent a month in the salons of Paris, where he became acquainted with the disturbingly atheistic ideas of the *philosophes*. In all likelihood, this is the background for Burke’s surprisingly harsh denunciations of atheists as “outlaws of the constitution” and a “confederacy of the powers of darkness,” who are “endeavoring to shake all the works of God established in order and beauty.”<sup>69</sup> This may seem overwrought; Burke himself said “[p]erhaps I am carried too far.”<sup>70</sup> But his experience in France solidified Burke’s determination to create, through toleration, what he called “an alliance offensive and defensive”<sup>71</sup> of all religions against the threat of unbelief and its political manifestations.

<sup>65</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 24.

<sup>66</sup> *Id.* at 25.

<sup>67</sup> *Id.* at 33.

<sup>68</sup> *Id.* at 36.

<sup>69</sup> *Id.* at 36, 37.

<sup>70</sup> *Id.* at 37.

<sup>71</sup> *Id.*

The theory that Burke's early career was tolerant and liberal, and his later career conservative and establishmentarian,<sup>72</sup> or that his attitude toward radical Dissent soured when the Dissenters deserted Burke's Whig faction in favor of Pitt in the elections of 1784,<sup>73</sup> are difficult to sustain in light of these speeches in 1772 and 1773. At this point, Burke was at the center of Whig politics and a friend to Fox; his political relations with Dissenters were warm;<sup>74</sup> and the French Revolution was more than fifteen years in the future. This was Burke's most "liberal" period—if Burke's career can be divided between "liberal" and "conservative" periods. Yet even at this time, we see Burke as a staunch defender of the establishment, as a believer in ecclesiastical authority rather than individualistic conscience, and as an opponent of atheism. As his worst fears about the consequences of a politicized atheism came true in France in later years, the emotional temperature of Burke's "conservative" side undoubtedly increased, but the substance of his later arguments in the *Reflections* was plainly adumbrated in his treatment of the petitions of the Protestant Dissenters in 1772 and 1773.

#### D. CATHOLIC EMANCIPATION, THE GORDON RIOTS, AND DEFEAT IN BRISTOL

Burke's rising stature as a politician enabled him to run successfully for Parliament from the second city of the realm, the port of Bristol. In that capacity, Burke returned to his lifelong project of mitigating the anti-popery laws. In 1778, Burke induced Sir George Savile, a Protestant of aristocratic family with large land holdings in Ireland, to introduce legislation repealing the Penal Act of 1699, an act of "ludicrous cruelty" (according to Burke),<sup>75</sup> which outlawed performance of the Catholic mass and Catholic education, and which deprived Catholics of the right to bequeath property. Lord John Cavendish introduced a second bill authorizing the Irish Parliament to pass similar relief for the Catholics of that land. Although Burke was undoubtedly the prime mover of

<sup>72</sup> See note 16 and accompanying text.

<sup>73</sup> See Henriques, *Religious Toleration* at 117 (cited in note 2).

<sup>74</sup> Leading Dissenters praised Burke in 1772 for "magnificent efforts" in their behalf. Cone, *Burke and the Nature of Politics* at 224 (cited in note 52).

<sup>75</sup> Burke, *Speech at Bristol, Previous to the Election* (Sept 6, 1780), in 2 *Works* 365, 409.

these measures behind the scenes, he neither made the motions nor spoke in favor of the bills on the floor of the House, largely because of widespread insinuations that he was too close to the Catholic cause. The bills were enacted, and the Irish Parliament followed suit with a somewhat more limited bill of relief, which Burke later described as a “first faint sketch of toleration, which did little more than disclose a principle and mark out a disposition.”<sup>76</sup>

Burke was widely given the credit in Ireland for passage of these measures, and it is reported that the King was influenced to sign by an “Address and Petition to the Throne” Burke had drafted some fourteen years before, which was preserved and presented to the monarch.<sup>77</sup> Burke himself attributed the change in opinion that enabled passage of the bills to the crisis precipitated by the American Revolution, which made it imperative that all the subjects of Britain be conciliated and united.<sup>78</sup>

The next step was introduction of a similar measure for Catholic emancipation in Scotland. This, however, was blocked by the fierce opposition of an organization called the Protestant Association, led by the fanatical Lord George Gordon. Gordon, a strange figure who later converted to Judaism and eventually died insane, led a mob of some 60,000 people to Parliament to present a petition demanding repeal of the English Relief Act. The mob, which one historian has called “unparalleled in the history of parliament,” forced entering members of the Lords and Commons to wear blue cockades and shout “No Popery!,” violently attacking those who resisted (including such luminaries as the Archbishop of York, the Bishop of Lincoln, the Duke of Northumberland, and Lord Chief Justice Mansfield).<sup>79</sup> There ensued a week of riots during which Catholic churches were looted and burned, homes and other property destroyed, many members of Parliament roughed up, and Burke’s home, family, and person threatened. As many as 450 lives may have been lost.<sup>80</sup> Burke later described the scene at Parliament

<sup>76</sup> Id at 403–04.

<sup>77</sup> See Mahoney, *Burke and Ireland* at 69–74 (cited in note 38); MacKnight, 2 *Life and Times* at 236–46 (cited in note 16).

<sup>78</sup> Burke, *Speech at Bristol, Previous to the Election* (Sept 6, 1780), in 2 *Works* 365, 400–04.

<sup>79</sup> Mahoney, *Burke and Ireland* at 93–94 (cited in note 38).

<sup>80</sup> See Stanley Ayling, *Edmund Burke: His Life and Opinions* 97 (St. Martin’s, 1988). See also Cone, *Burke and the Nature of Politics* at 350–52 (cited in note 52).

to his Bristol constituents, stating: “I do not wish to go over the horrid scene that was afterwards acted. Would to God it could be expunged forever from the annals of this country!”<sup>81</sup>

Despite urgings by his friends to leave the city, Burke repeatedly ventured among the mob, announcing his identity and his support for the Relief Act.<sup>82</sup> Inside Parliament, he unstintingly opposed repeal of the Act. As he described it:

In this audacious tumult, . . . I, who had exerted myself very little on the quiet passing of the bill, thought it necessary then to come forward. I was not alone; but . . . I may and will value myself so far, that, yielding in abilities to many, I yielded in zeal to none. With warmth and with vigor, and animated with a just and natural indignation, I called forth every faculty that I possessed, and I directed it in every way in which I could possibly employ it. I labored night and day. I labored in Parliament; I labored out of Parliament. If, therefore, the resolution of the House of Commons, refusing to commit this act of unmatched turpitude, be a crime, I am guilty among the foremost.<sup>83</sup>

Burke prevailed and the Act survived, but the King and the government privately made clear that they would not support any further reform of the Penal Laws, for fear of future violence.<sup>84</sup> Indeed, the House of Commons passed (though the Lords rejected) a bill offered by Sir George Savile as a sop to the Protestant Association, which would restrain the “Papists, or persons professing the Popish religion, from teaching, or taking upon themselves the education or government of the children of Protestants.”<sup>85</sup> Burke took a spirited part in debate against the bill, defending Catholic education and the rights of parents to direct the education of their offspring. This foreshadowed the U.S. Supreme Court’s (1925) holding in *Pierce v Society of Sisters*.<sup>86</sup>

Burke found himself in political trouble with his Bristol constituents, who were not pleased with his activities in favor of Irish

<sup>81</sup> Burke, *Speech at Bristol, Previous to the Election* (Sept 6, 1780), in 2 *Works* 365, 410.

<sup>82</sup> Mahoney, *Burke and Ireland* at 95 (cited in note 38); MacKnight, 2 *Life and Times* at 366 (cited in note 16); Cone, *Burke and the Nature of Politics* at 351 (cited in note 52).

<sup>83</sup> Burke, *Speech at Bristol, Previous to the Election* (Sept 6, 1780), in 2 *Works* 365, 412–13.

<sup>84</sup> Mahoney, *Burke and Ireland* at 96 (cited in note 38).

<sup>85</sup> *Id.* at 98–99.

<sup>86</sup> 268 US 510 (1925).

trade, in opposition to life imprisonment for debt, or in support of the American colonists—and most of all, who were distressed by his role in passage of the Catholic Relief Act. Burke delivered an impassioned speech defending his role in the Act, and the propriety of religious toleration. Despite his constituents' disapproval, he declared that he “never was less sorry for any action of my life.”<sup>87</sup> “I could do nothing but what I have done on this subject,” he told them, “without confounding the whole train of my ideas and disturbing the whole order of my life.”<sup>88</sup> He explained that this was an issue on which he was compelled to follow his conscience rather than the wishes of his constituents. “No man carries further than I do the policy of making government pleasing to the people,” he said, “[b]ut the widest range of this politic complaisance is confined within the limits of justice. . . . I never will act the tyrant for their amusement.”<sup>89</sup>

Burke paid the price of electoral rejection. Thenceforth he served in Parliament in the less exalted role of member for a pocket borough.

#### E. BURKE'S LATER CAREER, THE REVOLUTION IN FRANCE, AND DISASTER IN IRELAND

The next decade was for Burke a time of frenetic activity, great achievement, and political disappointment. The Rockingham Whigs came to power (briefly) with the collapse of the war effort against the Americans in 1782. Though formally only a junior minister, Burke played a significant role in forcing peace on a reluctant George III, and won passage of his “economical reform.” After only a few months, however, Rockingham died and Burke went into opposition, returning to power (again briefly) the following year. During this period, Burke began his crusade against corruption and colonial exploitation in India—an effort that brought about the defeat of his political party. The India effort occupied Burke's attention (in the form of prosecuting the impeachment of Warren Hastings, Governor-General of Bengal) for more than half a decade: a tiring, thankless, and ultimately fruitless task.

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<sup>87</sup> Burke, *Speech at Bristol, Previous to the Election* (Sept 6, 1780), in 2 *Works* 365, 419.

<sup>88</sup> *Id* at 388.

<sup>89</sup> *Id* at 421.



All the while, Burke pursued his efforts for the toleration of Catholics in Ireland. One of the more dubious achievements of the Rockingham Administration was passage of legislation restoring power to the Irish Parliament.<sup>90</sup> The principal arena for reform of the Irish Penal Laws thus shifted to Ireland. In some ways, this made reform more difficult, because Catholics were excluded from Parliament as both electors and members.

Burke corresponded actively with members of the Irish Parliament as well as leaders in the movement for reform. Many of these letters were published and served as public advocacy. Among these, Burke's *Letter to a Peer of Ireland* (Lord Kenmare, then head of the Catholic Association) in 1782,<sup>91</sup> and *First Letter to Sir Hercules Langrishe* (a member of the Irish Parliament and moderate advocate of reform) in 1792,<sup>92</sup> are classics, and contributed significantly to the passage of reform legislation in those years. The 1782 Act removed restrictions on purchasing, inheriting, and bequeathing land and legitimated most of the priestly functions of parish priests. The 1792 Act opened the practice of law to Catholics, lifted the ban on religious intermarriage, permitted Catholic schools, and allowed foreign education of Catholic children.

In 1790, in recognition of Burke's guiding role, the Catholic Committee of Ireland hired his son, Richard, as its agent for the campaign for enfranchisement and other reform. As the chairman of the Committee observed, "The many obligations we are under to the Zeal and brilliant Abilities of the Father inspire us with the strongest reliance on the Son for his most strenuous exertions and able assistance in our behalf."<sup>93</sup> Burke wrote an interesting series of letters to his son in that capacity, discussing the circumstances in Ireland and the reasons for further reform. These offer insight both into the complicated political dynamics of the Irish question, and also into Burke's own principles of political prudence and reform. The overriding problem in Ireland, as perceived by Burke, was that the intransigence of the Protestant authorities was driving

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<sup>90</sup> Burke opposed this measure, at least when it was first proposed, apparently because it would strengthen the hand of the Protestant Ascendancy. Later, after Irish leaders promised support for Catholic emancipation, Burke muted and perhaps abandoned his opposition. O'Brien, *The Great Melody* at 197–201, 243–45 (cited in note 13).

<sup>91</sup> Published in 4 *Works* 217.

<sup>92</sup> Published in 4 *Works* 241.

<sup>93</sup> Quoted in Mahoney, *Burke and Ireland* at 162 (cited in note 38).

the Catholics to violence, as well as to an association with the revolutionary principles emanating from France. He attempted a compromise based on preservation of the existing civil structure of the Irish nation, accompanied by Catholic emancipation and enfranchisement. Fearing the effects of violence, Burke urged on the Irish people a strategy of “still, discontented, passive obedience” in lieu of a “giddy unsupported resistance.”<sup>94</sup>

Largely as a result of the efforts of Burke and his son, the British government pressured the Irish Parliament to enact a third Catholic Relief Act in 1793, extending to qualified Catholic citizens the rights to vote, to serve on juries, to hold military commissions, and to obtain university degrees, provided they took an oath that, among other things, denied the infallibility of the Pope and abjured any intention to disturb the established church.<sup>95</sup> Catholics remained excluded from Parliament and other high offices of Irish government, and the hostility between the Protestant government and the Catholic majority continued to fester.

During the same period, Protestant Dissent reemerged as an issue in Parliament, through a series of petitions for repeal of the Corporation and Test Acts. For Burke, this was not precisely an issue of toleration. Even as regards the Catholics of Ireland, Burke accepted the well-established distinction between the right to practice one’s religion and even to vote, and the right to hold high political office.<sup>96</sup> Restrictions on officeholding had long been a constitutional device by which Parliament could restrict the power of untrustworthy monarchs to appoint officials who were not committed to the principles of the Protestant settlement of 1688. On the other hand, the form of the Test Act was particularly obnoxious: to require officeholders to take Anglican communion was, as Burke said, “a bad and insufficient test for the end it was meant to accomplish.”<sup>97</sup> He called it “an abuse of the sacramental rite.”<sup>98</sup>

Burke found it difficult to make up his mind. As of 1780, he

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<sup>94</sup> Quoted in *id* at 202.

<sup>95</sup> *Id* at 211–16.

<sup>96</sup> See Burke, *Tract on the Popery Laws* (circa 1761), in 6 *Works* 299, 311; *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 252–53.

<sup>97</sup> Edmund Burke, *Speech on Repeal of the Test and Corporation Acts* (Mar 2, 1790), in 28 *Parliamentary History of England* 432, 441 (T. C. Hansard, 1816) (“*Parliamentary History*”).

<sup>98</sup> *Id*.

was prepared to support repeal of the Test and Corporation Acts.<sup>99</sup> But he perceived that the character of Dissent was changing. Rather than representing a difference of conscience, Burke believed that the organized forces of Dissent had been transformed into a “*political* faction,” for the specific purpose of subverting the constitution of church and state, and destroying the Church of England.<sup>100</sup>

Moreover, Burke’s views on the church-state issue were profoundly influenced by the events then unfolding in France. Among the first actions of the new revolutionary authorities were the disestablishment of the church, the seizure of its property, and harassment of its faithful clergy. It was not long before the church was actively persecuted and a “Temple of Reason” erected on the altar of Notre Dame. Even before the Terror, at a time when liberal politicians and preachers in England still hailed the revolution as a triumph of liberty, Burke responded with his most famous work, *Reflections on the Revolution in France*, denouncing the Revolution and warning of parallel movements in England. Burke, together with Hume, was the first to perceive that principles of Enlightenment, democratization, modernization, defeudalization, and human rights could, if unconstrained, produce a regime of tyranny and religious persecution. The *Reflections* contained his great defense of the established institutions of the English constitution: “We are resolved,” he declared, “to keep an established church, an established monarchy, an established aristocracy, and an established democracy, each in the degree it exists, and in no greater.”<sup>101</sup> Burke’s counter-revolutionary fervor precipitated a painful break in 1791 with his friend and protege and the leader of his political party, Charles James Fox, who continued to support the Revolution. After this, Burke (ironically, the great defender of party loyalty) was a man without a party.

As the French Revolution came to dominate Burke’s attention, he became less accommodating toward those radical Protestants who, he believed, were the vanguard of Jacobinism in the British

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<sup>99</sup> He so stated publicly a decade later. Id at 442. See also *Letter from Edmund Burke to Edmund S. Pery* (July 18, 1778), in 6 *Works* 197, 202.

<sup>100</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), 7 *Works* 39, 47 (emphasis in original).

<sup>101</sup> Burke, *Reflections* at 80.

Isles. He had learned from the French experience that “rationalist” critics of the church were capable of acts of antireligious fanaticism, and he was shocked when ostensibly liberal English Dissenters were enthusiastic—rather than horrified—about the events in France. Accordingly, he absented himself from the House when proposals for repeal of the Test and Corporation Acts came to the floor in 1787 and 1789,<sup>102</sup> and he moved into active opposition in debates in 1790 and 1792.<sup>103</sup> He explained in a letter to Richard Bright, a prominent Dissenter and a neighbor at Beaconsfield, that he had previously been willing to overlook “many things which appear to me, perhaps not so commendable in the Conduct of those who seemd to lead [the Dissenters]” because he had thought them “animated with a serious, humane, hatred of Tyranny, oppression, and corruption in all persons in power.”<sup>104</sup> But he had “found by experience” that they were “of a direct contrary Character”—that they were attempting to draw England into an imitation of the French Revolution, which would be “highly dangerous to the constitution and the prosperity of this Country.”<sup>105</sup>

It is common for modern scholars to dismiss Burke’s position on the Test and Corporation Acts as an abandonment of “the principle of religious toleration,”<sup>106</sup> but Burke understood the question of eligibility for political office as raising issues of politics and power rather than conscience. Thus, while he “professed himself

<sup>102</sup> In a letter, Burke wrote that if he were able to attend the vote on the bill in 1789, he would “certainly” vote for it, “in conformity to my known principles.” *Letter from Edmund Burke to Richard Bright* (May 8–9, 1789), in 5 *Correspondence* 470. But in view of Burke’s exhausting labors on the Hastings impeachment, his ill health, and the Dissenters’ betrayal of the Whigs in the election of 1784, Burke stated that he would not engage in “Activity” in support of the bill, and that he would, in all likelihood, not attend the Parliamentary session. *Id.*

<sup>103</sup> See Burke, *Speech on Repeal of the Test and Corporation Acts* (Mar 2, 1790), in 28 *Parliamentary History* 432, 440–41. See also Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 49–50.

<sup>104</sup> *Letter from Edmund Burke to Richard Bright* (Feb 18, 1790), in 6 *Correspondence* 82, 83.

<sup>105</sup> *Id.*

<sup>106</sup> See L. G. Mitchell, *Introduction*, to 8 *Writings and Speeches of Edmund Burke* 8 (Clarendon, 1989). Mitchell’s further statement that, for Burke, “[r]eligious dissent of all kinds acquired a demonic character,” *id.*, suggests a misunderstanding of Burke. If anything, the French Revolution solidified Burke’s disposition toward toleration of what he called all “serious religion.” See Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 37. See also discussion in text at notes 65–74. Burke’s fear and distaste was reserved for atheists and those radical Dissenters whose emphasis was on attacking revealed and established religion rather than on any affirmative teaching of their own.

ready to grant relief from oppression to all men," he was "unwilling to grant power, because power once possessed was generally abused."<sup>107</sup> His argument was straightforward: the established Church of England is an essential element of the constitution ("a great national benefit, a great public blessing"<sup>108</sup>); prominent Dissenters have declared their intention to destroy and persecute the church; it is only their lack of access to political power that prevents them from achieving their announced objectives; the Test and Corporation Acts are thus necessary to protect the constitution, the establishment, and the Church. The "question," therefore "is, whether you should keep them within the bounds of toleration, or subject yourself to their persecution."<sup>109</sup> It is easy to say, in retrospect, that Burke's fears on this subject were exaggerated, but this was the world's first confrontation with revolutionary internationalism, and the rest of Europe was being swept into its vortex. Even so, Burke did not propose to add any new limitations or penalties on those he deemed so dangerous: he urged only that the occasion was not ripe for the lifting of political incapacities that already existed.

The form of the Test Act, however, remained problematic. Burke proposed replacement of the sacramental test with a formal promise not to "attempt to subvert the constitution of the church of England, as the same is now by law established."<sup>110</sup> Nothing came of this compromise suggestion.

In his continued efforts on behalf of Catholic emancipation, Burke the reformer became increasingly indistinguishable from Burke the conservative. While the intransigence of the Protestant authorities was driving many Irish Catholics into the arms of Jacobinism and rebellion, Burke maintained that the best and most effective arguments on their behalf came not from the new doctrines of the Rights of Man but from ancient principles of the English constitutional system. In his *First Letter to Sir Hercules Langrishe*, he explained why toleration for Catholics was consistent with the

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<sup>107</sup> Burke, *Speech on Repeal of the Test and Corporation Acts* (Mar 2, 1790), in 28 *Parliamentary History* 432, 441.

<sup>108</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 56.

<sup>109</sup> *Id.* at 48.

<sup>110</sup> Burke, *Speech on Repeal of the Test and Corporation Acts* (Mar 2, 1790), in 28 *Parliamentary History* 432, 441 n \*.

fundamental laws, going back to Magna Charta.<sup>111</sup> In an “essay” written for Henry Dundas, the Home Secretary, Burke argued that the denial of the franchise to Irish Catholics was a comparatively recent and deplorable innovation. The extension of a new right is “very dangerous,” Burke wrote, since it could lead to unforeseen consequences; but restoration of the capacity to enjoy an old right is “extremely safe.” He was careful to dissociate his appeal for enfranchisement of the Catholics of Ireland from any claim based on “speculative right” or “general principles of liberty, or as a conclusion from any given premise, either of natural or even of constitutional right.” The French Declaration of the Rights of Man had exposed the dangers of arguments of that sort. Rather, the Catholic majority should be given the vote as “a protection, and a requisite security” which they lacked for the exercise of legal right.<sup>112</sup> This, Burke maintained, would strengthen the state, because “a greater number of persons will be interested in conservation” of the constitution. “[I]f the experience of mankind is to be credited, a seasonable extension of rights is the best expedient for the conservation of them. Every right, every privilege, every immunity, every distinction known in the world, and which has been preserved throughout the fluctuations of time and circumstance, has been so preserved.”<sup>113</sup> The key words here —“conservation” and “preservation”—demonstrate the conservative character of Burke’s argument, in which he sought to conserve and protect the ancient liberties of Irishmen and Englishmen against the “fluctuations of time and circumstance.”

Despite the hostile reaction of his former political allies to the *Reflections* and the cool reception of his ideas by Pitt, Burke continued to write furious polemics against the Revolution in France. He gained credibility and political support as the terrible events bore out his predictions. He sought to discredit Fox as leader of the Whigs<sup>114</sup> and to persuade Pitt to commit to war against revolu-

<sup>111</sup> *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 257–70.

<sup>112</sup> *Letter from Edmund Burke to Henry Dundas*, quoted in Mahoney, *Burke and Ireland* 207–09 (cited in note 38).

<sup>113</sup> *Id.* at 208.

<sup>114</sup> This was the main purpose of Burke’s *Observations on the Conduct of the Minority* (1793), in 5 *Works* 1.

tionary France.<sup>115</sup> He warned that ideological movements in Britain, especially among Rational Dissenters, were parallel to those that had brought about the Revolution in France, and that from “the same beginnings” might come “the very same effects.”<sup>116</sup> Without the support of a political party, Burke became a party unto himself: a mighty, even obsessive force for counter-revolution. As Sir Gilbert Elliot wrote in 1793: “Burke is in himself a sort of *power* in the State. It is even not too much to say that he is a sort of *power* in Europe, though totally without any of those means, or the smallest share in them, which give or maintain power in other men.”<sup>117</sup> These efforts eventually bore fruit. In 1793, England entered the war against France. In 1794, the Whig Party split. The larger faction, led by the Duke of Portland, who was friendly to Burke, joined with Pitt (and against Fox) in a coalition to prosecute war against France. This coalition marks the beginning of the modern Conservative Party.

In that same summer, Burke retired from Parliament. But not from public life. With his caustic *Letters on a Regicide Peace*,<sup>118</sup> he inveighed against proposals for a premature end to the war. On a happier note, with the entry of the Portland Whigs into government, hopes were raised for a complete Catholic emancipation in Ireland. Burke’s friend and political patron, Rockingham’s nephew Earl Fitzwilliam, was named Lord Lieutenant of Ireland. He immediately set about a thorough program of reform, in active consultation with Burke. Comprehensive reform legislation was introduced in the Irish Parliament, and a half million signatures were reportedly gathered in support. Within a few months of Fitzwilliam’s arrival, however, the King announced his strong opposition to the emancipation plans, and the government instructed Fitzwilliam to use his “Zeal & Influence” to prevent any further proceeding on the emancipation bill.<sup>119</sup> Within a few weeks, Fitzwilliam

<sup>115</sup> See Edmund Burke, *Thoughts on French Affairs* (Dec, 1791), in 4 *Works* 313.

<sup>116</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 50. See also Burke, *Speech on Repeal of the Test and Corporation Acts* (Mar 2, 1790), in 28 *Parliamentary History* 432, 440–41.

<sup>117</sup> *Letter from Sir Gilbert Elliot to Lady Elliot* (May 2, 1793), in 2 *Life and Letters of the First Earl of Minto* 137–38 (Countess of Minto ed, 1874), quoted in L. G. Mitchell, *Introduction*, in 8 *Writings and Speeches of Edmund Burke* 44.

<sup>118</sup> Burke, *Letters on a Regicide Peace* (1796–97), in 5 *Works* 231; Burke, *Fourth Letter on the Proposals for Peace with the Regicide Directory of France* (1795–97), in 6 *Works* 1.

<sup>119</sup> See Mahoney, *Burke and Ireland* at 250 (cited in note 38).



had been dismissed. According to Burke's Irish sources, the country was "now on the brink of a civil war."<sup>120</sup> Burke himself wrote to Fitzwilliam that "My heart is almost broken."<sup>121</sup>

No more was accomplished toward toleration in Burke's lifetime, and Ireland descended into an era of violence. Burke died in 1797, at a time when the armies of France were overrunning Europe. He was buried with the rites of the Anglican Church.

## II. BURKE'S DEFENSE OF THE ESTABLISHED CHURCH

On what grounds did Burke defend the established church, and how was this connected to his advocacy of toleration? Nowhere does Burke set forth the argument in theoretical terms; it must be pieced together from speeches and essays addressing the particular political issues of the day.

The established church "is the first of our prejudices," he says in the *Reflections*, but he quickly adds that it is "not a prejudice destitute of reason, but involving in it profound and extensive wisdom."<sup>122</sup> As we shall see, Burke's establishment is different, both in purpose and in character, from the prototypical established church.

### A. THE ROLE OF THE ESTABLISHMENT IN BURKE'S CONSTITUTION

Burke did not rest his defense of the established Church of England on any claim of its spiritual or theological superiority. "It is not morally true," he said, "that we are bound to establish in every country that form of religion which in *our* minds is most agreeable to truth, and conduces most to the eternal happiness of mankind."<sup>123</sup> Indeed, it may be said that his defense of the established church rested on no *theological* claim whatsoever. Rather, the argument was political and constitutional. This is evident, in part, from the fact that the argument appears in its fullest form in his *Reflections on the Revolution in France*, where the established church

<sup>120</sup> Letter from Reverend Thomas Hussey to Edmund Burke (Feb 26, 1787), in 8 *Correspondence* 162, 162.

<sup>121</sup> Letter from Edmund Burke to Earl Fitzwilliam (circa Feb 26, 1795), in 8 *Correspondence* 161, 162.

<sup>122</sup> Burke, *Reflections* at 80.

<sup>123</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 42 (emphasis in original).

is presented as a means of upholding constitutional government and staving off revolution—and where revolution, for its part, is characterized as having the extirpation of religion as its principal object.<sup>124</sup> The question Burke addresses, then, is not how an establishment can contribute to the salvation of souls or the spiritual health of the nation, but how it can contribute to the stability of civil society.

The purpose of the establishment, Burke explains, is the “consecration of the state.” By this he does not mean that the state is holy or exempt from criticism. On the contrary, it means that those who hold power in the state are “infused” with the “sublime principle[]” that “they should not look to the paltry pelf of the moment nor to the temporary and transient praise of the vulgar, but to a solid, permanent existence in the permanent part of their nature. . . .”<sup>125</sup> Government must be viewed as a “holy function”—not in the sense that it is above criticism, but in the sense that it must conform, in “virtue and wisdom,” to principles higher than itself.<sup>126</sup> The established church thus stands as a reminder that those in power “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.”<sup>127</sup> It is a moral check on the abuse of power.

It is the democratic element in the English constitution, according to Burke, that most needs this kind of check. Princes are inherently more constrained because they must constantly win the support and approbation of others. “[W]here popular authority is absolute and unrestrained,” however, “the people have an infinitely greater, because a far better founded, confidence in their own power.” It is of “infinite importance,” therefore, that the people “should not be suffered to imagine that their will, any more than that of kings, is the standard of right and wrong.”<sup>128</sup> “When they are habitually convinced that no evil can be acceptable . . . to him whose essence is good, [the people] will be better able to extirpate out of the minds of all magistrates, civil, ecclesiastical, or

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<sup>124</sup> See Burke, *Reflections* at 80–90.

<sup>125</sup> *Id.* at 81.

<sup>126</sup> *Id.* at 83.

<sup>127</sup> *Id.* at 81.

<sup>128</sup> *Id.* at 82.

military, anything that bears the least resemblance to a proud and lawless domination.”<sup>129</sup>

In particular, the function of the establishment is to ensure continuity with the established traditions of the society. By “taking ground on that religious system of which we are now in possession,” Burke explained, “we continue to act on the early received and uniformly continued sense of mankind.”<sup>130</sup> Religion makes us aware that the civil order is but a part of the timeless moral order ordained by the universal sovereign, and not the mere choice of passing majorities.<sup>131</sup> Associate the state with the church, and the people will not be so ready as they otherwise might be to “chang[e] the state as often, and as much, and in as many ways as there are floating fancies or fashions.”<sup>132</sup> To avoid

the evils of inconstancy and versatility, ten thousand times worse than those of obstinacy and the blindest prejudice, we have consecrated the state, that no man should approach to look into its defects or corruptions but with due caution, that he should never dream of beginning its reformation by its subversion, that he should approach to the faults of the state as to the wounds of a father, with pious awe and trembling solicitude.<sup>133</sup>

The established church is a bulwark against hasty and incautious change.

This constitutional function explains why Burke insisted that the church must have a privileged role in the public sphere. She must “exalt her mitred front in courts and parliaments.”<sup>134</sup> To reduce the church to one among many private, voluntary associations would deprive it of the grandeur and public authority needed to “show to the haughty potentates of the world . . . that a free, a generous, an informed nation honors the high magistrates of its church; that it will not suffer the insolence of wealth and titles,

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<sup>129</sup> Id at 83.

<sup>130</sup> Id at 80.

<sup>131</sup> Id at 85. Burke returns to this theme in *An Appeal from the New to the Old Whigs* (1791), in 4 *Works* 57, 165–73.

<sup>132</sup> Burke, *Reflections* at 83.

<sup>133</sup> Id at 84.

<sup>134</sup> Id at 90.

or any other species of proud pretension, to look down with scorn upon what they looked up to with reverence.”<sup>135</sup> A purely private church would not, in Burke’s estimation, perform its desired constitutional role of reminding the wielders of political power that their exercise of that power is limited by higher Authority.

Even on Burke’s own premises, these would not be adequate arguments for establishing religion in America. He insisted that in these matters a “good statesman” will be guided by “circumstances”—“a knowledge of [the people’s] opinions, prejudices, habits, and all the circumstances that diversify and color life.”<sup>136</sup> He recognized that when an attempt is made to impose an established church contrary to the “genius and desires” of the nation (giving Scotland at the time of Charles I as an example, but surely thinking of Ireland in his own time), such a “usurpation” will “excite[ ] a most mutinous spirit in that country.”<sup>137</sup> As a practical constitutional prescription, Burke’s combination of toleration and establishment is suited only to countries in which a single religious tradition is both numerically dominant and closely tied to the national culture and aspirations of the people. In such a case, complete disestablishment may not be possible without a degree of anticlericalism or hostility toward religion. Establishment *cum* toleration may be the best practicable arrangement.

Burke may therefore speak more directly to some of the emerging democracies of Eastern Europe, or to the nations of Latin America, than to the United States. Even in 1789, the United States was a place of such extensive religious diversity, with such regional variations in historical religious attachment, that a national religious establishment was out of the question. Even those who supported establishment in their own states agreed that there could be no establishment at the national level. In less than fifty years after the founding, even state establishments became untenable. As Burke predicted, where the established church did not reflect the opinions of the great majority of the people, it produced “mutiny” rather than “virtue and wisdom.” Burke himself would

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<sup>135</sup> Id. In this passage, Burke evinces the same respect mixed with disdain for aristocratic pomp and privilege that he later reveals in his *Letter to a Noble Lord* (1796), in 5 *Works* 171.

<sup>136</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 45.

<sup>137</sup> Burke, *Speech on the Acts of Uniformity* (Feb 6, 1772), in 7 *Works* 3, 8.

not have advocated an establishment of religion in such a nation as the United States.

But that does not mean the United States can do without what Burke called “consecration.” In an odd way, the Constitution of the United States performs much the same role that the established church performed in Burke’s vision. The remedy against hasty and incautious change is the written constitution. As Madison stated in *The Federalist* No. 44:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. . . . They very rightly infer, therefore, that some thorough reform is wanting, which will . . . give a regular course to the business of society.<sup>138</sup>

The Constitution is our bulwark against change—our guarantee that passing majorities, inflamed by “floating fancies or fashions,” will not “destroy the entire fabric.” And the Constitution itself is protected by a quasi-religious status in the popular mind.<sup>139</sup>

Moreover, rather than an established church, it is our First Amendment that most plainly serves as a reminder that legitimate government is limited by the immutable principles of a higher Authority. I have observed in another place that our Free Exercise Clause stands as a recognition that even the democratic will of the people is subordinate, in principle, to the commands of God as perceived in the individual conscience, and that in such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility.<sup>140</sup> As Madison put the point:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into

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<sup>138</sup> Federalist 44 (Madison) in Clinton Rossiter, ed, *The Federalist Papers* 280, 282–83 (Mentor, 1961).

<sup>139</sup> See Max Lerner, *Constitution and Court as Symbols*, 46 Yale L J 1290, 1294–95 (1937); Sanford Levinson, “*The Constitution*” in *American Civil Religion*, 1979 Supreme Court Review 123, 123–24.

<sup>140</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1516 (1990).

any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.<sup>141</sup>

Religion—the recognition of an authority higher than the state—is thus central to the constraint of governmental power in both Burke’s England and Madison’s America, though Burke accomplishes this by incorporating the spiritual authority into the constitution of the state while Madison does so by placing the conscience of the individual above the civil authority. The two systems may appear to be opposites, but the true opposite of both is the totalitarian system first introduced in France, where the state, embodying the “general will,” is the highest authority and both established church and individual conscience are subjugated to it.

Burke’s view of establishment illuminates his disagreement with social contract theory, and thus with the more radical idea that the people have the right, at any time, to alter or abolish their form of government and to institute one more to their liking.<sup>142</sup> God—not the people—is the ultimate “institutor and author and protector of civil society.”<sup>143</sup> God willed the state, and His will is “the law of laws and the sovereign of sovereigns.”<sup>144</sup> In a famous passage of the *Reflections* seemingly addressed to Locke, Burke conceded that “Society is indeed a contract”—but that it “ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico, or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties.” It must be “looked on with other reverence.” It is “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.” The authority of the sovereign—even the people—is constrained by the immutable order ordained by God. “Each contract of each particular state is

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<sup>141</sup> James Madison, *Memorial and Remonstrance against Religious Assessments*, reprinted as an appendix to *Everson v Board of Education*, 330 US 1, 64 (1947) (Rutledge dissenting).

<sup>142</sup> See Burke, *An Appeal from the New to the Old Whigs* (1791), in 4 *Works* 57, 120–21, 161–63, 183.

<sup>143</sup> Burke, *Reflections* at 86.

<sup>144</sup> *Id.*

but a clause in the great primeval contract of eternal society . . . according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place.” This divine law, he wrote, is not subject to the “will” of the people, who “are bound to submit their will to that law.” Thus, it is in a case of “the first and supreme necessity only, a necessity that is not chosen but chooses,” that a people have the right to dissolve the bands of society.<sup>145</sup> The established church, in Burke’s view, is nothing more than “our recognition of a seigniorly paramount”<sup>146</sup>—a recognition, like that in the American Pledge of Allegiance, that the nation is “under God” and therefore limited and constrained in its use of power.

Thus, far from augmenting the authority of the sovereign, the established church in Burke’s vision is a means of limiting power.

It is noteworthy that Burke’s assessment of the effect of the establishment in England was shared by his philosophical *bête noire*, Jean-Jacques Rousseau—though Rousseau deplored what Burke celebrated. According to Rousseau, “the Kings of England have made themselves heads of the Church, . . . but this title has made them less its masters than its ministers; they have gained not so much the right to change it, as the power to maintain it.”<sup>147</sup> Thus he concludes, to his disgust, that “[t]here are [ ] two powers, two Sovereigns, in England. . . .”<sup>148</sup> To Rousseau, unlike Burke, this division of authority between church and state is “clearly bad,” because “all institutions that set man in contradiction to himself are worthless.”<sup>149</sup> The point of a civil religion, to Rousseau, is to “unite[ ] the divine cult with love of the laws” and to “mak[e] country the object of the citizens’ adoration.”<sup>150</sup> To Burke it is to remind both the rulers and the people of the limitations of the law and the obligations of the nation to a higher and more permanent order.

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<sup>145</sup> Id at 84–85.

<sup>146</sup> Id at 86.

<sup>147</sup> Jean Jacques Rousseau, *The Social Contract* 132 (E. P. Dutton, 1950) (G. D. H. Cole, trans).

<sup>148</sup> Id at 133.

<sup>149</sup> Id at 134.

<sup>150</sup> Id.



## B. POLITICS AND RELIGION

The proper role of religion in the civil order was moral and constitutional, according to Burke, rather than political. He did not wish to see the church become involved in day-to-day politics or in political agitation on particular issues. He had no respect for what he called “political theologians and theological politicians.”<sup>151</sup> “[P]olitics and the pulpit are terms that have little agreement,” he said. “The cause of civil liberty and civil government gains as little as that of religion by this confusion of duties. . . . Surely the church is a place where one day’s truce ought to be allowed to the dissensions and animosities of mankind.”<sup>152</sup> Burke observed that preachers who enter the political realm frequently are “[w]holly unacquainted with the world in which they are so fond of meddling, and inexperienced in all its affairs on which they pronounce with so much confidence.” The result, he said, is that “they have nothing of politics but the passions they excite.”<sup>153</sup> This promotes the worst sort of ideological politics. On the other hand, he criticized those who, on the basis of “but superficial studies in the natural history of the human mind have been taught to look on religious opinions as the only cause of enthusiastic zeal and sectarian propagation.”<sup>154</sup> There is “no doctrine whatever,” he warned, “that is not capable of the very same effect.”<sup>155</sup> Indeed, while recognizing that “[r]eligion is among the most powerful causes of enthusiasm,”<sup>156</sup> Burke more often treated religion as a source of restraint, stability, and order, and found the antireligious zealotry of the revolutionaries far more frightening.

These positions may be driven more by Burke’s view of politics than Burke’s view of religion, for to him politics was a matter of prudence, caution, and experience; reliance on principles and abstractions, divorced from “circumstances,” is likely to produce op-

<sup>151</sup> Burke, *Reflections* at 10.

<sup>152</sup> *Id.* at 10–11. See also Burke, *Speech on the Repeal of the Test and Corporation Acts* (Mar 2, 1790), in 28 *Parliamentary History* 432, 439 (“[H]e agreed with his right hon. friend that the church and the pulpit ought to be kept pure and undefiled, and that politics should not be adverted to in either. With equal propriety might theological discussions, he said, be taken up in that House, and questions solely religious be debated there.”).

<sup>153</sup> Burke, *Reflections* at 11.

<sup>154</sup> Burke, *Letters on a Regicide Peace* (1796–97), in 5 *Works* 231, 361.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

pression and folly.<sup>157</sup> A religiously informed politics is, by its nature, a principled politics: one in which statesmen will be distracted from the real world of the possible by aspirations of the ideal. As an explicit opponent of utopian politics, it is natural that Burke would resist the force of religion, as he did any other form of politics driven by ideological principle. By the same token, it is only natural that those who are engaged in the politics of social and moral reform will find the language of religion a powerful means for awakening national consciousness, and will disdain Burke's politics of prudential judgment and incremental change as an excuse for the status quo.

In his disdain for mixing "politics and the pulpit," Burke also revealed something of his understanding of the proper function of religion in human affairs: not as a set of prescriptions for government, but as a call to reflection and an antidote to politics based on intellectual pride or self-interest. To borrow language from social critic Christopher Lasch, religion is not "a set of comprehensive and unambiguous answers to ethical questions," but rather "encourag[es] believers at every step to question their own motives."<sup>158</sup> "The very essence of religion," according to Lasch, is a "spiritual discipline against self-righteousness."<sup>159</sup> This echoes Burke's claim that religion is necessary to counteract the "arrogance, and selfopinion," as well as the "lust of selfish will," of those who hold political power.<sup>160</sup>

In modern controversies over the legitimacy of expressly religious argument in the formation of public policy,<sup>161</sup> both sides might therefore draw support from Burke. On the one hand, Burke criticized efforts to draw specific public policy prescriptions from religion and to use instrumentalities of the church for political organizing. He would likely see the growth of religious political lobbies—whether of so-called "religious right," liberal "social gospel," or radical "liberation theology"—as a dangerous (though

<sup>157</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 41.

<sup>158</sup> Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* 243, 16 (Norton, 1995).

<sup>159</sup> *Id.* at 16.

<sup>160</sup> Burke, *Reflections* at 82, 83.

<sup>161</sup> See, for example, Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford, 1995); Stephen L. Carter, *The Culture of Disbelief* (Basic Books, 1993).

hardly novel<sup>162</sup>) aspect of politics, as well as a divisive development within the church. On the other hand, Burke would be unlikely to agree with the theory—formerly espoused by the Supreme Court—that political division along religious lines is uniquely divisive, and hence that measures supported by religious groups are for that reason constitutionally questionable.<sup>163</sup> Religious politics are objectionable as a species of ideological politics, not because of any special issues of “church and state.”

### C. THE INDEPENDENCE OF THE ESTABLISHED CHURCH IN BURKE’S CONSTITUTION

Perhaps the most unusual feature of Burke’s conception of the established church is that it must enjoy a large measure of independence from the government. This is unusual because with government support for religion usually comes government control; indeed, England had a long-standing practice (with the theological label of “Erastianism”) of subordination of the church to the state.<sup>164</sup> This enables the state to use the church as a subsidiary instrument of social control and national unity. This is found, in its most extreme form, in Hobbes.<sup>165</sup> Burke, however, insisted (ahistorically) that the people of England have “made their church, like their king and their nobility, independent.”<sup>166</sup> This independence is essential if the establishment is to perform its constitutional function, he explained, for “[r]eligion, to have any force on men’s understandings, indeed to exist at all, must be supposed paramount to laws, and independent for its substance upon any human institution.”<sup>167</sup> Moreover, it is essential that churches other than the established church be free to govern themselves: “Never

<sup>162</sup> See *McDaniel v Paty*, 435 US 618, 641 n 25 (1978) (Brennan concurring) (“[C]hurch and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education.”).

<sup>163</sup> *Lemon v Kurtzman*, 403 US 602, 622–23 (1971).

<sup>164</sup> See generally Weldon S. Crowley, *Erastianism in England to 1640*, 32 J Church & State 549 (1990).

<sup>165</sup> Thomas Hobbes, *Leviathan* ch 42–43 at 521–626 (Penguin, 1968) (originally published 1651) (C. B. Macpherson, ed).

<sup>166</sup> Burke, *Reflections* at 88.

<sup>167</sup> Burke, *Tract on the Popery Laws* (circa 1761), in 6 *Works* 299, 338.

were the members of one religious sect fit to appoint the pastors to another."<sup>168</sup>

Burke thought that a properly ordered state church should take its doctrinal bearings not from political determinations or theological theory, but from "the established opinions and prejudices of mankind."<sup>169</sup> The Anglican Church held its position in England by prescription; it was the embodiment of the religious experience of the English people over the centuries (as the Presbyterian Church was of the Scottish and the Roman Catholic of the Irish).<sup>170</sup> Burke's emphasis on prescription reflected the orthodox conviction that the truths of revelation are not open to revision by process of ordinary investigation and analysis: that the truths of religion must be eternal if they are to be recognized as truths. It was decidedly unorthodox, however, in locating authority not in biblical text (the Protestant view) or apostolic succession (the Catholic view), or even the government (the Erastian view), but in the slowly evolving opinions of the nation.

Recognition of prescriptive authority protects the church from rapid and improvident alteration and at the same time insulates it from the will of the sovereign. More particularly, prescription inhibits use of the church as an instrument of revolutionary tyranny. Although in theory Burke maintained that government has a "general superintending control over . . . the publicly propagated doctrines of men,"<sup>171</sup> he insisted that the conditions under which Parliament could properly exercise power over the doctrines of the Church of England were exceedingly rare. "As an independent church, professing fallibility, she has claimed a right of acting without the consent of any other; as a church, she claims, and has always exercised, a right of reforming whatever appeared amiss in her doctrine, her discipline, or her rites."<sup>172</sup> In support of this independence, Burke invoked the ancient medieval principle, devel-

<sup>168</sup> Edmund Burke, *Letter to a Peer of Ireland* (Feb 21, 1782), in 4 *Works* 217, 234.

<sup>169</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 43.

<sup>170</sup> See *Letter from Edmund Burke to William Smith, Esq., on the Subject of Catholic Emancipation* (Jan 29, 1795), in 6 *Works* 361, 368; Burke, *Reflections* at 80. For Burke's famous defense of the principle of prescription in political affairs, see Edmund Burke, *Speech on a Motion for a Committee to Inquire into the State of the Representation of the Commons in Parliament* (May 7, 1782), in 7 *Works* 89, 94–97.

<sup>171</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 41.

<sup>172</sup> Burke, *Speech on the Acts of Uniformity* (Feb 6, 1772), in 7 *Works* 3, 7.

oped in full form during the papacy of Gregory VII, of the “liberty of the Church.”<sup>173</sup> The power of Parliament over the doctrines of the church is essentially declaratory rather than directive: to give legal force and recognition to doctrinal change arising from the institutional church itself or to correct “intolerable . . . abuse” recognized as such by the majority of the people, whose church it is.<sup>174</sup> It is better to tolerate “imperfection”—which will exist in all human institutions—than to use the power of the state to bring about frequent religious “alterations,” which lead to “religious tumults and religious wars.”<sup>175</sup>

Independence is attained in the English system by endowing the church with sufficient private property that it is dependent neither upon “the unsteady and precarious contribution of individuals” nor upon the vagaries of Parliamentary appropriation. “They [the English people] certainly never have suffered, and never will suffer, the fixed estate of the church to be converted into a pension, to depend on the treasury and to be delayed, withheld, or perhaps to be extinguished by fiscal difficulties. . . .”<sup>176</sup> As one dependent on the largesse of others would know, such fiscal difficulties “may sometimes be presented for political purposes.”<sup>177</sup> If the clergy depended upon appropriations from the Parliament, rather than the security of earnings from the lands of the church, they would be subordinate to the civil authorities, and subject to their whim and control. Thus,

[t]he people of England think that they have constitutional motives, as well as religious, against any project of turning their independent clergy into ecclesiastical pensioners of state. They tremble for their liberty, from the influence of a clergy depen-

<sup>173</sup> Id. On the “freedom of the church,” see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 88–99, 105 (Harvard, 1983).

<sup>174</sup> Burke, *Speech on the Acts of Uniformity* (Feb 6, 1772), in 7 *Works* 3, 10.

<sup>175</sup> Id at 10–11.

<sup>176</sup> Burke, *Reflections* at 88.

<sup>177</sup> Id. One might speculate that Burke’s sensitivities on this score were heightened by his own experience. Early in his career, he resigned an official pension of £300 per year because it would have made him, in effect, a perpetual retainer to his then-employer, William Gerard Hamilton. Later in the same year, Burke unexpectedly inherited an estate of approximately the same value—an inheritance that secured his independence to the same extent that the earlier pension would have imperiled it. See MacKnight, 1 *Life and Times* at 177–83 (cited in note 16). Though no commentator has noted the connection, Burke’s depiction of the situation of the church in the *Reflections* has a certain autobiographical flavor.

dent on the crown; they tremble for the public tranquillity from the disorders of a factious clergy, if it were made to depend upon any other than the crown.<sup>178</sup>

It was this aspect of the establishment—the independence of the church through its base of private property—that was the first major casualty of the Revolution in France.

It is therefore not so clear as it might at first appear that Burke's position was in opposition to that of the opponents of the proposed Virginia Assessment Bill in 1785. That bill would, in effect, have made clergy pensioners of the state. While Burke presumably would not have agreed with Madison and Jefferson in their argument that the assessment would violate the conscience of the taxpayer, he might well have agreed with their equally important argument that the assessment would undermine the independence and vitality of the church. A Baptist declaration against religious assessments observed that if the state provided a "Support for Preachers of the Gospel," this would give the state a "Right to *regulate* and *dictate to*; it may judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach."<sup>179</sup> That was precisely what Burke wished to avoid; perhaps he would have suggested that the assessment be shelved in favor of endowing the churches with public lands—the approach taken by the federal government in the Northwest Ordinance.

It was, I think, the independence of the church rather than its financial needs that principally underlay Burke's refusal to leave the church solely to the voluntary support of its members, as in America. To be sure, Burke tended to assume that the motivation for cutting the church off from public support was hostility to its mission: "[t]hey who think religion of no importance to the state," he said, "have abandoned it to the conscience or caprice of the individual; they make no provision for it whatsoever, but leave every club to make, or not, a voluntary contribution towards its support, according to their fancies."<sup>180</sup> But as an economic proposition, it is debatable that public financial support is in the interest

<sup>178</sup> Burke, *Reflections* at 88.

<sup>179</sup> *Declaration of the Virginia Association of Baptists* (Dec 25, 1776), in Julian P. Boyd, ed, *The Papers of Thomas Jefferson* 660, 661 (Princeton, 1950) (emphasis in original).

<sup>180</sup> *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in *4 Works* 241, 257.

of the church. Adam Smith made the plausible economic argument that ministers of the gospel who “depend altogether for their subsistence upon the voluntary contributions of their hearers” were likely to be superior in “[t]heir exertion, their zeal and industry,” to those who derive their support from a “fund to which the law of their country may entitle them,” whether it be a “landed estate, a tythe or land tax, or [an] established salary or stipend.”<sup>181</sup> Burke was a sophisticated student of economics, whose thinking paralleled and in some respects anticipated Smith’s work.<sup>182</sup> If creation of incentives for “zeal and industry” were all there were to it, Burke likely would have been forced to agree with Smith. The problem, from Burke’s perspective, was that a voluntary system renders the clergyman dependent on the popularity and regard of his parishioners. From the perspective of his episcopal ecclesiology, this is no better than dependence on the political authorities. In America, where most Protestants adhered to some form of congregational ecclesiology, they would naturally be less concerned with this consequence of voluntarism.

There is reason to believe that Burke’s (and Rousseau’s) portrayal of the independence of the Church of England during this period was greatly exaggerated. Appointment of church officers and control over church benefices could hardly fail to give the government effective control. One historian has commented that “at no other time [than the eighteenth century] was the influence of state over church so great. . . . The privileged clergy were an integral part of the extravagant patronage network which dictated how England was governed, and high office in the church was determined by political considerations.”<sup>183</sup> Burke’s failure to acknowledge this situation is particularly striking in light of his criticism of the King’s use of favors and offices to dominate the Parliament.<sup>184</sup> The *Reflections* must be understood as Burke’s portrayal

<sup>181</sup> Adam Smith, V *An Inquiry into the Nature and Causes of the Wealth of Nations* 740–41 (Random House, 1937) (originally published 1776). Madison adopted this argument in paragraph 7 of his *Memorial and Remonstrance*, reprinted as an appendix to *Everson*, 330 US at 63, 67–68 (Rutledge dissenting), and the experience of religious vitality in America would seem to bear out Smith’s prediction. See Gary M. Anderson, *Mr. Smith and the Preachers: The Economics of Religion in “The Wealth of Nations,”* 96 J Pol Econ 1066 (1988).

<sup>182</sup> See Donald Barrington, *Edmund Burke as an Economist*, 21 *Economica* 252 (1954).

<sup>183</sup> Eric J. Evans, *The Contentious Tithe: The Tithe Problem and English Agriculture, 1750–1850* 2 (Routledge, 1976).

<sup>184</sup> See, for example, Edmund Burke, *Speech on the Plan for Economical Reform* (Feb 11, 1780), in 2 *Works* 265.



of the ideal type of the English constitution, often in romantic and exaggerated terms—not as a hardheaded analysis of the realities.

Burke's insistence on the independence of the church is one point in common with American constitutional principles. The Supreme Court has stated that "religious organizations . . . [have] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."<sup>185</sup> But for Burke, church independence was a matter of "equitable discretion" rather than legal right.<sup>186</sup> He did not deny that Parliamentary interference with church doctrine would be "most legal," but argued only that it would be "unwise or unwarrantable."<sup>187</sup> From an American perspective, it seems dubious to suppose that an established church, dependent on the equitable discretion of the government, could ever have the degree of independence Burke deemed necessary.

#### D. TOLERATION, COERCION, AND ESTABLISHMENT

Burke presupposed that an established church could be tolerant and, for the most part, noncoercive. "I am persuaded that toleration, so far from being an attack upon Christianity, becomes the best and surest support that possibly can be given to it," Burke declared.<sup>188</sup> Burke's established church was one that had made peace with Roman Catholicism,<sup>189</sup> allowed persons of various doctrinal persuasion to "live quietly under the same roof,"<sup>190</sup> and had embraced toleration as "a part of Christianity."<sup>191</sup> In this, Burke

<sup>185</sup> *Kedroff v St. Nicholas Cathedral*, 344 US 94, 116 (1952).

<sup>186</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 42.

<sup>187</sup> *Id.*

<sup>188</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 25. There is some reason to doubt that the tolerant establishment in Britain was, in actuality, as tolerant as Burke suggested it could be. See Jonathan Bush, "Include Me Out": *Some Lessons of Religious Toleration in Britain*, 12 *Cardozo L Rev* 881 (1991). But then, it was not until the 1840s that Britain could be said to have adopted Burke's recommendation for extending toleration to Catholics and Jews. See Henriques, *Religious Toleration* at 4–5, 136–205 (cited in note 2).

<sup>189</sup> Burke, *Reflections* at 79 ("Violently condemning neither the Greek nor the Armenian, nor, since heats are subsided, the Roman system of religion, we prefer the Protestant . . .").

<sup>190</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 29.

<sup>191</sup> *Id.* at 25.

can be seen as the voice of the road not taken in America, for at the time of the adoption of the First Amendment, almost half the states had some form of established church, all of which attempted to combine official support for religion with broad toleration and respect for diversity of sects.<sup>192</sup> By the 1830s, this attempt had been abandoned, and disestablishmentarianism prevailed in every state, later becoming a principle of national constitutional law through the Fourteenth Amendment.<sup>193</sup> Most modern American commentators (myself included) tend to assume that a prohibition on establishments is necessary as a backstop for full freedom of religion (whether or not disestablishment serves other, more institutional, values). Burke challenges that assumption by linking establishment together with toleration. “Zealous as I am for the principle of an establishment,” he said, “I would have toleration a part of establishment, as a principle favorable to Christianity, and as a part of Christianity.”<sup>194</sup> This meant that the establishment could not use direct coercion against Dissenters with regard to matters of conscience. In this, Burke resembles modern American commentators (and jurists) who interpret the Establishment Clause as directed primarily, if not exclusively, at the evil of religious coercion.

In part, Burke’s rejection of direct coercion as an instrument of the established church was connected to his general advocacy of toleration, which will be discussed in greater detail in the next section. He wrote that “[i]f ever there was anything to which, from reason, nature, habit, and principle, I am totally averse, it is persecution for conscientious difference in opinion.”<sup>195</sup> Perhaps more importantly, however, Burke maintained that persecution could undermine—but could not effectually support—religion. If it is the purpose of the establishment to promote religion, he maintained, coercive means would be counterproductive. In the *Tract on the Popery Laws*, he denied

<sup>192</sup> See McConnell, 103 Harv L Rev at 1436–37, 1455–58 (cited in note 140). Burke’s views bear a strong resemblance to those of Joseph Story. See Joseph Story, *Commentaries on the Constitution of the United States* § 988 at 700 (Carolina, 1987) (originally published 1833).

<sup>193</sup> See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Incorporation of the Nonestablishment Principle*, 28 Ariz St L J (forthcoming 1996).

<sup>194</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 25.

<sup>195</sup> Burke, *Speech on the Acts of Uniformity* (Feb 6, 1772), in 7 *Works* 3, 10.

that it is in a man's moral power to change his religion whenever his convenience requires it. If he be beforehand satisfied that your opinion is better than his, he will voluntarily come over to you, and without compulsion, and then your law would be unnecessary; but if he is not so convinced, he must know it is his duty in this point to sacrifice his interest here to his opinion of his eternal happiness, else he could have in reality no religion at all.<sup>196</sup>

As Conor Cruise O'Brien has pointed out, this passage has a "poignant ring," in light of the probable fact that Burke's father was one of those who betrayed his "duty" by sacrificing his "opinion of his eternal happiness" to the necessities of legal practice—and that Burke himself could pursue his political career only on account of that betrayal.<sup>197</sup> Perhaps that is why, in a letter to his son written thirty years after he wrote the *Tract*, Burke stated:

Strange it is, but so it is, that men, driven by force from their habits in one mode of religion, have, by contrary habits, under the same force, often quietly settled in another. They suborn their reason to declare in favor of their necessity. Man and his conscience cannot always be at war. If the first races have not been able to make a pacification between the conscience and the convenience, their descendants come generally to submit to the violence of the laws, without violence to their minds.<sup>198</sup>

This, too, has an autobiographical ring, perhaps more authentic than the first—and more realistic. It is hard to deny that government power, executed prudently and effectively, can have an influence on opinion. But this insight made Burke all the more opposed to religious persecution, such as he witnessed in Ireland. The Penal Laws were not devised to encourage conversion to Anglicanism, Burke pointed out, but solely to encourage apostasy from Catholicism. "What do the Irish statutes?" he asked. "They do not make a conformity to the *established* religion, and to its doctrines and practices, the condition of getting out of servitude. No such thing. Let three millions of people but abandon all that they and their ancestors have been taught to believe sacred, and to forswear it publicly in terms the most degrading, scurrilous, and

<sup>196</sup> Burke, *Tract on the Popery Laws* (circa 1761), in 6 *Works* 299, 335.

<sup>197</sup> O'Brien, *The Great Melody* at 42–43 (cited in note 13).

<sup>198</sup> *Letter from Edmund Burke to Richard Burke, Esq. on Protestant Ascendancy in Ireland* (1793), in 6 *Works* 285, 395.

indecent for men of integrity and virtue, and to abuse the whole of their former lives, and to slander the education they have received, and nothing more is required of them.”<sup>199</sup> The “deeper evil,” Burke perceived, was not persecution, but that the persecution was purely destructive.<sup>200</sup> The Protestant Ascendancy in Ireland had this in common with the atheist philosophers of France and the Radical Dissenters of England: in each case, the object is not to convert the people to a better and truer religion, but to destroy traditional religious faith and leave in its place only a “dreadful void.”<sup>201</sup> He deemed it “madness and folly” to drive men “from any *positive* religion whatever into the irreligion of the times, and its sure concomitant principles of anarchy.”<sup>202</sup>

Burke thus rejected coercion as a means of maintaining the establishment. This meant that government power over religion was limited; it could give support and encouragement to beliefs that already were widely held, but could not impose beliefs on an unwilling populace. “Religion,” he said, “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.”<sup>203</sup> He nonetheless recognized that “men must believe their religion upon some principle or other, whether of education, habit, theory, or authority.”<sup>204</sup> One important means of supporting religion is through education. He noted that “[o]ur education is in a manner wholly in the hands of ecclesiastics, and in all stages from infancy to manhood.” By this means, “we attach our gentlemen to the church.”<sup>205</sup> Burke thus allowed government to use its prestige and its resources to promote religion, and to give special status to the church established by law, but not to punish those who refused to conform or to penalize those who sought spiritual sustenance in another denomination. “[T]olerance,” he wrote, “does not exclude national preference, either as to modes, or opinions; and all

<sup>199</sup> Id at 396 (emphasis in original).

<sup>200</sup> Id at 393–94.

<sup>201</sup> Id at 395.

<sup>202</sup> Burke, *Letter on the Affairs of Ireland* (1797), in 6 *Works* 413, 426 (emphasis in original).

<sup>203</sup> Burke, *Tract on the Popery Laws* (circa 1761), in 6 *Works* 299, 338.

<sup>204</sup> *Letter from Edmund Burke to Richard Burke, Esq. on Protestant Ascendancy in Ireland* (1793), in 6 *Works* 385, 395.

<sup>205</sup> Burke, *Reflections* at 87.

the lawful and honest means which may be used for the support of that preference.<sup>206</sup>

While these forms of “preference” may be far less oppressive than overt persecution, however, it remains true that they involve coercion of a sort, especially the coercion of taxation, which has been at the forefront of American controversies over church and state. Burke’s position on the coercive aspects of the establishment was less than satisfactory. The right of the church to compel payment of tithes, for example, was the most irksome and unpopular aspect of the establishment during this period, and did more to bring the church into conflict and disrepute with the ordinary people of England than any other.<sup>207</sup> The tithe was in effect a tax, typically a tenth, on agricultural production and sometimes on the fruits of commerce or labor, with numerous and chaotic exceptions resting on custom, precedent, statute, and case law. Far from uniting the people and fostering respect for the divine representatives on earth, the tithing system led to widespread public disaffection and an appearance (if not the reality) of clerical oppressiveness.<sup>208</sup> It could not have escaped Burke’s attention that this system was inimical to his vision of the role of the church. His only direct comments on the tithe, in a letter to his son, evinced great sympathy for Irish farmers who resisted the exaction.<sup>209</sup> Burke presumably found it difficult to attack the tithing system outright, however, for in legal form the tithes were an appurtenance of real property, of ancient provenance, not much different in their legal standing than any other nonpossessory property interest.<sup>210</sup> Thus, in his defense of the establishment we may perceive a discreet silence about the tithe. Instead, he argued optimistically that a greater security of the real property of the church might render

<sup>206</sup> *Letter from Edmund Burke to William Burgh* (Feb 9, 1775), in 3 *Correspondence* 110, 112.

<sup>207</sup> See generally Evans, *The Contentious Tithe* (cited in note 183).

<sup>208</sup> It was also an inefficient and counterproductive tax, as it discouraged both the improvements of the landlord and the cultivation of the farmer, as Adam Smith pointed out. Smith, V *The Wealth of Nations* at 789. Given Burke’s attention to issues of public economics, and general agreement with Smith on such matters, it is likely that he was aware of this critique.

<sup>209</sup> *Letter from Edmund Burke to Richard Burke, Esq. on Protestant Ascendancy in Ireland* (1793), in 6 *Works* 385, 399–400.

<sup>210</sup> Evans, *The Contentious Tithe* at 8–9, 17 (cited in note 183). About one-third of the rights to tithes were owned by private persons, most of them derived from the sale of monastic properties at the time of Henry VIII. *Id.* at 12, 17.

the collection of tithes less vital: "I heartily wish to see the Church secure in such possessions as will not only enable her ministers to preach the Gospel with ease, but of such a kind as will enable them to preach it with its full effect, so that the pastor shall not have the inauspicious appearance of a tax-gatherer."<sup>211</sup> So, Burke "wished" for an alternative, but made no protest against the tithe.

As with the issue of religious participation in politics, various positions in the American controversy over the importance of "coercion" as an aspect of establishment<sup>212</sup> can draw some support from Burke. Those who hold that coercion is a necessary element in finding an unconstitutional establishment will agree with Burke's position that coercion, rather than endorsement or general support, is the evil to be avoided. Those who hold that noncoercive government action can constitute an establishment can point out that Burke's advocacy of a noncoercive establishment precisely proves their point. And still others can point to Burke's ambivalence about tithes and imprecision in the use of the term "coercion" to show that the very meaning of "coercion" is too uncertain to be a useful category for deciding whether there is impermissible government support of religion.

#### E. WHY BURKE AND THE AMERICANS REACHED DIFFERENT

##### CONCLUSIONS ON THE RELATION BETWEEN CHURCH AND STATE

What accounts for the difference between Burke and the Americans regarding the separation of church and state? Differences in circumstances surely account for a large part of the difference. But there are reasons of a more theoretical nature, as well.

First, a central tenet of the American rights tradition (especially under the First Amendment) is what one commentator calls the "postulate of distrust."<sup>213</sup> As Jefferson wrote in the *Kentucky Resolutions*:

<sup>211</sup> Edmund Burke, *Speech on Dormant Claims of the Church* (Feb 17, 1772), in 7 *Works* 137, 142. Burke's optimism had some basis in fact: during the last half of the eighteenth century, there was a "decisive shift in the source of income of many of the better endowed clergy" from tithes to direct ownership of land. Evans, *The Contentious Tithe* at 8 (cited in note 183).

<sup>212</sup> See *Board of Education of Kiryas Joel v Grumet*, 114 S Ct 2481, 2499 (1994) (O'Connor concurring); *Lee v Weisman*, 505 US 577, 587, 592-97 (1992); *County of Allegheny v ACLU*, 492 US 573, 659-62 (1989) (Kennedy concurring in part).

<sup>213</sup> Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, in Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein, eds, *The Bill of Rights in the Modern State* 41, 48 (Chicago, 1992).

[I]t would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights; that confidence is every where the parent of despotism; free government is founded in jealousy, and not in confidence; it is jealousy, and not confidence, which prescribes limited constitutions to bind down those whom we are obliged to trust with power.<sup>214</sup>

On much the same logic, Madison, in his *Memorial and Remonstrance against Religious Assessments*, wrote that

it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.<sup>215</sup>

To Burke, such an attitude would seem pathological. It is not possible to achieve the beneficent purposes of government if the very potential for abuse is treated as a reason for withdrawal of confidence. “You can hardly state to me a case to which legislature is the most confessedly competent, in which, if the rules of benignity and prudence are not observed, the most mischievous and oppressive things may not be done.”<sup>216</sup> There is no alternative to confidence. It is “a moral and virtuous discretion, and not any abstract theory of right, which keeps governments faithful to their ends.”<sup>217</sup> Questions of abuse of power should be examined in light of context and circumstance—and not rigid and acontextual principles. He therefore insisted that toleration should be understood not as a matter of universal human rights, but as “a part of moral and political prudence.”<sup>218</sup> Burke maintained that the government should pursue a broad policy of toleration, reserving to itself the authority to intervene in cases of genuine danger to the “peace,

<sup>214</sup> *Kentucky Resolutions* (Nov 10, 1798), in Philip B. Kurland and Ralph Lerner, 5 *The Founders' Constitution* 131, 133 (Chicago, 1987).

<sup>215</sup> Madison, *Memorial and Remonstrance*, reprinted as an appendix to *Everson*, 330 US at 65 (Rutledge dissenting).

<sup>216</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 42.

<sup>217</sup> *Id.*

<sup>218</sup> *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 258.



order, liberty, and . . . security” of society.<sup>219</sup> He judged claims for toleration on their individual merits, in light of “the peculiar and characteristic situation of a people,” and his “knowledge of their opinions, prejudices, habits, and all the circumstances that diversify and color life.”<sup>220</sup> He adhered to this approach not only with regard to the Unitarians, whom he distrusted, but with regard to the Irish Catholics, whom he did not. Thus, in arguing for representation of Catholics in the Irish Parliament, he insisted that “I do not put the thing on a question of right,” that “the whole question comes before Parliament as a matter for its prudence,” and that the issue was one of “discretion.”<sup>221</sup>

Americans had no such reticence about framing issues in terms of rights. Despite wide disagreement on questions of establishment, there was seemingly universal consensus that liberty of conscience or the free exercise of religion was a natural and inalienable right.<sup>222</sup> Where Burke’s approach was flexible and contextual, allowing a prudent discretion to government officials to evaluate the facts of the case, the Madisonian-Jeffersonian ideal was driven by articulated principle and a pervasive distrust of government. In this, Burke resembles certain Justices on the modern Supreme Court, who eschew the discovery or articulation of any general principles to guide decision making in the church-state area, in favor of contextual, fact-specific decision making.<sup>223</sup> This gives government and courts more latitude to adjust policies in light of

<sup>219</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 44.

<sup>220</sup> *Id.* at 45.

<sup>221</sup> *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 292. Similarly, in an essay entitled *On the State of Ireland*, written for Secretary of State Henry Dundas, Burke wrote, speaking for the Catholic Committee:

[T]he Roman Catholics ask a share in the privilege of election; not as a matter of speculative right, not upon general principles of liberty, or as a conclusion from any given premises, either of natural or even of constitutional right. They ask it as a protection, and a requisite security which they now have not, for the exercise of legal right. They ask it from a practical sense of the evils they feel by being excluded from it. It is necessary for the free enjoyment of their industry and property, to secure a fair dispensation of justice, both criminal and civil and to secure them that just estimation and importance, without which, in human tribunals, they cannot obtain it.

4 *Correspondence of the Right Honourable Edmund Burke* 65, 67 (F. & J. Kivington, 1844).

<sup>222</sup> See McConnell, 103 *Harv L Rev* at 1455–56 (cited in note 140).

<sup>223</sup> See *Rosenberger v Rector & Visitors, Univ Va*, 115 S Ct 2512, 2526 (1995) (O’Connor concurring).

circumstance, rather than to adopt determinate “principles” to cabin the discretion of court or legislature.

Second, Burke could not share the assumption, common among Americans, that there is a fundamental distinction between matters of spiritual and temporal concern. The ideal of “separation of church and state” presupposes that we can—in Locke’s words—“distinguish exactly the business of civil government from that of religion.”<sup>224</sup> This is reflected in Jefferson’s metaphorical “Wall of Separation.”

But what if we cannot? What if “civil government” and “religion” are both legitimately involved in many of the same things? Burke claimed that the government cannot be “remote and indifferent” to anything that has an effect on the “concerns of men.”<sup>225</sup> At the same time, Burke described religion as “one great source of civilization amongst us” and as “the basis of civil society.”<sup>226</sup> “If religion only related to the individual, and was a question between God and the conscience, it would not be wise, nor in my opinion equitable, for human authority to step in.”<sup>227</sup> But, Burke wrote, “[i]t is the interest, and it is the duty, and because it is the interest and the duty, it is the right of government to attend much to opinions; because, as opinions soon combine with passions, even when they do not produce them, they have much influence on actions.”<sup>228</sup> It is therefore impossible for the people as a whole to lay down as a “universal proposition” that “nothing relative to religion was your concern.”<sup>229</sup>

At the time of the American Founding, it may have appeared that the limited peacekeeping functions of the state could be distinguished from the more elevated functions of the church. Whether that was an accurate perception even then may be debated, but as the modern state has expanded its attentions to more and more aspects of life, previously private and frequently religious, Burke’s position more closely resembles the reality. What

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<sup>224</sup> John Locke, *A Letter Concerning Toleration*, in 6 *The Works of John Locke* 5, 9 (Thomas Davison, 1823).

<sup>225</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 43.

<sup>226</sup> Burke, *Reflections* at 80, 79.

<sup>227</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 48.

<sup>228</sup> *Id* at 44.

<sup>229</sup> *Id* at 46.

belongs to the governmental side of the Wall, and what to the religious? Education? Public health? Domestic relations? Charity? Character building? Art? The just conduct of war? Modern commentators, in contrast to the Jeffersons and Madisons of the Founding, typically accept as necessary and inevitable that governments will intervene to mold the beliefs and attitudes of the people, on everything from smoking to gender bias.<sup>230</sup> No longer does it seem heterodoxical to say that government should “attend much to opinions.” But if Burke is right and Locke is wrong—if it is *not* possible to “distinguish exactly the business of civil government from that of religion”—how can a constitutional principle based on “separation” of the religious and civil spheres be made to work?

The difference here lies not so much in Burke’s conception of the established church, but in his broader conception of government. There is a close, but generally unrecognized, connection between the idea of the “Wall of Separation” and the idea of a radically limited government. Once government shakes off its limited role and concerns itself with the general welfare of the people, including their cultural and intellectual lives, it has leapt the “Wall” and entered the traditional sphere of religion. In contrast to many of our Founders, Burke had a more modern conception of the jurisdiction of the state, which did not permit him the easy answer of a “Wall of Separation.” If the government is “a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection,”<sup>231</sup> then it necessarily will be conveying a collective teaching on science, art, virtue, and perfection (whether we label the teaching a “religion” or not). It follows not that an establishment is desirable, but that it is inescapable. *Some* sort of opinions necessarily will guide the state in its “superintending control over . . . the publicly propagated doctrines of men.”<sup>232</sup> If the Jeffersonian-Madisonian ideal of the limited state is abandoned as naive or outmoded, then the serious questions become how to protect against arbitrary or tyrannical use of this power and how to respect the legitimate rights of those who dis-

<sup>230</sup> See, for example, Lawrence Lessig, *The Regulation of Social Meaning*, 62 U Chi L Rev 943 (1995).

<sup>231</sup> Burke, *Reflections* at 85.

<sup>232</sup> *Speech on the Petition of the Unitarians* (May 11, 1792), 7 *Works* 42.

agree with the official orthodoxy. Burke's prescription—to limit governmental power by encouraging it to adhere to teachings broadly accepted by the public, preserved through diffuse institutions largely independent of the central state, to restrict it to non-coercive means, and to give broad toleration to dissenters—could possibly be the least dangerous alternative.

### III. TOLERATION

As has already been seen, Burke supported establishment but had a commitment to toleration that was equally strong if not stronger. This was an atypical stance for his day. At risk of oversimplification, the positions on establishment and toleration at that time may be divided into three camps.<sup>233</sup> First were the evangelical separationists—a position that barely existed in Britain at this time, but was highly influential in America. Evangelical separationists in America, led by the Baptists, opposed the establishment both because they deemed it erroneous on theological grounds and because they thought government support rendered the clergy subservient to the state; and they supported the widest possible toleration or free exercise in matters of religion because they considered religion to be the central and most important activity of life. Second were the secularists—relatively rare in America, apart from Jefferson, but influential in England. Led by so-called “Rational Dissenters” like Richard Price and Joseph Priestly, they were superficially aligned with the evangelical separationists—both opposed the establishment—but the secularists sought to reduce the role of revealed religion in public life and generally believed that scientific ideas should supplant the superstition and nonrationalistic religion of the past. While the evangelical separationists stressed that religion is too sacred to be subject to human interference, the secularists maintained that religion is—or should be—irrelevant to the state. Third were the establishmentarians, such as Lord North and William Blackstone. By Burke's day, it was *de rigueur* to recognize a degree of toleration as part of the establishment; but this toleration was typically grudging, and held to a nar-

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<sup>233</sup> These positions are set forth in greater detail and nuance in Henriques, *Religious Toleration* (cited in note 2).

row compass. In actual disputes over the extension of toleration, the establishmentarians were almost invariably opposed.<sup>234</sup>

#### A. TOLERATION OF CATHOLICS AND NON-CHRISTIANS

It should be noted that adherents of none of these positions had much enthusiasm for toleration of Roman Catholics, the most burning religious issue of the era. To the evangelicals, Catholicism represented the gravest of theological error; to the secularists and Rational Dissenters, Catholicism was superstitious and unenlightened;<sup>235</sup> to the establishmentarians, the constitutional status of the Protestant religion was a central tenet of the Glorious Revolution. It was widely held that the Glorious Revolution of 1688—the political heritage of Burke's Whig Party—was a victory over Papism, and thus that the suppression of Catholicism was part of the fundamental constitutional fabric of the realm, at least as long as Catholics maintained their potentially subversive loyalty to a foreign power, the Pope in Rome.<sup>236</sup> Antipathy toward Papists was widespread, and was one of the few attitudes that evangelical separatists, secularists, and establishmentarians had in common.

The perennial argument against admission of Catholics to the rights of citizens was that they were disloyal to the British government—that because of either their lingering loyalties to the Stuart line or their allegiance to the Pope in Rome, they might be ex-

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<sup>234</sup> See generally G. U. Bennett, *The Tory Crisis in Church and State 1688–1730* (1975). Opposition to the extension of toleration proceeded along two dimensions. First, establishmentarians were disposed to support toleration only for those whose ideas were reasonably close to the national consensus. Thus, dissenting clergy who affirmed thirty-six of the Thirty-Nine Articles were freely permitted to preach, while those who dissented more fundamentally were (at least in theory) not. This was the issue involved in Burke's *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21. Second, tolerant establishmentarians generally supported extension of the protection of natural rights to Dissenters, but resisted extension of the equal benefits of government action. See Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 *Supreme Court Review* 295, 318–22.

<sup>235</sup> As late as 1787, Dissenters' propaganda excused the Test Act as a safeguard against Popery, and sought to show that no such safeguard was needed against Protestants. See Henriques, *Religious Toleration* at 91 (cited in note 2). Conor Cruise O'Brien has pointed out that Burke's fury at Richard Price was driven partly by the latter's anti-popery rhetoric. *Great Melody* at 395.

<sup>236</sup> See Henriques, *Religious Toleration* (cited in note 2) at 57, 77–79 (describing the Tory theory that the Corporation and Test Acts were “fundamental laws” of the Union). Burke summarizes this argument in his *First Letter to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 245, and refutes it, *id.* at 257–70.

pected to side with the Catholic powers of Europe in conflict with the King. As Blackstone argued:

If once they [Papists] could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of reliques and images; nay even their transubstantiation. But while they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.<sup>237</sup>

These suspicions were all the stronger with regard to the Catholics of Ireland, who might, in addition to any disloyalty arising from their Catholicism, be expected to chafe against their subordination to the English and to the Protestant ruling class.

Burke strenuously sought to refute these claims. Burke referred to the idea of the Pope as a dangerous foreign power as a “commodious bugbear”—an idea that, if it “were clearly brought forth and defined, [ ] would meet with nothing but scorn and derision.”<sup>238</sup> He pointed to recent events in England and Canada to prove that the Catholic citizens had “cast off all foreign views and connections” and had resolved to “stand or fall with their country.”<sup>239</sup> He could not, of course, deny that the Catholics of Ireland were restive under the current regime, but the “real cause” of the disorders in Ireland was not their Catholicism; it was their persecution. The Irish Popery Laws

divided the nation into two distinct bodies, without common interest, sympathy, or connection. One of these bodies was to possess *all* the franchises, *all* the property, *all* the education: the other was to be composed of drawers of water and cutters of turf for them. Are we to be astonished, when, by the efforts of so much violence in conquest, and so much policy in regulation, continued without intermission for near an hundred years, we had reduced them to a mob . . . ?<sup>240</sup>

<sup>237</sup> Blackstone, 4 *Blackstone's Commentaries* at 55 (cited in note 39).

<sup>238</sup> *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 280–81.

<sup>239</sup> Burke, *Speech at Bristol, Previous to the Election* (Sept 6, 1780), in 2 *Works* 365, 400 (describing the outpouring of Catholic support for the Crown during the American Revolution). See also *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 304 (describing the loyalty of Canadian Catholic citizens).

<sup>240</sup> *First Letter from Edmund Burke to Sir Hercules Langrishe* (Jan 3, 1792), in 4 *Works* 241, 246–47.

Although Burke's most passionate commitment to toleration involved the Catholics of Ireland, he extended the principle to other Dissenters from the established church as well. He advocated toleration for all of what he called "serious religion." He explained that

[e]ven the man who does not hold revelation, yet who wishes that it were proved to him, who observes a pious silence with regard to it, such a man, though not a Christian, is governed by religious principles. Let him be tolerated in this country. Let it be but a serious religion, natural or revealed, take what you can get. Cherish, blow up the slightest spark: one day it may be a pure and holy flame.<sup>241</sup>

Burke attacked the hypocrisy of those who condemned the persecution of Protestants in Catholic France but excused the persecution of Catholics in Ireland. How could they "persuade themselves that what was bad policy in France can be good in Ireland, or that what was intolerable injustice in an arbitrary monarch becomes . . . an equitable procedure in a country professing to be governed by law"?<sup>242</sup> To Burke it was absurd to maintain "that the names of Protestant and Papist can make any change in the nature of essential justice."<sup>243</sup> "Toleration is good for all, or it is good for none."<sup>244</sup>

In his *First Letter to Sir Hercules Langrishe*, Burke wrote that "[t]oleration, being a part of moral and political prudence, ought to be tender and large. A tolerant government ought not to be too scrupulous in its investigations, but may bear without blame, not only very ill-grounded doctrines, but even many things that are positively vices."<sup>245</sup> In 1775, Burke stated his desire to give "full civil protection," including freedom of worship and religious education, to "Jews Mahometans and even pagans."<sup>246</sup> In this, he was more than fifty years ahead of his day. To be sure, Burke (like others of his era) was not above the occasional anti-Semitic re-

<sup>241</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 37.

<sup>242</sup> Burke, *Tract on the Popery Laws* (circa 1761), in 6 *Works* 299, 329–330.

<sup>243</sup> *Id.* at 329.

<sup>244</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 29.

<sup>245</sup> Reprinted in 4 *Works* 241, 258.

<sup>246</sup> *Letter from Edmund Burke to William Burgh* (Feb 9, 1775), in 3 *Correspondence* 110, 112.



mark,<sup>247</sup> and he undertook no specific Parliamentary action to repeal the laws against Judaism in England. But in Parliament he declared that the Jews are a people whom it was the special object of humanity to protect rather than abuse,<sup>248</sup> and in a letter to a Catholic friend, Burke commended the Austrian Emperor's extension of toleration to the Jews and indicated his support for such a measure in England—while opining that the nation was not yet ready for it, and that it could not pass without ministerial support.<sup>249</sup>

Burke devoted more than a decade of his life to fighting oppression in India, through his attacks on the East India Company and his prosecution of Warren Hastings. His principal efforts involved civil oppression and economic exploitation of the Indian people, but he did not fail to recognize and resist religious oppression as well. In a letter to a prominent English Protestant dissenter, Burke described his efforts against Hastings as “endeavoring . . . to relieve twenty Millions of Dissenters from the Church of England, in Asia from real grievances, which God forbid any of the Dissenters in Europe [should suffer].”<sup>250</sup> He inveighed against the East India Company's “indignities to the Indian Priesthood.”<sup>251</sup> He studied Halhed's code of Hindu law intently in preparation for his case against Warren Hastings and—according to Charles James Fox—“spoke of the piety of the Hindoos with admiration, and of their holy religion and sacred functions with an awe bordering on devotion.”<sup>252</sup> In his opening speech against Hastings, Burke stated: “We must not think to force [Hindus] into the narrow circle of our ideas; we must extend ours to take in their system of opinions and rites.”<sup>253</sup>

<sup>247</sup> See Burke, *Reflections* at 42 (ugly comparison of French revolutionaries to “Jew brokers”).

<sup>248</sup> Edmund Burke, *Speech on a Motion Relating to the Seizure and Confiscation of Private Property in the Island of St. Eustatius* (May 14, 1781), in 22 *Parliamentary History* 218, 223–26.

<sup>249</sup> See Mahoney, *Burke and Ireland* at 113 (cited in note 38).

<sup>250</sup> *Letter from Edmund Burke to Richard Bright* (May 8–9, 1789), in 5 *Correspondence* 470, 470.

<sup>251</sup> Henry Richard Lord Holland, I *Memoirs of the Whig Party* 5–6 (Longman, Brown, 1852).

<sup>252</sup> *Id* at 6.

<sup>253</sup> Edmund Burke, *Speech in Opening the Impeachment of Warren Hastings* (Feb 15, 1788), in 9 *Works* 327, 379.

Burke was, however, ambivalent about new religions. “The only faint shadow of difficulty” with regard to religious toleration, he wrote in his first work on the subject, the *Tract on the Popery Laws*, “is concerning the introduction of new opinions.”<sup>254</sup> While new opinions may have been “favorable to the cause of truth,” according to Burke, “[e]xperience has shown” that they are not “always conducive to the peace of society.” Not only are new religious sects typically prone to “tumultuous and disorderly zeal,” but they also are “the cause of the bitterest dissensions in the commonwealth” on account of their resistance to the present establishment.<sup>255</sup> While Burke did not ultimately find this to be a sufficient basis for persecution, he could understand why it might persuade “a man of sense and of integrity.”<sup>256</sup> Some thirty years later, Burke’s suspicion and distaste for new religions—this time the Unitarian Society—had only increased: “Old religious factions are volcanoes burnt out; on the lava and ashes and squalid scorix of old eruptions grow the peaceful olive, the cheering vine, and the sustaining corn. . . . But when a new fire bursts out, a face of desolations comes on, not to be rectified in ages.”<sup>257</sup> Therefore, he said, “when men come before us, and rise up like an exhalation from the ground, they come in a questionable shape,” and we must “try whether their intents be wicked or charitable, whether they bring airs from heaven or blasts from hell.”<sup>258</sup>

#### B. BURKE’S ARGUMENTS FOR TOLERATION

To some extent, Burke’s arguments for toleration resembled those typically offered in enlightened circles. Persecution was cruel, ineffective, hypocritical, and bad for business.<sup>259</sup> In typical Enlightenment fashion, Burke argued that “[i]t is not permitted to us to sacrifice the temporal good of any body of men to our

<sup>254</sup> Burke, *Tract on the Popery Laws* (circa 1761), in 6 *Works* 299, 336.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 336–37.

<sup>257</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 46.

<sup>258</sup> *Id.*

<sup>259</sup> On the latter point, see Burke, *Speech at Bristol, Previous to the Election* (Sept 6, 1780), in 2 *Works* 365, 406 (making argument that Catholics were among the “best manufacturers” in England and might be forced to emigrate to Holland if the Penal Laws were not reformed).

own ideas of the truth and falsehood of any religious opinions."<sup>260</sup> Burke expressed these points with his usual panache, but the substance of the arguments is not much different from that in other reformers of his era. Certainly, experience showed that the persecution of Catholics in Ireland was ineffectual: "Ireland, after almost a century of persecution, is at this hour full of penalties and full of Papists."<sup>261</sup> The effect of the Penal Laws was not to persuade, convert, or uplift, but merely to injure. "We found the people heretics and idolaters; we have, by way of improving their condition, rendered them slaves and beggars: they remain in all the misfortune of their old errors, and all the superadded misery of their recent punishment."<sup>262</sup>

Burke's advocacy of toleration, however, was antithetical to the Enlightenment project of secularization of society. For many advocates of toleration, this was part of the effort to reduce the power of "superstition" and to confine religion to the merely private. Burke, by contrast, advocated toleration as a means of fostering religion and enlarging its role in public life. In this, Burke had something in common with the Baptist and other evangelical advocates of religious freedom who were so influential in the movements for disestablishment and free exercise in the American states. Burke was well aware that some persons advocated toleration out of "a cold apathy, or indeed rather a savage hatred, to all Religion, and an avowed contempt of all those points on which we [Christians] differ, and on those about which we agree."<sup>263</sup> Jefferson predicted that the rise of liberty of conscience would bring about the decline of orthodox Christianity and usher in an era of rational religion.<sup>264</sup> Burke, by contrast, wrote that general toleration would "encrease real Zeal, Christian fervour, and pious emulation" and that it would never "introduce indifference."<sup>265</sup>

<sup>260</sup> *Letter from Edmund Burke to Richard Burke, Esq., on Protestant Ascendancy in Ireland* (1793), in 6 *Works* 385, 394.

<sup>261</sup> Burke, *Tract on the Popery Laws* (circa 1761), in 6 *Works* 299, 334.

<sup>262</sup> *Id.* at 341.

<sup>263</sup> *Letter from Edmund Burke to Thomas Hussey*, in 8 *Correspondence* 245, 246.

<sup>264</sup> See *Letter from Thomas Jefferson to Dr. Benjamin Waterhouse* (June 26, 1822), in Paul Leicester Ford, ed, 12 *The Works of Thomas Jefferson* 243 (Knickerbocker, 1905); *Letter from Thomas Jefferson to James Smith* (Dec 8, 1822), in Adrienne Koch and William Peden, eds, *The Life and Selected Writings of Thomas Jefferson* 703 (Random House, 1944).

<sup>265</sup> *Letter from Edmund Burke to William Burgh* (Feb 9, 1775), in 3 *Correspondence* 110, 112.

Burke's advocacy of toleration was never based on the view that religion is unimportant or injurious. He maintained that "the glorious and distinguishing prerogative of humanity [is] that of being a religious creature,"<sup>266</sup> and was contemptuous of those who tolerated because of indifference: "[t]hat those persons should tolerate all opinions, who think none to be of estimation, is a matter of small merit. Equal neglect is not impartial kindness."<sup>267</sup> Burke is not like Jefferson, who based his toleration on the proposition that "it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."<sup>268</sup> True toleration, Burke said, is the toleration of those who "think the dogmas of religion, though in different degrees, are all of moment, and that amongst them there is, as amongst all things of value, a just ground of preference. They favor, and therefore they tolerate."<sup>269</sup>

In some ways, therefore, Burke sounded more American than Jefferson did. The American struggle for religious freedom was led by religious enthusiasts rather than religious rationalists. The United States never associated religious freedom with anticlericalism, as in France. The emphasis here was always more on freedom *of* religion than on freedom *from* religion. But Burke's advocacy of toleration was not based on the same principles as that of the evangelical separationists. For the most part, the advocates of that position were sectarians, firmly convinced of the correctness of their theological position and imbued with a zeal for spreading the gospel as they understood it. For them, toleration was based on the theological principle that the moving force in the formation of Christian faith must be the calling of God (in the Calvinist camp) or the free will of the believer (in the Arminian camp)—but not the hand of government.<sup>270</sup> By contrast, Burke's toleration was ecumenical in spirit, based on the intrinsic worth of all reli-

<sup>266</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 35.

<sup>267</sup> Burke, *Reflections* at 132.

<sup>268</sup> Thomas Jefferson, *Notes on the State of Virginia* 159 (Norton, 1955) (originally published 1787).

<sup>269</sup> Burke, *Reflections* at 132.

<sup>270</sup> See, for example, Issac Backus, *An Appeal to the Public for Religious Liberty* (1773), in Ellis Sandoz, ed, *Political Sermons of the American Founding Era 1730–1805* 327 (Liberty, 1991).

gious positions. True toleration, according to Burke, is based on the conviction that the “serious religion[s], natural or revealed,”<sup>271</sup> all share a common faith in the sovereignty of God and the immutable principles of morality and justice. The English, Burke said, “would reverently and affectionately protect all religions because they love and venerate the great principle upon which they all agree, and the great object to which they are all directed.”<sup>272</sup> “[H]ave as many sorts of religion as you find in your country; there is a reasonable worship in them all.”<sup>273</sup> Arguments for toleration were based more on an ecumenical evaluation of the worth of religion than on the inherent and sacred primacy of conscience.

As the French Revolution unfolded, Burke became alarmed at the connection between what he called “fanatical atheism”<sup>274</sup> and the spread of Jacobinism, which he considered the greatest of all threats to the constitution, to liberty, order, and religion, and all the more convinced that revealed religion is a vital protection against totalitarianism. He could not, therefore, view religion as a purely private matter, bereft of political significance, as Enlightenment reformers were wont to do. Rather, he developed a theory in which toleration was part of a general strategy, together with establishment, to maintain the social and cultural preconditions for limited government.

### C. BURKE’S DISAVOWAL OF TOLERATION TO ATHEISTS

Like John Locke before him,<sup>275</sup> Burke disavowed toleration of atheists. “They are never, never to be supported, never to be tolerated.”<sup>276</sup> Atheism, he maintained, was “the most horrid and cruel blow that can be offered to civil society.”<sup>277</sup> Of all Burke’s positions, this is the one that seems most foreign to American princi-

<sup>271</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 37.

<sup>272</sup> Burke, *Reflections* at 132.

<sup>273</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 36.

<sup>274</sup> Burke, *Letters on a Regicide Peace* (1796–97), in 5 *Works* 231, 363.

<sup>275</sup> See John Locke, *A Letter Concerning Toleration*, in 6 *The Works of John Locke* 1, 46–47 (cited in note 224).

<sup>276</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 36.

<sup>277</sup> *Id.*

ples, the least defensible, the least consistent with a liberal society. In one of the more sensible statements in *Everson v Board of Education*, the Court declared that the state “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.”<sup>278</sup> In our tradition, protection of freedom of religion includes freedom not to believe. How can Burke’s intolerance toward atheists be understood?

First, it is worth noting that acceptance of atheism as within the principle of freedom of religion is a nineteenth-century development, even in this country. In his studies of the Founders’ views on religious liberty, Professor Philip Kurland found “no evidence that they were equally concerned with freedom for irreligion. Quite to the contrary, they sought to protect man’s relation to his god.”<sup>279</sup> Indeed, members of Congress engaged in drafting and proposing the Bill of Rights stated that they hoped “the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all,”<sup>280</sup> and during the course of deliberating over constitutional exemptions from compulsory militia service it was said that “I do not mean to deprive [those who are religiously scrupulous in this respect] of any indulgence the law affords; my design is to guard against those who are of no religion.”<sup>281</sup> It was not until the middle of the nineteenth century that courts began to recognize atheists and nonbelievers as having rights of religious freedom.<sup>282</sup>

Second, Burke made clear that he did not, and could not, support measures against nonbelievers on religious grounds, but only if they behaved as a political faction, threatening violence to the constitution. The only legitimate basis for restraint upon religious freedom, he said, is that “the person dissenting does not dissent from the scruples of ill-informed conscience, but from a party

<sup>278</sup> *Everson*, 330 US at 16 (emphasis in original).

<sup>279</sup> Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm & Mary L Rev 839, 856 (1986).

<sup>280</sup> 1 *Annals of Congress* 730 (Aug 15, 1789) (remarks of Representative Huntington).

<sup>281</sup> *Id* at 767 (Aug 20, 1789) (remarks of Representative Scott).

<sup>282</sup> See Lash, 28 Ariz St L J (forthcoming 1996) (cited in note 193).

ground of dissension, in order to raise a faction in the state.”<sup>283</sup> On the floor of Parliament, Burke read from the “political catechism” of the Unitarians to show that it “contained no precept of religion whatsoever,” but was “one continued invective against kings and bishops.”<sup>284</sup> He claimed that the religious assemblies of the Unitarians had been “turned into places of exercise and discipline for politicks; and for the nourishment of a party which seems to have contention and power much more than Piety for its Object,” and which “is proceeding systematically, to the destruction of this Constitution in some of its essential parts.”<sup>285</sup> Indeed, it was Burke’s belief that atheists, if they could only seize political power as they had in France, would “not leave to religion even a toleration.”<sup>286</sup> The goal of “fanatical” atheism is the “utter extirpation of religion.”<sup>287</sup> The closest modern analogy is not to toleration of atheists, but to recognition of the Communist Party—a faction that, if it could seize power, would extirpate the freedoms of others.

Third, we should recognize that Burke’s intemperate rhetoric against toleration of atheists was not connected with any program of actual persecution. Atheists were excluded from certain public and corporate offices, but in this they were treated no worse than any other Dissenters from the Church of England. Indeed, in some respects, atheists were in a less disadvantaged position than religious Dissenters (other than so-called “Orthodox Dissenters” who fell within the ambit of the Act of Toleration), since the latter could be punished for public acts of worship or preaching. No such strictures applied to atheists, since they did not engage in worship.<sup>288</sup> Indeed, it is not clear that the rights of atheists were

<sup>283</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 30.

<sup>284</sup> Burke, *Speech on Repeal of the Test and Corporation Acts* (Mar 2, 1790), in 28 *Parliamentary History* 432, 436–37.

<sup>285</sup> *Letter from Edmund Burke to Richard Bright* (Feb 18, 1790), in 6 *Correspondence* 82, 83–84.

<sup>286</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 37. See also Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), 7 *Works* 39, 48.

<sup>287</sup> Burke, *Letters on a Regicide Peace* (1796–97), in 5 *Works* 231, 361–64.

<sup>288</sup> Burke commented on the fact that non-orthodox Dissenters were treated less favorably than atheists in his *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 33–35.



dramatically different in Britain than the United States, even today. While atheism is often recognized as a “religion,” it is unlikely that atheists could claim that they have any duties or demands arising from their nonbelief (which is not to say that they do not have moral duties arising from some nonreligious philosophical source, but that is not the same thing as to say that these arise from their religious beliefs). Accordingly, it is unlikely that atheists would have occasion to assert free exercise rights. For the most part, the religious freedom interests of atheists are protected not as a matter of free exercise, but as an aspect of nonestablishment—and for Establishment Clause purposes it is irrelevant what the nature of the claimant’s beliefs (or lack thereof) may be. Thus, in this country, as in Burke’s England, atheists have no significant rights in their capacity as atheists.

But these observations only mitigate the significance of the difference between Burke and the modern American posture toward toleration of atheists. We must consider, as well, his justification. Burke’s principal argument was that toleration is a form of benefit to Dissenters on account of the belief that all “*positive* religion”<sup>289</sup> has a certain worth, on account of its recognition of enduring principles of right and justice. Atheism, being mere negation, lacks this quality, and indeed fosters a spirit of anarchy.<sup>290</sup> He did not consider intolerance toward atheism as intolerance toward a religion—but toward a denial of religion. Thus, he could say: “At the same time that I would cut up the very root of atheism, I would respect all conscience,—all conscience that is really such.”<sup>291</sup> By his premises, therefore, exclusion of atheists and nonbelievers from toleration was not based on hatred or prejudice, but on legitimate differences. If toleration is extended to dissenting believers out of a recognition that their affirmative belief contributes to the common good by reinforcing the ties of immutable justice and morality, then there is no reason to treat mere unbelief, mere “negation,” in the same way. It may well be that certain affirmative philosophical beliefs held by atheists have a status that should be recognized as tantamount to religion,<sup>292</sup> but bare atheism, without

<sup>289</sup> Burke, *Letter on the Affairs of Ireland* (1797), in 6 *Works* 413, 426 (emphasis in original).

<sup>290</sup> *Id.*

<sup>291</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 36.

<sup>292</sup> As the Supreme Court suggested in *Welsh v United States*, 398 US 333 (1970).

more, does not promote the habits of mind and spirit that entitle “serious religion” to a heightened degree of respect.

#### IV. CONCLUSION: THE CONNECTION BETWEEN TOLERATION AND ESTABLISHMENT

The central preoccupation of Burke’s political thought is with the restraint of power. As Conor Cruise O’Brien has emphasized in his recent biography, the animating theme—what he calls, after Yeats, the “Great Melody”—of Burke’s career was his opposition to the abuse of power: in the American colonies, Ireland, France, and India.<sup>293</sup> In each of these situations, men in authority over others, but not restrained by the authority of the law, exercised essentially unlimited power, to the detriment of those in whose names they were supposed to govern. To others, even to Burke’s usual political allies, these presented different questions altogether: Whigs typically sympathized with the oppression of the Indians or the Americans, but optimistically assumed that the unbridled power of the revolutionaries in France would be liberating. To Burke, the “malignancy” was the same:

I think I can hardly overrate the malignity of the principles of Protestant ascendancy . . . as they affect these countries, and as they affect Asia,—or of Jacobinism, as they affect all Europe and the state of human society itself. The last is the greatest evil. But it readily combines with the others, and flows from them.<sup>294</sup>

Arbitrary power is the polar opposite of the constitution of freedom; legitimate government is more than the mere will of the sovereign. In a speech directed against the claim by Warren Hastings of “arbitrary power” over the people of India, Burke declaimed:

[A]rbitrary power is a thing which neither any man can hold nor any man can give. No man can lawfully govern himself according to his own will; much less can one person be governed by the will of another. We are all born in subjection,—all born equally, high and low, governors and governed, in subjection to one great, immutable, preexistent law, prior to all

<sup>293</sup> O’Brien, *The Great Melody* at xxiii (cited in note 13).

<sup>294</sup> *Second Letter from Edmund Burke to Sir Hercules Langrishe on the Catholic Question* (May 26, 1795), in 6 *Works* 375, 379.

our devices and prior to all our contrivances, paramount to all our ideas and all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the universe, out of which we cannot stir.<sup>295</sup>

In his *Appeal from the New to the Old Whigs*, Burke wrote: “Neither the few nor the many have a right to act merely by their will, in any matter connected with duty, trust, engagement, or obligation.”<sup>296</sup> Thus, to Burke, “the important, but at the same time the difficult problem to the true statesman,” is to use “moral instruction” and “civil constitutions” to impose restraint on the immoderate exercise of power.<sup>297</sup>

Burke understood religion—the consciousness of that “great, immutable, pre-existing law” to which he appealed in his speech against Hastings—to be essential to the restraint of power. Without religion, “it is utterly impossible,” according to Burke, that those in power (whether monarchs, aristocrats, or the people) should “empt[y] themselves of all the lust of selfish will.”<sup>298</sup> Knowledge that God’s will is superior to man’s is the strongest security against the possibility that the people might imagine that their will “is the standard of right and wrong.”<sup>299</sup> Thus, “[a]ll 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.”<sup>300</sup>

For most people within a society, the established church is the best guarantor of this sensibility of restraint. The Church of England reflects and represents the long-standing beliefs of the major part of the nation, and thus speaks with the authority of prescription. Such a religion, Burke maintained, is “well fitted to the frame and pattern of your [the English] civil constitution”; it is a “barrier against fanaticism, infidelity, and atheism”; it “furnishes support

<sup>295</sup> Edmund Burke, *Speech in Opening the Impeachment of Warren Hastings* (Feb 16, 1788), in 9 *Works* 396, 455.

<sup>296</sup> Burke, *An Appeal from the New to the Old Whigs* (1791), in 4 *Works* 57, 162.

<sup>297</sup> *Id.* at 163–64.

<sup>298</sup> Burke, *Reflections* at 83.

<sup>299</sup> *Id.* at 82.

<sup>300</sup> *Id.* at 81.

to the human mind in the afflictions and distresses of the world, consolation in sickness, pain, poverty, and death"; and it "dignifies our nature with the hope of immortality, leaves inquiry free, whilst it preserves an authority to teach, where authority only can teach."<sup>301</sup> "[T]his national Church Establishment is a great national benefit," he said, "a great public blessing."<sup>302</sup> Indeed, Burke maintained, the English people "do not consider their church establishment as convenient, but as essential to their state." It is "the foundation of their whole constitution."<sup>303</sup>

But there were some in England and many more in Ireland who, for reasons of conscience and conviction, adhered to a religious faith other than that established by law. They, too, deserved the support and encouragement of the law. Their articles of faith may contain error (as, indeed, the established church may contain error), but all religions impart some measure of the truth of the sovereignty of God and therefore the restraint of man. "Do not promote diversity," Burke thus advised, but "when you have it, bear it; have as many sorts of religion as you find in your country; there is a reasonable worship in them all."<sup>304</sup> Burke declared that he would "never call any religious opinions, which appear important to serious and pious minds, things of no consideration. . . . As long as men hold charity and justice to be essential integral parts of religion, there can be little danger from a strong attachment to particular tenets in faith."<sup>305</sup>

Moreover, any attempt to root out dissenting faiths and replace them with the established church is likely to prove not just unsuccessful, but counterproductive. It is easier to destroy faith than to replace it with another. This is what Burke saw to be the consequence of the persecution of Catholics in Ireland, where the Penal Laws were "partly leading, partly driving into Jacobinism that description of [the Irish] people whose religious principles, church

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<sup>301</sup> Burke, *Speech on the Petition of the Unitarians* (May 11, 1792), in 7 *Works* 39, 57.

<sup>302</sup> *Id.* at 56.

<sup>303</sup> Burke, *Reflections* at 87.

<sup>304</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 36.

<sup>305</sup> *Letter from Edmund Burke to William Smith, Esq., on the Subject of Catholic Emancipation* (Jan 29, 1795), in 6 *Works* 361, 365.

polity, and habitual discipline might make them an invincible dike against that inundation.”<sup>306</sup> This persecution, to Burke, is “madness and folly.” There is no conceivable justification for “driving men . . . from any *positive* religion whatever into the irreligion of the times, and its sure concomitant principles of anarchy.”<sup>307</sup>

In these circumstances, Burke maintained that differences among religions must take second seat to the more important conflict between religion and its detractors. “If ever the Church and the Constitution of England should fall in these islands,” he wrote, “it is not Presbyterian discipline nor Popish hierarchy that will rise upon their ruins. . . . It is the new fanatical religion, now in the heat of its first ferment, of the Rights of Man, which rejects all establishments, all discipline, all ecclesiastical, and in truth all civil order, which will triumph. . . .”<sup>308</sup> It was therefore just as important to tolerate and protect conscientious members of other faiths as it was to support the established church. He responded to a member of Parliament who opposed extension of toleration to those whom Burke called “conscientious Dissenter[s]”:<sup>309</sup>

The honorable gentleman would have us fight this confederacy of the powers of darkness with the single arm of the Church of England,—would have us not only fight against infidelity, but fight at the same time with all the faith in the world except our own.<sup>310</sup>

The spread of Jacobinism—along with a rising spirit of rebellion—in Ireland gave Burke’s advocacy against the Protestant Ascendancy a new urgency. Catholicism ought to be a force for stability and order, but persecution was turning Catholics into allies of revolution. He wrote to an Irish parliamentarian that “in Ireland particularly the Roman Catholic religion . . . ought to be cherished as a good, (though not as the most preferable good, if a choice

<sup>306</sup> *Second Letter from Edmund Burke to Sir Hercules Langrishe on the Catholic Question* (May 26, 1795), in 6 *Works* 375, 380–81.

<sup>307</sup> Burke, *Letter on the Affairs of Ireland* (1797), in 6 *Works* 413, 426 (emphasis in original).

<sup>308</sup> *Letter from Edmund Burke to Richard Burke, Esq. on Protestant Ascendancy in Ireland* (1793), in 6 *Works* 385, 398.

<sup>309</sup> Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar 17, 1773), in 7 *Works* 21, 35.

<sup>310</sup> *Id.* at 37.

was now to be made,) and not tolerated as an inevitable evil." As matters stand, "the serious and earnest belief and practice of [Catholicism] by its professors forms . . . the most effectual barrier, if not the sole barrier, against Jacobinism."<sup>311</sup> But instead, as he wrote to another member of the (Protestant) Irish Parliament, the suppression of Catholicism is "driving the people in precisely the opposite direction."<sup>312</sup> He elaborated:

You make a sad story of the Pope. *O seri studiorum!* It will not be difficult to get many called Catholics to laugh at this fundamental part of their religion. Never doubt it. You have succeeded in part, and you may succeed completely. But in the present state of men's minds and affairs, do not flatter yourselves that they will piously look to the head of our Church in the place of that Pope whom you make them forswear, and out of all reverence to whom you bully and rail and buffoon them. Perhaps you may succeed in the same manner with all the other tenets of doctrine and usages of discipline amongst the Catholics; but what security have you, that, in the temper and on the principles on which they have made this change, they will stop at the exact sticking-places you have marked in *your* articles? You have no security for anything, but that they will become what are called *Franco-Jacobins*, and reject the whole together.<sup>313</sup>

This was Burke's nightmare: the Protestant Ascendancy and the principles of the French Revolution, tyranny and anarchy, advancing hand-in-hand in Ireland, and nothing he could do seemed to make any difference.

In Burke's constitution of freedom, toleration and establishment were not inconsistent principles, but alternative strategies for attaining the same objective: to nurture and strengthen the religious sensibilities that are the best and most reliable source of moral restraint. Burke strove his entire life to uphold constitutional principles of balanced government and incremental change that would protect against the dangers of arbitrary power. But in the end, he

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<sup>311</sup> *Letter from Edmund Burke to William Smith, Esq., on the Subject of Catholic Emancipation* (Jan 29, 1795), in 6 *Works* 361, 369.

<sup>312</sup> *Second Letter from Edmund Burke to Sir Hercules Langrishe on the Catholic Question* (May 26, 1795), in 6 *Works* 375, 380–81.

<sup>313</sup> *Id* at 381 (emphasis in original).

said, quoting Virgil's *Aeneid*, "[w]e have but this one appeal against irresistible power—

If you have no respect for the human race and mortal arms,  
Yet beware the gods who remember right and wrong.<sup>314</sup>

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<sup>314</sup> Burke, *An Appeal from the New to the Old Whigs* (1791), in 4 *Works* 57, 165. Burke quoted, of course, in Latin.