VIRGINIA LAW REVIEW

VOLUME 105 MAY 2019 NUMBER 3

ARTICLES

WHY DIDN'T THE COMMON LAW FOLLOW THE FLAG?

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This Article considers a puzzle about how different kinds of law came to be distributed around the world. The legal systems of some European colonies largely reflected the laws of the colonizer. Other colonies exhibited a greater degree of legal pluralism, in which the state administered a mix of different legal systems. Conventional explanations for this variation look to the extent of European settlement: where colonizers settled in large numbers, they chose to bring their own laws; otherwise, they preferred to retain preexisting ones. This Article challenges that assumption by offering a new account of how and why the British Empire selectively transplanted English law to the colonies it acquired during the eighteenth century. The extent to which each colony received English law depended on a political decision about what kind of colony policymakers wanted to create. Eighteenth-century observers agreed that English law could turn any territory into an anglicized, commercial colony on the model of Britain's North American settlements. Preserving preexisting laws, in contrast, would produce colonial economies that enriched the empire as a whole but kept local subjects poor and

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politically disadvantaged. By controlling how much English law each colony received, British officials hoped to shape its economic, political, and cultural trajectory. This historical account revises not only our understanding of how the common law spread but also prevailing ideas about law's place in development policy today.

INTRODUCTION

Most of the world's legal systems bear legacies of empire.[1] The nature of that legacy varies. In some colonies, the legal system mostly reflected

[1] See Daniel M. Klerman et al., Legal Origin or Colonial History?, 3 J. Legal Analysis 379, 380 (2011) (noting that French colonies generally inherited French civil law, while British colonies English common law); see also Jane Burbank & Frederick Cooper, Empires in World History: Power and the Politics of Difference 1–3 (2010) (noting that until the 1960s, most people lived as imperial subjects).

This Article uses the following abbreviations when citing archival sources: BL (British Library); BRBML (Beinecke Rare Book and Manuscript Library, Yale University); SA (Sheffield Archives, U.K.); TNA (The National Archives, U.K.); WLCL (William L. Clements Library, University of Michigan).

the colonizer's own laws.[2] In others, the colonial state administered a mix of different legal traditions, in what is sometimes described as legal pluralism.[3] The presence or absence of colonial legal pluralism continues to affect legal, social, and economic outcomes in many postcolonial countries today.[4]

Most scholars assume that this variation was the inevitable product of European settlement patterns. Where colonizers settled in large numbers (the story goes), they brought their own laws with them; otherwise, they retained preexisting ones.[5] This Article challenges that consensus by offering a new account of how and why the British Empire selectively transplanted English law to the colonies it acquired during the eighteenth century. It argues that the extent to which each colony received English law depended on a deliberate effort to direct its political and economic

[2] This was true, for instance, of the thirteen British colonies that became the United States. Colonial courts and legislatures sometimes gave English law a local accent, but metropolitan and provincial lawyers spoke the same legal language. See infra Section II.A; cf. Lawrence M. Friedman, A History of American Law 15 (3d ed. 2005) (describing colonial law as a "dialect[]" of English law).

[3] This Article uses "legal pluralism" to mean the imperial state's administration of multiple kinds of law. See Mitra Sharafi, Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism Through the Cultural Defense, 71 Law & Contemp. Probs. 139, 142 (2008) (citing M.B. Hooker, Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws 1 (1975)). This is sometimes referred to as "classic" legal pluralism, in contrast to the "new" legal pluralism, which describes the coexistence of state and nonstate norms. See, e.g., Robert W. Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 69 (1984); John Griffiths, What Is Legal Pluralism?, 24 J. Legal Pluralism & Unofficial L. 1 (1986); Sally Engle Merry, Legal Pluralism, 22 Law & Soc'y Rev. 869, 872–74 (1988); cf. Vernon V. Palmer, Empires as Engines of Mixed Legal Systems 3 (Tulane Univ. Sch. of Law Pub. Law & Legal Theory Working Paper Series, Working Paper No. 17-13, 2017), http://ssrn.com/abstract=3020404 (using "boxed pluralism" to describe a system in which "a significant part of the private law" varies among ethnic or racial groups). For the history of the term, see Paul D. Halliday, Laws' Histories: Pluralisms, Pluralities, Diversity, *in* Legal Pluralism and Empires, 1500–1850, at 261, 263–67 (Lauren Benton & Richard J. Ross eds., 2013); Sharafi, supra, at 142; Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, 30 Sydney L. Rev. 375, 390–96 (2008).

[4] See, e.g., Daniel Fitzpatrick, Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access, 115 Yale L.J. 996, 1040–42 (2006); Lauren Honig, Selecting the State or Choosing the Chief? The Political Determinants of Smallholder Land Titling, 100 World Dev. 94, 94 (2017); Hanna Lerner, Critical Junctures, Religion, and Personal Status Regulations in Israel and India, 39 Law & Soc. Inquiry 387, 403 (2014).

[5] See infra Part I; see also Daniel Oto-Peralías & Diego Romero-Ávila, Legal Reforms and Economic Performance: Revisiting the Evidence 7–13 (World Development Report Background Paper, 2017) (summarizing the literature).

development.[6] Policymakers believed that English law could turn any territory into an anglicized, commercial colony on the model of Britain's North American settlements. Legal pluralism, in contrast, would lead to extractive economies that benefitted metropolitan elites but kept local subjects relatively poor and politically disadvantaged. By controlling how much English law each colony received, British officials believed they could shape its economic, political, and cultural trajectory.[7]

[6] This Article uses a broad definition of "development" that encompasses both economic growth and the quality of governance. See Ronald J. Daniels, Michael J. Trebilcock & Lindsey D. Carson, The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies, 59 Am. J. Comp. L. 111, 112 n.2 (2011). Eighteenth-century writers used "political economy" in a similarly broad sense. See Daniel J. Hulsebosch, Constitution-Making in the Shadow of Empire, 56 Am. J. Legal Hist. 84, 91 (2016) (defining "political economy" as "the relation between political structure and economic development"); see also Timothy Mitchell, Society, Economy, and the State Effect, *in* The Anthropology of the State: A Reader 169, 182 (Aradhana Sharma & Akhil Gupta eds., 2006) ("The term *political economy* referred to the proper economy, or management, of the polity, a management whose purpose was to improve the wealth and security of the population.").

[7] This argument builds on a growing body of work that highlights the importance of politics in forming legal institutions. See, e.g., Daniel Klerman, Economics of Legal History, *in* 3 The Oxford Handbook of Law and Economics 409, 414–16, 425–26, 430–31 (Francesco Parisi ed., 2017); Daniel Klerman & Paul G. Mahoney, Legal Origin?, 35 J. Comp. Econ. 278, 279 (2007). My argument is especially indebted to work that has emphasized the role of political conflict in forging colonial and postcolonial law. See, e.g., Daniel J. Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830, at 260 (2005); Claire Priest, Currency Policies and Legal Development in Colonial New England, 110 Yale L.J. 1303, 1316 (2001).

Several recent publications have been particularly relevant. This Article's emphasis on partisan politics owes much to Heather Welland's account of the Quebec Act. Heather Welland, Commercial Interest and Political Allegiance: The Origins of the Quebec Act, *in* Revisiting 1759: The Conquest of Canada in Historical Perspective 166 (Phillip Buckner & John G. Reid eds., 2012). The argument here differs from hers in two ways. First, she describes the Quebec Act as emerging from a "paternal" and "interventionist" vision of empire, which she contrasts with the less regulatory approach of those who wanted to anglicize Canadian law. Id. at 182. This Article, however, argues that many of the Quebec Act's opponents also contemplated an activist state. Second, although Welland notes that legal pluralism was controversial, this Article offers a fuller explanation of why contemporaries cared about which legal system governed Quebec. Robert Travers's work on Bengal also stresses the role of ideological conflict in shaping colonial law. But while his book offers an unmatched guide to the origins of the East India Company's legal policy in Bengal, it focuses on debates about what kind of legal pluralism should emerge, a focus that sometimes discounts arguments for anglicizing Indian law. See Robert Travers, Ideology and Empire in Eighteenth Century India: The British in Bengal 50 (2007). Paul Halliday and G. Edward White also examine debates about extending English law to India, although they focus on habeas corpus, while this Article emphasizes private law. See Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 651–67 (2008). Finally, an extensive body of sociolegal and social-science literature has used the concepts of path

Recovering the political contingency of colonial legal systems sheds new light on law's role in shaping political and economic development today.[8] Scholars across a range of disciplines agree that a country's welfare depends at least partly on the quality of its institutions.[9] But efforts to determine which institutions matter have proved more controversial.[10] In particular, scholars continue to debate whether some legal systems—particularly the common law—promote better economic or political outcomes than others.[11]

Although scholars and practitioners disagree about the answer, their efforts have generally proceeded from a shared premise: that the distribution of colonial legal institutions offers a natural experiment about the effects of different kinds of law on development.[12] This Article questions that common assumption. The distribution of English law reflected a prior choice about whether a particular colony would be an economic "winner" or "loser." If the common law did promote economic growth in the British Empire, its superiority depended at least partly on a self-fulfilling prophecy. English law spurred development because anglophone settlers and merchants thought it would—and they acted accordingly by favoring investment and settlement in English-law jurisdictions.

To some extent, then, this Article reinforces recent skepticism about the innate superiority of Western or English law.[13] But it also offers a warning for those inclined to elevate this skepticism into an outright celebration of legal diversity. When contemporary commentators tally the sins of colonialism, they usually list legal pluralism as one of the few things European empires got right, and perhaps even something that

dependency and critical junctures to highlight the role of political conflict in shaping colonial and postcolonial legal institutions. See, e.g., Lerner, supra note 4; Mila Versteeg, History, Geography, and Rights: A Response to Chilton and Posner, 56 Va. J. Int'l L. 501, 504–05 (2016).

[8] Cf. Mark Brown, "An Unqualified Human Good"? On Rule of Law, Globalization, and Imperialism, 43 Law & Soc. Inquiry 1391, 1405–09 (2018) (surveying scholarship on the link between colonial history and present-day rule-of-law initiatives).

[9] See infra notes 271–273.

[10] See infra note 272.

[11] See infra notes 273–282.

[12] See, e.g., Daniels et al., supra note 6, at 125; Ralf Michaels, Comparative Law by Numbers? Legal Origins Thesis, *Doing Business* Reports, and the Silence of Traditional Comparative Law, 57 Am. J. Comp. L. 765, 769 (2009) (describing the methodology of the legal origins theory); Daniel Oto-Peralías & Diego Romero-Ávila, The Distribution of Legal Traditions Around the World: A Contribution to the Legal-Origins Theory, 57 J. L. & Econ. 561, 570 (2014).

[13] See infra Section V.B.

multicultural democracies might emulate today.[14] The history uncovered in this Article offers a grimmer message: that pluralism itself can serve as an instrument of imperial exploitation.

Indeed, this Article argues that the tendency to celebrate legal pluralism helped to justify Britain's turn toward a more authoritarian and exploitative form of colonial rule. As a result of the Seven Years' War (1754–63), Britain seized several territories from rival empires.[15] Spanish Florida became British West Florida and East Florida.[16] France gave up Quebec, Senegal, and the four "Ceded Islands" in the West Indies.[17] Two years later, the British East India Company (EIC) acquired the *diwani* of Bengal, which gave the Company the right to collect the region's tax revenues and the responsibility to administer civil justice.[18] Britain transplanted

[14] See infra notes 307–309.

[15] Fred Anderson, Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754–1766, at 505–06 (2000).

[16] West Florida encompassed parts of present-day Louisiana, Mississippi, and Alabama, as well as the Florida Panhandle. East Florida encompassed the rest of present-day Florida. Colin G. Calloway, The Scratch of a Pen: 1763 and the Transformation of North America 152 (2006).

[17] I.e., Dominica, Grenada, Saint Vincent and the Grenadines, and Tobago. Elizabeth Mancke, Another British America: A Canadian Model for the Early Modern British Empire, 25 J. Imperial & Commonwealth Hist. 1, 1 (1997). France also surrendered the Illinois Country, the region east of the Mississippi River and north of the Ohio River. Because the Quebec Act of 1774 merged Illinois into Quebec, this Article treats those two colonies as one, despite differences in how each was governed before 1774.

[18] This Article generally treats Bengal as if it were an ordinary British colony. Strictly speaking, Bengal was administered not by the British state but by the EIC, a chartered corporation with a long history of guarding its independence. See Philip J. Stern, The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India 63 (2011). By the 1760s, however, the Company was heavily regulated by Parliament, especially with respect to the law it administered in India. See Philip Lawson, The East India Company: A History 120–21 (1993); infra note 109. As a result, it makes sense to view British policy in India as the product of political conflict, not just the decision of a corporation united around a common vision of profit maximization. Moreover, even when Parliament did not intervene directly, Company policies often depended on internal battles between corporate factions with distinct political agendas—to the extent that shareholders' meetings became known as "little parliaments." H.V. Bowen, Revenue and Reform: The Indian Problem in British Politics 1757–1773, at 39 (1991). Shareholders and directors often wished to conform the Company's agenda to their own political commitments; at the same time, each group argued that its own political program would make the Company more profitable. As a result, questions of corporate governance became entangled with broader debates about the future of the British Empire. See Lucy S. Sutherland, The East India Company in Eighteenth-Century Politics 17 (1952); James Vaughn, The Politics of Empire: Metropolitan Socio-Political Development and the Imperial Transformation of the British East India Company, 1675–1775, at 507–73 (2009) (unpublished Ph.D. dissertation, University of Chicago) (on file with ProQuest). In light of

English law to most of these colonies. But in Bengal and Quebec, it adopted a policy of legal pluralism, partially introducing English law while continuing to administer Hindu and Islamic law in the former and French civil law in the latter.[19]

The kind of law that Britain imposed in each colony reflected different agendas for colonial development. Britain transplanted English law to Senegal, the West Indies, and the Floridas because politicians agreed that those colonies should develop anglicized societies and commercial economies.[20] When it came to Bengal and Quebec, however, politicians disagreed about what kind of development Britain should encourage.[21] On one hand, Tories wanted Britain to withhold English law in order to keep those colonies culturally isolated, economically dependent on Britain, and politically docile. Whigs, on the other hand, insisted that Britain should govern all colonies based on a global common law that would both reflect and promote the equality of all British subjects. Britain ultimately imposed pluralistic legal systems in Bengal and Quebec because Tories prevailed.[22]

Tories won in part because they reframed colonial legal policy as a moral issue.[23] Although many Tories were attracted to legal pluralism because of its political-economic consequences, they also argued that Britain had a duty to preserve the laws of its conquered subjects. Some Tories, such as Lord Chief Justice Mansfield, described the preservation of local laws as a humanitarian duty; others, such as Governor-General Warren Hastings, deployed the language of rights. But although the details of these arguments varied, they successfully divided the opposition and helped to legitimate a new form of empire that was culturally tolerant, authoritarian, and exploitative.

this entanglement, this Article elides the Company's independent significance in order to focus on the substance of arguments about colonial legal policy.

[19] Some scholars argue that "Hindu law" was itself a British invention. See, e.g., Nandini Bhattacharyya Panda, Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal 2 (2008). This Article uses "Hindu law" to describe what British officials thought they were administering.

[20] See infra Section III.B.

[21] For an explanation of Britain's political parties, see infra Part II, especially notes 115–117.

[22] See infra Section III.A.

[23] See infra Section IV.A.

I. THE PUZZLE OF LEGAL PLURALISM

Why would Britain—or any polity—encourage legal pluralism? Most theories of the state describe a ruthless quest for uniformity. Charles Tilly's landmark study of state formation begins with the following anecdote: "Some 3,800 years ago, [Hammurabi] conquered all the region's other city-states, and made them subject to Marduk, his own city's god. . . . By conquering, he gained the right and obligation to establish laws for all the people."[24] For Tilly, states don't just make war; they also make uniform laws and cults.[25] This tendency persisted in the modern era.[26] Max Weber, for instance, described the development of uniform rules as one of modernity's defining attributes.[27] And yet, as Brian Tamanaha has observed, "legal pluralism is everywhere."[28] Not only do nonstate norms continue to regulate many aspects of society, but states themselves often administer multiple kinds of law.[29] If states lust after legal uniformity, why do they so rarely attain it?

Existing explanations fall into three broad categories. The first is that legal pluralism emerges when states are too weak to impose uniform laws[30]—or, to switch perspectives, when minority groups are strong enough to make states recognize their customs.[31] The difficulty of

[24] Charles Tilly, Coercion, Capital, and European States, AD 990–1990, at 1 (1992).

[25] Daryl J. Levinson, Incapacitating the State, 56 Wm. & Mary L. Rev. 181, 196 (2014).

[26] See, e.g., James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed 4–5 (1998).

[27] Max Weber, Economy and Society: An Outline of Interpretive Sociology 694–704 (Guenther Roth & Claus Wittich eds., 1978). According to Weber, "legal particularisms" persist in modern law, but only on a contractual basis that the state makes available to all. See Anthony T. Kronman, Max Weber 108–12 (1983).

[28] Tamanaha, supra note 3, at 376.

[29] See, e.g., Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 40–41 (1983).

[30] See, e.g., Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 38–39 (1983); Jean-Laurent Rosenthal & R. Bin Wong, Before and Beyond Divergence: The Politics of Economic Change in China and Europe 32–33 (2011); Richard J. Ross & Philip Stern, Reconstructing Early Modern Notions of Legal Pluralism, *in* Legal Pluralism and Empires, supra note 3, at 109, 112–13; see also Laura F. Edwards, The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South 4–6 (2009) (arguing that in the antebellum American South, "[p]roponents of state law . . . aspired to create a unified body of law" but were frustrated by "relatively weak" state governments).

[31] See, e.g., Hendrik Hartog, Pigs and Positivism, 1985 Wis. L. Rev. 899, 935.

transplanting laws from one culture to another can further strain state capacity.[32]

A second explanation distinguishes "ordinary" states, which pursue uniform laws, from empires, which do not.[33] For some scholars, this is just a special version of the state-weakness explanation: empires lack the strength to impose uniform laws on their colonies.[34] Other accounts describe legal pluralism as a benefit that empires enjoy: it is what allows metropolitan elites to exploit the unhappy periphery.[35] Either way, pluralism is part of what makes empires *feel* imperial.[36] To be sure, the contours

[32] See William Twining, Normative and Legal Pluralism: A Global Perspective, 20 Duke J. Comp. & Int'l L. 473, 509 (2010). Comparative lawyers continue to debate the feasibility of legal transplants. See generally John W. Cairns, Watson, Walton, and the History of Legal Transplants, 41 Ga. J. Int'l & Comp. L. 637, 639 (2013) (describing this debate). One view, associated especially with Alan Watson, argues that transplantation is usually feasible even between societies with different cultures or levels of economic development. Alan Watson, Legal Transplants: An Approach to Comparative Law 55 (2d ed. 1974). An opposing view, often ascribed to Montesquieu, insists that because law is rooted in specific cultural or economic conditions, transplantation is typically difficult, impossible, or undesirable. See Montesquieu, The Spirit of the Laws 8–9 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds., 1989) (1748); Brian Z. Tamanaha, The Third Pillar of Jurisprudence: Social Legal Theory, 56 Wm. & Mary L. Rev. 2235, 2241–42 (2015) (describing this view). Many scholars today adopt an intermediate position that seeks to identify the conditions that make successful transplants possible. See, e.g., Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, The Transplant Effect, 51 Am. J. Comp. L. 163, 189 (2003); Emily Kadens, The Myth of the Customary Law Merchant, 90 Tex. L. Rev. 1153, 1159, 1161–62 (2012).

[33] See, e.g., Karen Barkey, Empire of Difference: The Ottomans in Comparative Perspective 83 (2008) ("[E]mpires involve not uniformity but diversity of rule."); Burbank & Cooper, supra note 1, at 8 ("The concept of empire presumes that different peoples within the polity will be governed differently."); Palmer, supra note 3, at 4; cf. Mark J. Roe & Jordan I. Siegel, Finance and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in *The Law–Growth Nexus*, 47 J. Econ. Literature 781, 785 (2009) ("Britain was running an empire, not spreading its institutions wherever it could.").

[34] See, e.g., Alison Games, The Web of Empire: English Cosmopolitans in an Age of Expansion 1560–1660, at 7, 291 (2008); Eliga H. Gould, Among the Powers of the Earth: The American Revolution and the Making of a New World Empire 27–28 (2012).

[35] See, e.g., Pekka Hämäläinen, The Comanche Empire 349–50 (2008); Timothy Parsons, The Rule of Empires: Those Who Built Them, Those Who Endured Them, and Why They Always Fall 15 (2010).

[36] See Christina Duffy Burnett & Burke Marshall, Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 1, 11–12 (Christina Duffy Burnett & Burke Marshall eds., 2001) (asking why it seems "imperialistic to withhold uniformity"); cf. Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 4 (2004) ("Many staples of the American constitutional order, such as jury trials, may be poorly suited to the long-term occupation of territories that have experienced legal traditions that do not employ the full range of Anglo-American institutions. If the Constitution always requires such institutions to be implemented in federal

of legal pluralism may change over time.[37] But legal pluralism of some sort is simply a fact of imperial life—the existence of which lies mostly beyond the control of empires themselves.[38]

Finally, a third group of explanations suggests that legal pluralism emerges because states believe they have a duty to preserve it.[39] That duty might arise from domestic law,[40] international law,[41] or other moral commitments,[42] particularly those rooted in the Enlightenment.[43]

These three explanations are not mutually exclusive.[44] In fact, they share a common feature: all three explanations downplay the importance of political decision-making. States pursue uniformity unless they are empires; until they are frustrated by their own weakness; or until they embrace a commitment to toleration. These explanations certainly explain

territory . . . that could effectively prevent many kinds of acquisitions by making it difficult or impossible to govern the territory once it is acquired.").

[37] Lauren Benton, for instance, describes an unavoidable transition, beginning in "the late eighteenth century," from the "fluid jurisdictional politics" of early modern empires to "state-centered legal pluralism." Lauren Benton, Law and Colonial Cultures: Legal Regimes in World History, 1400–1900, at 6, 147–49, 259 (2002).

[38] See id. at 3 (describing legal pluralism as a "universal feature of the colonial order"). Explanations that focus on empire have much in common with the "endowment" or "institutional transplants" theory, which seeks to explain why European empires "tried to replicate European institutions" in some colonies but not others. See Daron Acemoglu, Simon Johnson & James A. Robinson, The Colonial Origins of Comparative Development: An Empirical Investigation, 91 Am. Econ. Rev. 1369, 1370 (2001); Stanley L. Engerman & Kenneth L. Sokoloff, Factor Endowments, Inequality, and Paths of Development Among New World Economies, 3 Economía 41, 41–44 (2002). The endowment theory is discussed infra Section V.A.

[39] See, e.g., Jeffrey A. Redding, Dignity, Legal Pluralism, and Same-Sex Marriage, 75 Brook. L. Rev. 791, 827–28 (2010).

[40] See, e.g., Angela R. Riley, Good (Native) Governance, 107 Colum. L. Rev. 1049, 1050 (2007).

[41] See, e.g., Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 Tex. L. Rev. 1, 166 & n.1144 (2002).

[42] See, e.g., Víctor M. Muñiz-Fraticelli, The Structure of Pluralism: On the Authority of Associations 25–28 (2014).

[43] See, e.g., Sharon Korman, The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice 33–35 (1996); Philip Lawson, The Imperial Challenge: Quebec and Britain in the Age of the American Revolution 139 (1990); Hannah Weiss Muller, Bonds of Belonging: Subjecthood and the British Empire, 53 J. Brit. Stud. 29, 46 (2014).

[44] See, e.g., Amy Chua, Day of Empire: How Hyperpowers Rise to Global Dominance—and Why They Fall, at xxxiii–iv, 192–227 (2007) (tracing the history of British pluralism and intolerance in India, and attributing eventual loss of the colony to the failure of pluralism); P.J. Marshall, The Making and Unmaking of Empires: Britain, India, and America c. 1750–1783, at 205–06 (2005); Oto-Peralías & Romero-Ávila, supra note 5, at 11.

some instances of legal pluralism.[45] But as the following Parts will show, they fail to account for much of the British Empire's legal policy.

II. SEEKING A COMMON LAW

The last Part summarized three common explanations for legal pluralism. Those explanations cannot account for early modern Britain's approach to colonial law. In the seventeenth and early eighteenth centuries, legal pluralism was neither inevitable nor a necessary feature of imperial rule. From the Restoration in 1660 through the middle of the eighteenth century, Britain generally tried to extend English law throughout its empire.[46] And although some British politicians eventually defended legal pluralism by appealing to toleration, many eighteenth-century policymakers considered it perfectly tolerant—and consistent with emerging Enlightenment theories of diversity—to impose English law on non-English subjects.[47]

A. The Expansion of English Law

English law had a long tradition of pluralism.[48] Common law courts, Chancery, and Admiralty all applied different substantive and procedural rules,[49] and the common law itself made room for local customs.[50] At the

[45] For example, in ancient Rome, legal pluralism was indeed an inherent part of imperial rule. See Clifford Ando, Pluralism and Empire: From Rome to Robert Cover, 1 Critical Analysis L. 1, 9 (2014). The legal pluralism of medieval European law resulted in part from the weakness of monarchs vis-à-vis local lords and the Church. See R.C. van Caenegem, Legal History: A European Perspective 119 (1991). And constitutional and liberal commitments to toleration underpin the recognition of religious law in Western democracies today. See, e.g., Michael A. Helfand, Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders, 86 N.Y.U. L. Rev. 1231, 1232–35 (2011).

[46] See infra Section II.A.

[47] See infra Section II.B.

[48] See, e.g., 1 William Blackstone, Commentaries *64–*92; Hulsebosch, supra note 7, at 58; Ken MacMillan, Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576–1640, at 25–26 (2006).

[49] See Daniel Klerman, Jurisdictional Competition and the Evolution of the Common Law, 74 U. Chi. L. Rev. 1179, 1186–87 (2007).

[50] J.G.A. Pocock, The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect 30–31 (rev. ed. 1987). For instance, intestate property in Kent passed by gavelkind (a system of partible inheritance), in contrast to the general rule of primogeniture. Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire, at xiii (2004); George L. Haskins, The Beginnings of Partible Inheritance in the American Colonies, 51 Yale L.J. 1280, 1299 (1942).

same time, the pursuit of a unified legal system was a crucial element of early modern English state-building.[51] By the eighteenth century, the Crown, Parliament, and the courts had cabined the power of local customs[52] and defined increasingly clear, hierarchical relationships among England's many courts.[53]

England also sought to unify its law geographically, starting with Wales[54] and Ireland.[55] (Scotland bucked the trend, as Section B explains.) Contemporaries generally viewed these extensions of English law as successful. As Sir Edward Coke wrote in 1628, the "union of lawes is the best meanes for the unity of countries."[56] The Crown was slower to export English law to the American colonies. Some jurists, including Coke, raised jurisprudential and political objections to transplanting the common law overseas,[57] and at first the English state lacked the capacity to control the laws of North America.[58] But by the end of the seventeenth

[51] See, e.g., Bilder, supra note 50, at 31–32; Michael Braddick, State Formation in Early Modern England, c. 1550–1700, at 55 (2000).

[52] See E.P. Thompson, Custom, Law and Common Right, *in* Customs in Common 97, 97–98 (1991); see also Haskins, supra note 50, at 1299 (noting sixteenth-century statutes limiting the scope of Kentish land law); Terry Reilly, *King Lear*: The Kentish Forest and the Problem of Thirds, 26 Okla. City U. L. Rev. 379, 383 (2001) (noting "repeated efforts . . . to abolish gavelkind"). The declining vitality of local custom reflected broader European trends. See James Q. Whitman, Why Did the Revolutionary Lawyers Confuse Custom and Reason?, 58 U. Chi. L. Rev. 1321, 1322 (1991).

[53] See John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 196, 334–35, 361–62 (2009); see also Paul D. Halliday, Habeas Corpus: From England to Empire 62–63 (2010) (arguing that early modern England exhibited "a single legal culture of many intertwined parts").

[54] Laws in Wales Act 1542, 35 Henry 8, c. 26; Laws in Wales Act 1535, 27 Henry 8, c. 26; Matthew Lockwood, The Conquest of Death: Violence and the Birth of the Modern English State 34 (2017).

[55] Hans S. Pawlisch, Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism 55 (1985); F.H. Newark, Notes on Irish Legal History, 7 N. Ir. Legal Q. 121, 126 (1947).

[56] 1 Edward Coke, The First Part of the Institutes of the Lawes of England 141.b (London, Garland Publishing, Inc. 1979) (1628). That maxim was repeated well into the eighteenth century. See, e.g., 1 Robert Chambers, A Course of Lectures on the English Law Delivered at the University of Oxford 1767–1773, at 276–77 (Thomas M. Curley ed., 1986); Matthew Hale, The History of the Common Law 58 (Dublin, James Moore 1792) (1713).

[57] Daniel J. Hulsebosch, The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence, 21 Law & Hist. Rev. 439, 439, 448–49, 454–58 (2003).

[58] See William E. Nelson, The Common Law in Colonial America: The Chesapeake and New England, 1607–1660, at 6–7 (2008). England developed a centralized imperial state only in the second half of the seventeenth century. Compare Abigail L. Swingen, Competing Visions of Empire: Labor, Slavery, and the Origins of the British Atlantic Empire 32–55 (2015) (pointing to the Western Design of 1656 as a key moment of centralization), with Steve Pincus

century, Crown officials and imperial agents had started to bring colonial laws in line with those of England.[59]

Much of this work fell to the Privy Council, which heard appeals from colonial cases. Privy Counsellors recognized that colonial laws would necessarily diverge from their metropolitan source, in response both to local conditions and to the perceived needs of a more vigorous royal prerogative on the imperial frontier.[60] At the same time, however, the Privy Council saw English legal protections as a crucial attraction for potential settlers and as a valuable instrument of centralization.[61] Ultimately, the Privy Council reconciled these concerns by requiring that colonial laws not be "repugnant" to those of England.[62] In doing so, it laid the framework for an often contentious debate about the precise scope of English liberties abroad—but one that assumed a jurisprudential unity between England and its colonies.[63]

This framework applied even to places with substantial non-English populations, such as New York, which England captured from the Netherlands in 1664.[64] Even though the colony's articles of capitulation had provided for the limited survival of Dutch law,[65] New York's conquerors quickly began working to suppress its influence. Limited state capacity and local resistance sometimes made for slow progress, but "the common law began to assume primacy [in New York City] within a year of the English conquest,"[66] and by 1691, authorities could declare the common

& James Robinson, Wars and State-Making Reconsidered: The Rise of the Developmental State, 71 Annales 9, 37 (2016) (arguing that England "became an imperial state" when it created the Board of Trade in 1696).

[59] William E. Nelson, The Common Law in Colonial America: The Middle Colonies and the Carolinas, 1660–1730, at 3 (2013).

[60] Daniel J. Hulsebosch, English Liberties Outside England: Floors, Doors, Windows, and Ceilings in the Legal Architecture of Empire, *in* The Oxford Handbook of English Law and Literature, 1500–1700, at 747, 766–68 (Lorna Hutson ed., 2017). Of course, the royal prerogative was itself a central part of English law. Id.

[61] See William E. Nelson, The Common Law in Colonial America: The Chesapeake and New England, 1660–1750, at 132 (2016); Hulsebosch, supra note 60, at 761–62, 766–67.

[62] Bilder, supra note 50, at 2; Joseph Henry Smith, Appeals to the Privy Council from the American Plantations 656 (1950).

[63] See Richard J. Ross, The Career of Puritan Jurisprudence, 26 Law & Hist. Rev. 227, 231–32 (2008).

[64] See Hulsebosch, supra note 7, at 48.

[65] Specifically, rules relating to inheritance and the interpretation of preconquest contracts. Jaap Jacobs, New Netherland: A Dutch Colony in Seventeenth-Century America 103 (Brill 2005).

[66] Nelson, supra note 59, at 43–45.

law fully in force.[67] In India, where the East India Company operated trading settlements at Calcutta, Madras, and Bombay, the Company sought to align its courts with English models.[68] This effort sometimes demanded doctrinal innovation. For example, in order to accommodate testimony by non-Christian litigants, courts had to expand the range of permissible oaths.[69] But British officials generally found it more appealing to modify English law than to restrict the places or parties to which it applied.

Britain's ambition of extending English law abroad was not always fully realized.[70] But by the early eighteenth century, the British state had adopted a policy of seeking to apply English law in all English courts, whatever their location.[71]

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[67] See Herbert A. Johnson, The Advent of Common Law in Colonial New York, *in* Essays on New York Colonial Legal History 37, 37–38 (1981).

[68] Mitch Fraas, Making Claims: Indian Litigants and the Expansion of the English Legal World in the Eighteenth Century, 15 J. Colonialism & Colonial Hist. (2014), https://muse.jhu.edu/article/542520.

[69] See id.

[70] See, e.g., Gagan D.S. Sood, Sovereign Justice in Precolonial Maritime Asia: The Case of the Mayor's Court of Bombay, 1726–1798, 37 Itinerario 46, 55 (2013). When East India Company courts departed from English law, they drew objections both from London lawyers and from Indian litigants. Compare Petition of the Gentoo Merchants in Bombay ([1746]), IOR/H/432, at 45, 47–48 (on file with BL) (complaining that the Bombay Mayor's Court had ignored English law), with Letter from John Browne, EIC Counsel, to President & Council of Madras (Feb. 3, 1738), IOR/H/427, at 27–28 (on file with BL) (reminding local officials that they were bound to apply English law to Indian litigants).

[71] By the 1760s, a handful of British possessions—Newfoundland, Gibraltar, and Minorca—lacked English law. See Jack P. Greene, 1759: The Perils of Success, *in* Revisiting 1759, supra note 7, at 95, 97. But these exceptions did not reflect a policy of accepting or encouraging legal pluralism. Newfoundland was "not a colony but rather a seasonal station for the migratory fishery"; even so, its blend of customary and maritime law "developed within the common law tradition." Jerry Bannister, The Rule of the Admirals: Law, Custom, and Naval Government in Newfoundland, 1699–1832, at 4, 15 (2003). Gibraltar and Minorca were essentially military garrisons. Peter Marshall, The Incorporation of Quebec in the British Empire, 1763–1774, *in* Of Mother Country and Plantations: Proceedings of the Twenty-Seventh Conference in Early American History 42, 44 (Virginia Bever Platt & David Curtis Skaggs eds., 1971) [hereinafter Of Mother Country and Plantations]; cf. Lawson & Seidman, supra note 36, at 203 ("[S]mall territories, such as Guam, Wake, and Midway, whose acquisition [by the United States] can be constitutionally validated by the naval power [of U.S. Const. art. I, § 8], are not the stuff of which colonial empires are made."). Minorca did have a sizable civilian population governed by Spanish law, but British observers treated that situation as the regrettable consequence of the island's terms of cession in 1713, and they periodically proposed ways to anglicize local courts. See Desmond Gregory, Minorca, the Illusory Prize: A History of the British Occupation of Minorca Between 1708 and 1802, at 86 (1990); Stephen Conway, The Consequences of Conquest: Quebec and British Politics, 1760–1774, *in* Revisiting 1759, supra note 7, at 141, 147–48.

B. Legal Uniformity in an Age of Enlightenment

The story so far has focused on the period up to the 1740s. Some scholars have described that decade as a turning point in European thinking about legal pluralism. In particular, the publication in 1748 of Montesquieu's *Spirit of the Laws* (1748) is supposed to have inspired a new skepticism about transplanting laws from one society to another.[72] Perhaps the influence of Montesquieu, and of sociological jurisprudence more broadly, explains Britain's turn toward legal pluralism in the second half of the eighteenth century?

This Section suggests not. To the contrary, many of the Britons who were most familiar with Montesquieu's work in the 1740s and early 1750s continued to believe that English law could productively anglicize in the British Empire. This belief was on full display in efforts to anglicize Scots law in the 1740s, and it remained a common premise of debates about legal pluralism after the Seven Years' War. To be sure, Montesquieu's work did shape eighteenth-century discussions of legal pluralism,[73] but it was not enough to inspire Britain's change in policy.[74]

Some of the earliest British readings of *Spirit of the Laws* came in the context of efforts to forge a more thoroughgoing union between England and Scotland. Between 1603, when the Scottish and English crowns were joined in the person of James VI/I, and 1707, when the two kingdoms formed a legislative union, politicians repeatedly tried to unify English and Scots laws.[75] When those efforts failed, English politicians decided that they could accept the survival of Scots law because it had already started to converge with that of England.[76] Parliament periodically tried

[72] See Tamanaha, supra note 32, at 2241–44.

[73] See, e.g., Jeremy Bentham, Place and Time (1782), *in* Selected Writings 152, 156 n.(a) (Stephen G. Engelmann ed., 2011) (describing *The Spirit of the Laws* as a watershed for imperial lawmaking).

[74] Cf. Richard Bourke, Edmund Burke and the Politics of Conquest, 4 Mod. Intell. Hist. 403, 422 (2007) (showing that Montesquieu influenced Edmund Burke's approach to legal pluralism, but that Burke ultimately rejected some of Montesquieu's conclusions). Commentators have often observed that Montesquieu's work can lend itself to varied interpretations. See, e.g., Jacob T. Levy, Rationalism, Pluralism, and Freedom 147 (2015).

[75] See Brian P. Levack, The Proposed Union of English Law and Scots Law in the Seventeenth Century, 20 Jurid. Rev. 97, 97 (1975); A.J. MacLean, The 1707 Union: Scots Law and the House of Lords, 4 J. Legal Hist. 50, 67–68 (1983).

[76] See J.D. Ford, The Legal Provisions in the Acts of Union, 66 Cambridge L.J. 106, 117, 139–40 (2007).

to hasten the process,[77] but it generally accepted that Scots law was there to stay.

In the 1740s, however, many British politicians reconsidered their toleration of Scottish legal pluralism. A failed Jacobite rebellion in 1745 had enjoyed disproportionate support in Scotland,[78] and the British ministry concluded that the surest way to prevent future uprisings was to integrate Scotland more fully with England.[79] In part, that meant anglicizing Scots law.[80] The ministry's proposals included abolishing feudal courts;[81] eliminating feudal land tenures;[82] and introducing English-style grand juries,[83] circuit courts,[84] and evidentiary rules.[85] These were relatively minor changes, but reformers described them as the first step toward a broader harmonization of British law. "I think it impossible for England and Scotland to be on a Right Foot" until they are on the "same Foot" with respect to "Law & Courts & the Administration of Justice," wrote one Scottish lawyer who supported the reforms.[86] A leading English statesman called this program a "Battle for our Constitution."[87] For Lord Chancellor Hardwicke, it was nothing less than a "Scotch Reformation."[88]

[77] See, e.g., Treason Act 1708, 7 Ann. c. 21 ("Whereas nothing can more conduce to the improving the Union of the Two Kingdom [sic] . . . than that the Laws of both Parts of Great Britain should agree . . . .").

[78] After the Glorious Revolution of 1688 forced James II into exile, his followers, known as Jacobites, periodically tried to regain the throne for him and his successors. See Daniel Szechi, The Jacobites: Britain and Europe, 1688–1788, at xxii, 12 (1994).

[79] See Linda Colley, Britons: Forging the Nation, 1707–1837, at 83–84 (2d ed. 1992); Allan I. Macinnes, Clanship, Commerce and the House of Stuart, 1603–1788, at 217–21 (1996).

[80] For the connection between legal pluralism and the 1745 rebellion, see Gould, supra note 34, at 27.

[81] Heritable Jurisdictions (Scotland) Act 1746, 20 Geo. 2 c. 43.

[82] The Tenures Abolition Act 1746, 20 Geo. 2 c. 50, abolished some feudal tenures, but others survived until 2004. See Abolition of Feudal Tenure (Scotland) Act 2000, (ASP 5).

[83] Charles Erskine, Lord Tinwald, The Alterations Proposed to Be Made in the Criminal Law of Scotland (Jan. 21, 1747), Add MS 35446, at 127 (on file with BL).

[84] Lord Hardwicke, Speech to the House of Lords (Feb. 17, 1747), *in* 14 The Parliamentary History of England, from the Earliest Period to the Year 1803, at 9, 18 (William Cobbett ed., London, T.C. Hansard 1813) [hereinafter Parliamentary History].

[85] Specifically, abolishing the requirement that evidence in capital cases be reduced to writing. Id. at 25.

[86] Letter from James Erskine, Lord Grange, to Lord Hardwicke (Mar. 1, 1747), Add MS 35446, at 148 (on file with BL).

[87] Paul Langford, A Polite and Commercial People: England 1727–1783, at 217–18 (1998).

[88] Letter from Lord Hardwicke to Duke of Cumberland (Apr. 16, 1747), Add MS 35589, at 211r (on file with BL).

Although some Scottish elites objected to this program,[89] others praised it as embodying Enlightenment theories of law and society.[90] The Scottish lawyer Sir John Dalrymple, for example, described Hardwicke's efforts as epitomizing the ideas of government that Montesquieu had recently expounded. Those ideas, Dalrymple suggested, led him to advocate for a greater unity between English and Scots law.[91] The Scottish judge Lord Kames, who, like Dalrymple, praised Montesquieu as "the greatest genius of the present age,"[92] considered it "an unhappy circumstance, that different parts of the same kingdom should be governed by different laws."[93] To be sure, Dalrymple and Kames both warned Parliament against immediately legislating legal uniformity.[94] But they also suggested that judges should help Scots law "decay by degrees" until it more closely resembled that of England.[95]

When reformers like Dalrymple and Kames considered the relationship between law and society, their principal conclusion was not that local conditions demanded the preservation of Scots law, but that laws and other institutions could reshape Scotland's customs, economy, and even

[89] See Bob Harris, Politics and the Nation: Britain in the Mid-Eighteenth Century 14 (2002); Colin Kidd, Union and Unionisms: Political Thought in Scotland, 1500–2000, at 178–89, 210 (2008).

[90] See, e.g., Letter from David Hume to Montesquieu (Apr. 10, 1749), *in* 1 The Letters of David Hume 133, 134 (J.Y.T. Greig ed., 1969) (1932).

[91] When Dalrymple wrote a history of feudal law in Britain, he described his project as seeking to show "how much greater [the] similarity [between Scots and English law] might yet be made." Letter from Sir John Dalrymple to Lord Hardwicke (Feb. 14, 1756), Add MS 35449, at 91 (on file with BL). Dalrymple took his epigraph from *The Spirit of the Laws*, called Montesquieu "the greatest genius of our age," and emphasized that Montesquieu himself had provided feedback on the project. John Dalrymple, Essay Towards a General History of Feudal Property in Great Britain, at iv (4th ed. London, A. Millar 1759); see also Letter from Sir John Dalrymple of Cousland, 4th baronet, to Charles Yorke, Solicitor Gen. (Apr. 12, 1757), Add MS 35635, at 100 (on file with BL) (noting the assistance Dalrymple received "from the late President Montesquieu").

[92] 1 Henry Home, Lord Kames, Sketches of the History of Man 163 (James A. Harris ed., 2007) (1788).

[93] Henry Home, Lord Kames, Historical Law-Tracts, at xii (2d ed. Edinburgh, Printed by A. Kinkaid for A. Millar, A. Kincaid & J. Bell 1761). For similarities between Kames's and Montesquieu's approaches, see David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain 147–49 (1989).

[94] Dalrymple, supra note 91, at viii–ix; Kames, supra note 93, at xii.

[95] Dalrymple, supra note 91, at ix; see also Lieberman, supra note 93, at 159–60 (explaining Kames's preference for judicial rather than legislative change); Peter Stein, Legal Evolution: The Story of an Idea 25 (1980) (describing Kames, Dalrymple, and Charles Yorke as writing to support the unification of English and Scots law).

climate.[96] "Mankind are undoubtedly the same in their natural State in every Climate, every Country, and every Age," the politician John Perceval observed.[97] "It is their respective constitutions or different modes of government which create all the difference that can be found between one Nation and another . . . ."[98] Instead of treating racial, cultural, or environmental factors as rigid determinants of human difference, British commentators instead looked to law and government as potentially transformative.[99]

This point bears emphasizing. Scholars have rightly highlighted the centrality of racism and racial categories for colonialism, and especially for shaping British colonial law.[100] But in the 1760s and 1770s, many British officials took a more flexible view of the difference between European and non-European populations.[101] The well-connected colonial administrator Maurice Morgann made this clear in a proposal he prepared for the gradual emancipation of slaves. Although Morgann posited a "corporeal distinction" between Europeans and Africans, he insisted that "experience, and the nature of man . . . forbid us to suppose that there is any original or essential difference in the mental part."[102] For Morgann, this mix of mental similarity and physical diversity offered Britain a unique opportunity. Because Africans fared better than Europeans in hot climates, Morgann argued, Britain should turn over its southern colonies to free black subjects, who would occupy roles identical to those of their white counterparts to the north. Morgann's plan hinged on the ability of shared institutions to elide racial differences: white and black subjects "will talk the same language, read the same books, profess the same

[96] See Fredrik Albritton Jonsson, Enlightenment's Frontier: The Scottish Highlands and the Origins of Environmentalism 69–89 (2013).

[97] John Perceval [later 2d Earl of Egmont], Draft of a Speech on the Proposed Feudal Tenures Bill ([1746?]), Add MS 47097, at 1, 2 (on file with BL).

[98] Id.

[99] See Dror Wahrman, The Making of the Modern Self: Identity and Culture in Eighteenth Century England 86–87 (2004).

[100] See, e.g., Elizabeth Kolsky, Colonial Justice in British India: White Violence and the Rule of Law 4–5 (2010); Kunal M. Parker, The Historiography of Difference, 23 Law & Hist. Rev. 685, 688 (2005).

[101] Cf. Jennifer Pitts, Empire and Legal Universalisms in the Eighteenth Century, 117 Am. Hist. Rev. 92, 95 (2012) (noting the "striking openness" of eighteenth-century thinkers "to the possibility of shared legal frameworks and mutual obligations between Christians and non-Christians, Europeans and non-Europeans").

[102] [Maurice Morgann], A Plan for the Abolition of Slavery in the West Indies 5 (London, William Griffin 1772).

religion, *and be fashioned by the same laws* . . . ."[103] Like Hardwicke's "Scotch Reformation," Morgann's proposal assumed that English institutions could transform anyone, anywhere, into "assimilated, productive, loyal Britons."[104]

Not everyone shared Morgann's faith in institutions. By the 1760s, some writers had already started to assert more rigid racial categories.[105] Nonetheless, shortly before Britain adopted a policy of legal pluralism in Quebec and Bengal, some of Britain's most prominent judges, lawyers, and politicians believed that it was possible, prudent, and just to impose English law on non-English subjects.

III. LEGAL POLICY AND COLONIAL DEVELOPMENT

Until the middle of the eighteenth century, Britain pursued a unified imperial law. The details of that law differed by jurisdiction, but lawyers and litigants across the empire saw themselves as participating in a common jurisprudence and a shared set of institutions. That changed in the 1760s. During the Seven Years' War, Britain conquered several territories from France and Spain, and shortly afterwards, the East India Company gained control of the taxes and civil administration (*diwani*) of Bengal.[106] In most of these new colonies—Senegal, the Ceded Islands, and the Floridas—Britain continued its earlier policy of transplanting English law.[107] But in Bengal, the East India Company began administering Hindu and Islamic law,[108] a policy that Parliament later confirmed.[109] In Quebec,

[103] Id. at 25 (emphasis added).

[104] See Christopher Leslie Brown, Moral Capital: Foundations of British Abolitionism 219 (2006).

[105] See Peter Silver, Our Savage Neighbors: How Indian War Transformed Early America 116–23 (2008) (arguing that a category of "whiteness" began to emerge in North America in the 1760s); Kathleen Wilson, Rethinking the Colonial State: Family, Gender, and Governmentality in Eighteenth-Century British Frontiers, 116 Am. Hist. Rev. 1294, 1315–16 (2011) (describing shifting racial distinctions in the British West Indies). Compare F.T.H. Fletcher, Montesquieu and English Politics (1750–1800), at 95–96 (1939) (noting David Hume's emphasis on the primacy of institutions over climate in the 1740s), with Silvia Sebastiani, Hume versus Montesquieu: Race Against Climate, *in* The Scottish Enlightenment: Race, Gender, and the Limits of Progress 23, 24 (2013) (showing that in the early 1750s, Hume tempered his emphasis on institutions by suggesting "polygenetic differentiation between human groups").

[106] See supra notes 15–19 and accompanying text.

[107] See infra Section III.B.

[108] Travers, supra note 7, at 117–18.

[109] The Regulating Act, 1773, 13 Geo. 3 c. 63, authorized the Crown to establish in Calcutta a Supreme Court of Judicature (§ 13), which was to have jurisdiction only over "British Subjects" (§ 14) and others who voluntarily consented to its jurisdiction (§ 16). After conflicts

Britain initially imposed English law, but in 1774 Parliament passed the Quebec Act, which restored French civil law while leaving English criminal law in place.[110] In short, Britain inaugurated a limited policy of legal pluralism.[111]

Britain's change in policy reflected a new set of development priorities.[112] Policymakers believed that colonies that enjoyed English law

erupted over the court's jurisdiction, Parliament passed another statute in 1781 clarifying that India would have a "dual judicial system" and further limiting the reach of English law. M.P. Jain, Outlines of Indian Legal History 120–29 (3d ed. 1972).

[110] The Quebec Act, 1774, 14 Geo. 3 c. 83, § 11 (repealed 1791), had four other major provisions. First, it accommodated Quebec's Catholic majority by guaranteeing toleration of Catholicism in the colony and codifying the Catholic Church's right to collect tithes. Id. § 5. Second, the Act restored the seigneurial, i.e., feudal, system of land tenure, abrogating the British township system that had been erected in 1763. Id. §§ 8, 10. Third, the Act provided for a Crown-appointed governor, who would govern with an appointed legislative council—but not an elected assembly. Id. § 12. Finally, the Act expanded Quebec's boundaries to include much of present-day Ontario, Illinois, Indiana, Michigan, Ohio, Wisconsin, and Minnesota. Id. § 1.

[111] The nature of legal pluralism varied by colony. Bengal operated on a "parallel jurisdictional model" that sought to segregate Europeans from Indians. In contrast, all inhabitants of Quebec were subject to an "integrated" model that combined English criminal law and French civil law. The difference between parallel and integrated models of legal pluralism can have important implications for subsequent development outcomes. For instance, Ronald Daniels, Michael Trebilcock, and Lindsey Carson argue that modern rule-of-law outcomes in former British colonies depend partly on the extent to which indigenous and English law were integrated into a single system. Daniels et al., supra note 6, at 156–73. Daniels et al. express no view as to why Britain might have adopted different policies for each colony. See id. at 129 n.68.

[112] Britain's turn toward legal pluralism had earlier roots. In the 1740s, Tories and conservative Whigs began to express some of the same concerns that later drove Tories to favor legal pluralism. In particular, many politicians began to worry that British society had grown licentious and disorderly. See Sarah Kinkel, Disorder, Discipline, and Naval Reform in Mid-Eighteenth-Century Britain, 128 Eng. Hist. Rev. 1451, 1460 (2013). Around the same time, some East India Company officials began campaigning to exclude Indian litigants from Company courts, with limited success. See Arthur Mitchell Fraas, "They Have Travailed Into a Wrong Latitude": The Laws of England, Indian Settlements, and the British Imperial Constitution 1726–1773, 336–81 (2011) (unpublished Ph.D. dissertation, Duke University), http://hdl.handle.net/10161/3954 [https://perma.cc/C4DX-M5YL]. It was only in the 1760s, however, that calls to limit the reach of English law achieved widespread political appeal or practical effect. In part, this reflected the growing strength of radical Whiggery during the 1760s, which led Tories to seek new ways to restore order to the empire. See Justin du Rivage, Revolution Against Empire: Taxes, Politics, and the Origins of American Independence 78–82 (2017); Vaughn, supra note 18, at 379. Around the same time, changes in the nature of commerce gave courts a more salient role in governing economic transactions, so that legal policy became an increasingly effective way to manipulate political-economic outcomes. See Christian R. Burset, A Common Law? Legal Pluralism in the Eighteenth-Century British Empire 178–237 (2018) (unpublished Ph.D. dissertation, Yale University) (on file with the Virginia Law Review Association). These changes occurred just as Britain conquered several new colonies—

would grow to resemble England itself, including its vibrant commercial economy and robust public sphere. Legally plural colonies, however, would become politically docile and develop extractive economies. Legal pluralism's political-economic implications made it controversial, and the preservation of Hindu and Islamic law in Bengal and of French law in Quebec depended on the outcome of a divisive political contest between rival parties with conflicting ideas about what kind of colonies Britain should foster.[113] In contrast, the decision to extend English law to the Floridas, the West Indies, and Senegal was uncontroversial because politicians broadly agreed about what kind of colonies they should become.[114]

A. The Purpose of Legal Pluralism

Legal pluralism in Bengal and Quebec emerged from a fight between Tories and Whigs about the future of the British Empire.[115] In eighteenth-

a confluence of events that offered a uniquely potent opportunity to deploy legal pluralism as a policy tool.

[113] See infra Section III.0.

[114] See infra Section III.B.

[115] A note on partisan labels. Eighteenth-century writers did not always agree about how to describe political divisions. In part, this was because they disagreed about what it meant to belong to a party. See, e.g., Richard Bourke, Empire & Revolution: The Political Life of Edmund Burke 196–97 (2015) (contrasting Bolingbroke's view of parties as evil with Burke's account of "party [as] a means of principled association"); John Brewer, Party Ideology and Popular Politics at the Accession of George III 39–47 (1976). In addition, party labels changed their meaning over the course of the century. See Ian R. Christie, Party in Politics in the Age of Lord North's Administration, 6 Parliamentary Hist. 47, 49–50 (1987). Accordingly, the labels used here reflect recent historiography rather than contemporary usage, although contemporaries would have recognized the groups these labels describe.

Historians have identified three ideological coalitions that structured politics in later-eighteenth-century Britain. The first, known as "radical Whigs" or "Patriots," included the leaders of the American Revolution and sympathetic Britons like William Pitt (later the Earl of Chatham). The second group, known as "establishment" or "moderate" Whigs, was led in the late 1760s and 1770s by the second Marquess of Rockingham; Edmund Burke was its intellectual heavyweight. Finally, there was a coalition that historians have variously dubbed "authoritarian reformers," "authoritarian Whigs," or "neo-Tories." Its adherents included Lord Chief Justice Mansfield and George Grenville, who crafted the Stamp Act. See Sarah Kinkel, The King's Pirates? Naval Enforcement of Imperial Authority, 1740–76, 71 Wm. & Mary Q. 3, 8–10 (2014); Vaughn, supra note 18, at 5. In general, radical and establishment Whigs were skeptical of legal pluralism, while neo-Tories supported it. Accordingly, this Article often lumps together the first two groups as "Whigs." See Welland, supra note 7, at 177 (discussing the alliance on Quebec policy between Chatham and Rockingham as well as the development of "new Whigs," which included both men's factions). This Article uses "Tory" for the third group because the "authoritarian" label, while accurate, may inspire misleading comparisons to more recent authoritarian regimes.

century Britain, parties were loose coalitions, each of which had a distinctive colonial agenda.[116] As in the present-day United States, parties were not ideologically uniform, but their members shared many of the same goals and commitments.[117] These partisan divisions shaped eighteenth-century debates about colonial law.

Tories took a pessimistic view of Britain's recent history. Although Britain had just defeated France and Spain in a global war, Tories worried that the conflict had left Britain fiscally and morally exhausted. Taxes were too low, spending was too high, and society had lost its respect for authority. To remedy these ills, Tories proposed a wide-ranging restoration of fiscal, social, and political discipline.[118] Their program depended on extracting as much revenue as possible from Britain's colonists while keeping them too weak to challenge London's supremacy.[119]

Whigs worried less about colonial power. They believed that the empire's prosperity depended on colonists' ability to buy British manufactured goods. Accordingly, Whigs wanted to maximize the wealth and number of Britain's colonial subjects.[120] Whigs agreed with Tories that unfettered growth might eventually make colonial subjects too rich to control,[121] but Whigs either dismissed that concern as too far-off to worry

[116] See, e.g., du Rivage, supra note 112, at 13–15. Although this Article often focuses on the words and actions of political elites, eighteenth-century parties attracted—and depended on—popular support. See, e.g., Linda Colley, In Defiance of Oligarchy: The Tory Party 1714–60, at 146–74 (1982); Kathleen Wilson, The Sense of the People: Politics, Culture and Imperialism in England, 1715–1785 (1995).

[117] See, e.g., Steve Pincus, The Heart of the Declaration: The Founders' Case for an Activist Government 16 (2016).

[118] See Kinkel, supra note 112, at 1458–59.

[119] See du Rivage, supra note 112, at 15–16; infra notes 159–162 and accompanying text.

[120] Pincus, supra note 117, at 25–50; see, e.g., Letter from Sir William Johnson, Superintendent of Indian Affairs for the N. Dep't, to Henry Seymour Conway ([1763?]), Shelburne Papers, vol. 48, folder 6, at 67 (on file with WLCL) ("[T]he great object in every Colony is the encouraging Population . . . ."); id. at 73 (connecting population growth to the consumption of British manufactured goods); Letter from Phineas Lyman to Lord Shelburne ([after Aug. 1766]), Shelburne Papers, vol. 50, at 131–34 (on file with WLCL).

[121] See, e.g., Phineas Lyman, Plan Proposed by Gen. Phineas Lyman, for Settling La., and for Erecting New Colonies Between West Fla. and the Falls of St. Anthony ([1763–69]), Shelburne Papers, vol. 50, at 170–71 (on file with WLCL).

about[122] or looked forward to a more republican empire in which all members carried equal political weight.[123]

Tories and Whigs had very different priorities, but they agreed that legal policy would shape colonial development. Just as Kames, Dalrymple, and Hardwicke had argued in the 1740s and 1750s that English law could help anglicize Scotland, policymakers after the Seven Years' War continued to believe that the presence or absence of English law would play a decisive role in setting the course of newly acquired colonies. In the words of one Whig pamphlet, Britain's North American colonies had flourished partly thanks to "the Influence of . . . *English* Liberty and Laws."[124] If Britain wanted Bengal and Quebec to develop along the same lines, then English law was the answer. Legal pluralism, in contrast, would contribute to the Tory model of empire in three ways. First, diverse laws would divide colonial populations from each other and thus make them easier to control. Second, the absence of English legal protections would help imperial officials enforce a sense of hierarchy and obedience. Finally, legal boundaries would discourage the immigration and investment needed to develop commercial economies.

1. Divide and Rule

For Tories, the first advantage of legal pluralism was that it would divide colonial subjects from each other and from their potential British allies, thus fragmenting colonial politics and inhibiting resistance to metropolitan control.[125] In India, this meant separating Muslims from Hindus and Indians from Europeans. In Quebec, it meant isolating Canadians from other North Americans.

Eighteenth-century commentators recognized divide-and-rule as a well-worn tactic of imperial control.[126] Francis Maseres, Quebec's

[122] E.g., Memorandum from [Maurice Morgann] to Lord Shelburne 148, 150 ([1766?]), Shelburne Papers, vol. 168, box 2 (on file with WLCL) (stating that unfettered economic growth in North America "will be at last destructive of the Mother Country but the Period is so Distant that it is not an object of Policy"); Lyman, supra note 121, at 170–71.

[123] See du Rivage, supra note 112, at 44–51.

[124] Party Spirit in Time of Publick Danger, Considered 3 (London, T. Waller 1756). Neither Whigs nor Tories assumed that a colony's legal system alone was the only relevant force in shaping its development. See, e.g., id.

[125] Cf. Benton, supra note 37, at 12–15 (noting the power of jurisdictional divisions to reinforce cultural boundaries).

[126] See, e.g., Benjamin Franklin, The Interest of Great Britain Considered 39–44 (London, T. Becket 1760); Henry Fox, Speech in the House of Commons (Dec. 16, 1754), *in* 1

attorney general, thought it obvious that if Quebec retained "laws and customs considerably different from those of the neighbouring Colonies," it would make it harder for Canadians to "Join with those Colonies in rejecting the Supremacy of the Mother country."[127] But while Maseres came to see such disunion as troubling,[128] Tories embraced it as a tool of colonial discipline. Canada would be most useful to Britain, argued its Tory governor, if that colony remained "not united in any common principle, interest, or wish with the other Provinces."[129] One politician noted with approval that the "political separation of Canada from the rest of America might be a means of dividing their interests" from those of their southern neighbors.[130] "[D]o you wish . . . to combine the heart of the Canadian with that of the Bostonian?" asked Sir William Meredith.[131] In the wake of the Boston Tea Party, his answer was no.

Tories offered similar arguments for legal pluralism in Bengal. Diversity of sect and caste, observed one senior East India Company employee, had facilitated Bengal's conquest and "prevent[ed] [Indians'] uniting to fling off the yoke" of foreign rule.[132] Another Company employee explained this argument's implications for legal policy. Although he professed discomfort with creating "a most odious & invidious distinction" based on legal difference, he insisted on the "necessity that all British subjects in India . . . be separated from the native inhabitants" by keeping each religion under a distinct legal system. [133] Otherwise, he warned, "the

Proceedings and Debates of the British Parliaments Respecting North America, 1754–1783, at 33, 35 (R.C. Simmons & P.D.G. Thomas eds., 1982) [hereinafter Proceedings and Debates].

[127] Letter from Francis Maseres to Richard Sutton, Under-Sec'y of State for the S. Dep't (Aug. 14, 1768), *in* The Maseres Letters, 1766–1768, at 101, 110 (W. Stewart Wallace ed., 1919) [hereinafter Maseres to Sutton].

[128] See Francis Maseres, Statement to the House of Commons (June 2, 1774), *in* 5 Proceedings and Debates, supra note 126, at 18, 21.

[129] Letter from Guy Carleton, Governor of Quebec, to Lord Hillsborough, Sec'y of State for the Colonies (Nov. 20, 1768), *in* 1 Documents Relating to the Constitutional History of Canada, 1759–1791, at 325, 326 (Adam Shortt & Arthur G. Doughty eds., 2d ed. 1918) [hereinafter Constitutional History].

[130] Lord Lyttelton, Speech in the House of Lords (June 17, 1774), *in* 5 Proceedings and Debates, supra note 126, at 230, 231.

[131] [William Meredith], A Letter to the Earl of Chatham, on the Quebec Bill 35 (London, T. Cadell 2d ed. 1774).

[132] Luke Scrafton, Reflections on the Government of Indostan 26 (London, reprinted by W. Strahan for G. Kearsley & T. Cadell 1770) (1763).

[133] Memorandum from James Grant to Lord Shelburne, State of the British Affairs in India (Nov. 30, 1780), Shelburne Papers, vol. 99, at 301, 340 (on file with WLCL).

unaccustomed dangerous draught" of English law "must infallibly produce intoxication & turn into a curse & our own destruction."[134]

Whigs agreed with Tories that legal pluralism would isolate Canada and Bengal—which is why they insisted that Britain should bring those colonies under English law.[135] One law for all, Whigs argued, would both acknowledge the equality of all British subjects and effect new subjects' assimilation.[136] For example, the merchant William Bolts insisted that because Indians and Europeans in Bengal were equally "British subjects" and "members of the same body-politic," they deserved the protection of the same laws.[137] Similarly, an anonymous opponent of the Quebec Act argued that introducing English law to Canada would "make the rising generation look upon themselves as Englishmen."[138] In making these arguments, Whigs pointed to the histories of Wales and Ireland, which became "happily united with" England after receiving "the laws of the conquerors."[139] In contrast, the preservation of Indian and French laws would serve only to perpetuate the differences between Britain's new and old subjects.[140]

2. Preserving Hierarchy

Legal pluralism operated partly through the mere fact of legal difference. But Tories were also attracted to the substance of French, Hindu, and Islamic laws, which seemed especially well suited to producing the

[134] Id.

[135] See, e.g., Benjamin Franklin, Notes on Britain's Intention to Enslave America ([1774–75?]), *in* 21 The Papers of Benjamin Franklin 608, 608 (William B. Willcox ed., 1978).

[136] See, e.g., Charles James Fox, Speech in the House of Commons (May 26, 1774), *in* 4 Proceedings and Debates, supra note 126, at 471, 471 (opposing the Quebec Act because it frustrated his goal of "mak[ing] Englishmen mix as much as possible with the Canadians").

[137] William Bolts, Considerations on India Affairs, at iii (London, J. Almon, P. Elmsly, & Brotherton & Sewell 2d ed. 1772); see also id. at iv ("In speaking of British subjects, we would be understood to mean his Majesty's newly-acquired Asiatic subjects, as well as the British emigrants residing and established in India.").

[138] A Letter to Sir William Meredith, Bart., in Answer to His Late Letter to the Earl of Chatham 26–27 (London, G. Kearsly 1774) [hereinafter Letter to Sir William Meredith].

[139] John Glynn, Speech in the House of Commons (May 26, 1774), *in* 4 Proceedings and Debates, supra note 126, at 463, 464. Whigs and Tories disagreed about how quickly England had imposed its law on Ireland and Wales, with each party interpreting the historical record to favor its own cause. See Bourke, supra note 74, at 415–20.

[140] See, e.g., Articles of Association (Oct. 20, 1774), *in* 1 Journals of the Continental Congress, 1774–1789, at 75, 76 (Worthington Chauncey Ford ed., 1904) (warning that "civil [law] principles" would "dispose the inhabitants [of Quebec] to act with hostility against" the other American colonies).

kind of hierarchical society that Tories prized. During the 1760s, radical Whigs in England and the American colonies had become adept at using the common law—and especially jury trials—to advance their political agenda.[141] Tories worried that English law might communicate this same tendency towards radicalism to Bengal and Quebec. In contrast, retaining preconquest legal systems would preserve what Tories perceived as Indians and French Canadians' habits of obedience.

Tory officials throughout the empire praised non-English legal systems as conducive to maintaining order. French law in Quebec, reported its Tory governor, had "established Subordination, from the first to the lowest" and "secured Obedience to the Supreme Seat of Government from a very distant Province."[142] Attorney General Edward Thurlow agreed: under French law, "all orders of men habitually and perfectly knew their respective places . . . ."[143] This same principle applied in India. When one colonial governor suggested that Britain use African soldiers in Bengal, he advised that "[l]aws similar to those they were used to in their own Country . . . will make them . . . True, Faithful, and Obedient to Command."[144] By allowing African soldiers "in civil matters to be tried by each other," he continued, Britain "will always keep them in a State of Dependance [sic]."[145]

English law, in contrast, would produce "an excess of licentiousness."[146] Harry Verelst, the onetime governor of Bengal, warned that introducing English law would "instantly emancipate [Indians] from subjection to" Britain.[147] An anonymous pamphleteer agreed: English law would "introduce[] a Levelling Principle among People accustomed to the

[141] See John Brewer, The Wilkites and the Law, 1763–74: A Study of Radical Notions of Governance, *in* An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries 128, 139–47 (John Brewer & John Styles eds., 1980); Stephan Landsman, The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 Cornell L. Rev. 497, 583–89 (1990).

[142] Letter from Guy Carleton to Lord Shelburne (Dec. 24, 1767), *in* 1 Constitutional History, supra note 129, at 288, 289.

[143] Edward Thurlow, Report of the Attorney General (Jan. 22, 1773), *in* 1 Constitutional History, supra note 129, at 437, 437.

[144] John Roberts, Governor of Cape Coast Castle, Observations Relative to Sending Negroe Soldiers to [India] (Apr. 20, 1771), Add MS 38397, at 166, 171 (on file with BL).

[145] Id. at 170–71.

[146] Lyttelton, supra note 130, at 231.

[147] Harry Verelst, A View of the Rise, Progress, and Present State of the English Government in Bengal 144 (London, J. Nourse [and three others] 1772).

most rigid Subordination of Rank and Character . . . ."[148] When exposed to English institutions, officials in Calcutta warned, Indian natives "gradually acquire an independent and untractable [sic] Spirit."[149] The best "remedy for these evils" was to govern Indians under their own laws.[150]

The emancipatory power of English law came partly from juries, which often asserted a political as well as a judicial role.[151] Quebec's grand jury, for instance, claimed "a right to be consulted, before any Ordinance . . . be pass'd into a Law."[152] Unsurprisingly, these political pretensions often led to conflict between grand jurors and governmental officials.[153] Civil juries could also act politically, particularly in suits alleging official misconduct.[154] General Thomas Gage, the Tory military commander in North America, warned that it was too easy for an agitator motivated by "spite and malice" to promote "frivolous and vexatious Suits against the Officers, who were carrying on the King's Service."[155] It was bad enough that colonial juries could second-guess the actions of imperial officials. But it

[148] Observations Upon the Administration of Justice in Bengal Occasioned by Some Late Proceedings at Dacca 8 ([London, n.p.] [1778]).

[149] Letter from President & Council of Ft. William to EIC Court of Dirs. (Jan. 6, 1773), IOR/E/4/31, at 227, 231 (on file with BL).

[150] Id. at 232; see also George Rous, EIC Counsel, Legal Opinion (Jan. 5, 1781), IOR/L/L/7/287 (on file with BL) ("It may then deserve consideration what distinction should be made between whites & their black slaves [in the EIC outpost on St. Helena], for to give them equally the benefit of English laws would be to abolish the relation of master & slave.").

[151] Cf. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 94–96 (1998) (describing eighteenth-century views of "jurors as political participants").

[152] Presentments of the Grand Jury of Quebec (Oct. 16, 1764), *in* 1 Constitutional History, supra note 129, at 212, 213.

[153] See Lawson, supra note 43, at 51–52; Hilda Neatby, Quebec: The Revolutionary Age, 1760–1791, at 37, 127–28 (1966); Letter from Warren Hastings to Laurence Sulivan (Feb. 1, 1770), Add MS 29126, at 10, 13 (on file with BL) (describing how the grand jury of Madras had thrown "the civil part of the colony in[to] a violent fury").

[154] See Brewer, supra note 141, at 144–46, 154; cf. Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 63, 76 (2012) (noting that tort suits were the normal remedy for official misconduct in the eighteenth century); James E. Pfander, Constitutional Torts and the War on Terror 3–6 (2017) (same). American colonists had an especially strong sense of juries as political institutions. See, e.g., Renée Lettow Lerner, The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial, 22 Wm. & Mary Bill Rts. J. 811, 817–18 (2014); John Adams, Diary Entry (Feb. 12, 1771), *in* 2 Diary and Autobiography of John Adams 3 (L.H. Butterfield ed., 1964) ("As the Constitution requires, that, the popular Branch of the Legislature, should have an absolute Check so as to put a peremptory Negative upon every Act of the Government, it requires that the common People should have as compleat a Controul, as decisive a Negative, in every Judgment of a Court of Judicature.").

[155] Letter from Thomas Gage to Henry Bouquet, Commander of the S. Dep't (June 2, 1765), Gage Papers, vol. AS 36 (on file with WLCL).

would be even worse if jury service led to other forms of political consciousness. "[I]f the natives [of India] should be actually endowed with the real cap of liberty in the jury room," warned one pamphlet, "there is danger, nay, there is a certainty, that they would make bold to wear it elsewhere; and then, adieu to the English dominion in Bengal."[156] The safest thing, Tories insisted, was to stop Canadians and Indians from learning too much about self-government by preventing them from having juries in the first place.

3. Economic Dependence

Finally, Tories believed that legal pluralism would make Quebec and Bengal more economically dependent on Britain and more economically useful to the rest of the empire.[157] This meant different things in different places. In Quebec, Tories focused on suppressing manufacturing, while in Bengal, their chief concern was to facilitate tax collection.[158] In both colonies, however, Tories believed that the combination of legal difference and the absence of English legal protections would put local economies on a different economic trajectory from the one taken by older North American colonies.

Tories argued that suppressing manufacturing in North America was essential to preventing its independence. American-made products not only competed with British goods; they also enabled a dangerous degree of self-sufficiency by empowering Americans to boycott British manufactures.[159] If Britain was to maintain control, General Gage insisted, it had to end Americans' efforts to "manufacture for themselves."[160] "Surely," Gage continued, "the people in England can never be such dupes to believe that the Americans have traded with them so long out of pure Love, and Brotherly Affection."[161] Americans bought British goods because they had no choice, and British policies had to keep it that way.

[156] The Present State of the British Interest in India: With a Plan for Establishing a Regular System of Government in That Country 47 (London, J. Almon 1773) [hereinafter The Present State of the British Interest in India].

[157] Cf. Benton, supra note 37, at 22, 261–62 (discussing the relationship between legal pluralism and political economy); Ross & Stern, supra note 30, at 128–32 (same).

[158] See Vaughn, supra note 18, at 26; Welland, supra note 7, at 181.

[159] See T.H. Breen, The Marketplace of Revolution: How Consumer Politics Shaped American Independence, at xviii (2004).

[160] Letter from Thomas Gage to Lord Barrington, Sec'y at War (Mar. 10, 1768), Gage Papers, vol. ES 11 (on file with WLCL).

[161] Id.

Lord Mansfield agreed: once colonists began manufacturing, he asked, "[w]hat then will become of us?"[162]

These priorities guided Tories' legal policy.[163] Although Quebec was less economically advanced than its southern neighbors, imperial officials worried that it had already started to develop manufacturing by the late 1760s.[164] Accordingly, Tories looked for ways to redirect its economic activity towards the extraction of raw materials.[165] But while Tories agreed that manufacturing must be stopped, they worried that its "positive prohibition" would be "equally impracticable and impolitic."[166] An outright ban would require heavy-handed, resource-intensive tactics that would alienate colonists without any guarantee of success.[167] Accordingly, Tories looked for another "means of diverting the Peoples [sic] attention from" undesirable economic activities.[168]

The key was to deprive Quebec of the capital and labor that manufacturing required.[169] But once again, Tories worried that a direct prohibition would be ineffective and unpopular.[170] Accordingly, Tories manipulated the legal system to achieve the same end. Politicians knew that British

[162] Lord Chief Justice Mansfield, Speech in the House of Lords (Mar. 11, 1766), *in* 2 Proceedings and Debates, supra note 126, at 335, 342.

[163] See [James Marriott], Plan of a Code of Laws for the Province of Quebec 47–48 (London, n.p. 1774) (stating that economic policy "must direct the spirit of any code of laws" for Quebec).

[164] See, e.g., Letter from Lord Hillsborough, Sec'y of State for the Colonies, to Guy Carleton (Nov. 15, 1768), CO 43/8, at 56 (on file with TNA) [hereinafter Letter from Hillsborough] ("I am very concerned to find that the Manufacture of Linen & Woollen is carried on to a greater extent than I conceived the nature of that Country and Climate could have admitted of . . . ."); see also Letter from Francis Maseres to Fowler Walker (Nov. 19, 1767), *in* Maseres Letters, supra note 127, at 55, 61–62.

[165] See Lawson, supra note 43, at 113–14; Letter from Guy Carleton to [Lord Hillsborough], Sec'y of State (Aug. 31, 1768), CO 43/12, at 182, 183 (on file with TNA) (urging London to "promote the cultivation of Hemp & Flax" in Quebec in order to turn colonists away from making clothing).

[166] Letter from Hillsborough, supra note 164.

[167] Id.; cf. 2 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 582 (R.H. Campbell & A.S. Skinner eds., Liberty Fund 1981) (1789) (describing prohibitions on colonial manufacturing as "impertinent badges of slavery").

[168] Letter from Hillsborough, supra note 164.

[169] See, e.g., Letter from Thomas Gage to Lord Barrington (Dec. 2, 1772), Gage Papers, vol. ES 23, at 3 (on file with WLCL). Tories' attempt to restrict immigration to North America was one of the grievances that pushed American Whigs toward independence. See Pincus, supra note 117, at 117–21.

[170] In 1763, British officials had ordered a stop to British settlement west of a line drawn along the Appalachian Mountains. Settlement continued anyway. See Anderson, supra note 15, at 568–69.

settlers and investors would be reluctant to entrust themselves or their capital to a jurisdiction that lacked English law. As early as 1765, British merchants trading to Quebec had insisted on the need for English law to protect their interests.[171] Any laws "contrary to the Establishment of all the other Courts of Law in the British Dominions," they warned, would have "the most ruinous consequence to every Person in Trade."[172] They renewed this warning after Parliament passed the Quebec Act. "[I]f we had supposed the French laws . . . to be still in force there, or to be intended to be revived," the merchants complained, "we would not have had any commercial connections with the inhabitants of the said province, either French or English."[173] But for Tories, that was the point. French law would scare away investment. It would also scare away people—particularly Protestant immigrants whose connections to Britain might help jump-start the Canadian economy. As Solicitor General Alexander Wedderburn put it, the Quebec Act reflected Tories' belief that "it is not the interest of Britain that many of her natives should settle" in that province.[174]

Whigs agreed with Tories that legal pluralism would repel immigration and investment.[175] But their political-economic agenda depended on making Quebec rich and populous—and, therefore, on transplanting English

[171] The Memorial & Petition from the Merchants & Traders of the City of London Trading to Canada on Behalf of Themselves & Others (Apr. 18, 1765), CO 42/2, at 102 (on file with TNA); The Memorial of Fowler Walker, Agent on Behalf of the Merchants, Traders, and Others the Principal Inhabitants of the Cities of Quebec and Montreal (1765), CO 42/2, at 113, 114 (on file with TNA).

[172] The Memorial of the Merchants and Other Inhabitants of the City of Quebec (Apr. 10, 1770), CO 42/8, at 7, 7–8 (on file with TNA).

[173] The Case of the British Merchants Trading to Quebec (1763), *reprinted in* Francis Maseres, An Account of the Proceedings of the British, and Other Protestant Inhabitants, of the Province of Quebeck, in North-America 202, 207–208 (London, B. White 1775) [hereinafter Case of the British Merchants].

[174] Alexander Wedderburn, Report of the Solicitor General (Dec. 6, 1772), *in* 1 Constitutional History, supra note 129, at 424, 430. Policymakers especially wanted to block settlement in the Illinois Country, which the Quebec Act also placed under French civil law. See Thomas Bernard, An Appeal to the Public; Stating and Considering the Objections to the Quebec Bill 54–55 (London, T. Payne & M. Hingeston 1774); William Knox, The Justice and Policy of the Late Act of Parliament, for Making More Effectual Provision for the Government of the Province of Quebec 42–43 (London, J. Wilkie 1774) (describing the Quebec Act as having "the avowed purpose of excluding all further settlement" in the American interior).

[175] See, e.g., Letter from Silas Deane to Patrick Henry (Jan. 2, 1775), *in* Collections of the New-York Historical Society for the Year 1886, at 33, 35–37 (New York, printed for the Society 1887); Articles of Association, supra note 140, at 76.

law in order to attract settlers and capital.[176] The benefits were not just economic. If Quebec could attract immigrants from Britain and the older American colonies, the new arrivals would speed the assimilation of *Canadiens* by giving them an example of what it meant to be a British subject.[177] One pamphleteer, eager to accelerate the process, recommended founding a new capital of Quebec—subtly named "*British Town*"—to be settled by Englishmen who would introduce "the English language, the English manners, & a Spirit of Industry, among the French Canadians."[178] Just as English law had transmuted New Netherland into New York, it would work the same alchemy in Canada.[179]

Tories and Whigs also offered different visions for Bengal's economy. By the 1770s, the East India Company had ceased to operate as a mere trading company. Instead, its Tory leadership had turned the Company into a territorial power whose primary purpose was to tax local inhabitants and to remit the revenues to London.[180] In such a regime, English law was unnecessary. Legal pluralism was ideal for such a regime because it inhibited resistance to the Company's expropriation of Indian wealth by denying colonial subjects the opportunities for redress afforded by English law.[181]

[176] See, e.g., Edmund Burke, Commons Debates (June 10, 1774), *in* 5 Proceedings and Debates, supra note 126, at 204, 204; supra notes 120–123 (discussing Whigs' emphasis on colonial population growth and prosperity).

[177] See, e.g., Lawson, supra note 43, at 43; Letter to Sir William Meredith, supra note 138, at 5, 7–8; Maurice Morgann, An Account of the State of Canada from Its Conquest to May 1766 ([1766–67?]), Shelburne Papers, vol. 64, at 525, 548–50 (on file with WLCL).

[178] Memorandum to the Board of Trade, Some Thoughts on the Settlement and Government of Our Colonies in North America (Mar. 10, 1763), Shelburne Papers, vol. 48, folder 44, at 523, 527–29 (on file with WLCL).

[179] Case of the British Merchants, supra note 173, at 210.

[180] See Bowen, supra note 18, at 111–12; Vaughn, supra note 18, at 533–34; see also Letter from Philip Francis to Lord North, Prime Minister (Feb. 14, 1777), Mss Eur E15, at 521, 525 (on file with BL) (criticizing the Company on the ground that "every Consideration of prudence is absorbed in the Idea of unlimited Revenue, & immediate Returns").

[181] See supra note 154 (describing the importance of common-law juries for addressing official misconduct at the time); cf. The Present State of the British Interest in India, supra note 156, at 147–49 (London, J. Almon 1773) (arguing that Indians should be allowed to serve on juries alongside Europeans, and that these mixed juries "would prove the Magna Charta, the palladium, and true security of Indian liberty and property, against the despotism and extortion of their foreign government"). As Prasannan Parthasarathi has emphasized, the East India Company did in fact transplant some English legal ideas into India: those concerning free and unfree labor. Starting in the late 1760s, the Company introduced new, more coercive ways of controlling Indian weavers that contravened South Asian assumptions about the legitimacy of coercing workers. In other words, Company officials readily introduced novel aspects of British discipline—even in the face of local protest—while declining to transplant the more

Initially, Whigs had hoped that the Company would remain a purely commercial concern that confined itself to a few coastal outposts.[182] But as it became increasingly clear that the Company intended to become a territorial power, Whigs shifted their objective, arguing that the Company should create a settler colony along the lines of Britain's North American settlements.[183] Transplanting English law was at the core of this alternative vision. The Whig politician William Pulteney told Parliament that "the establishment of a proper system of laws" in Bengal would inevitably lead to more Britons residing there.[184] In the same speech, Pulteney attacked Tory plans to create a jurisdictional division between native and European litigants. Only a unified court system based on the laws of England, he suggested, would permit a free settlement based on trade rather than expropriation.[185]

Whigs did not assume that Bengal's climate and population posed an insurmountable obstacle to building another North America. Under the right kind of government, argued the writer John Campbell, Britain's South Asian outposts could "make as rich and as flourishing Colonies as *Virginia*, or *Jamaica*," as long as Europeans and Indians were "incorporated" together under a single set of "*good laws*."[186] Campbell considered this to be a universal prescription for colonial growth; he offered similar

emancipatory elements of English law. See Prasannan Parthasarathi, The Transition to a Colonial Economy: Weavers, Merchants and Kings in South India, 1720–1800, at 122–24, 147 (2001); see also Om Prakash, From Market-Determined to Coercion-Based: Textile Manufacturing in Eighteenth-Century Bengal, *in* How India Clothed the World: The World of South Asian Textiles, 1500–1850, at 217, 224–25, 227–28 (Giorgio Riello & Tirthankar Roy eds., 2009) (describing the Company's use of coerced labor in Bengal). Ultimately, the Company's introduction of English-style labor discipline without English-style avenues for redress undermined what had been a thriving textile industry. See John Darwin, After Tamerlane: The Global History of Empire Since 1405, at 193 (2007); Bishnupriya Gupta, Competition and Control in the Market for Textiles: Indian Weavers and the English East India Company in the Eighteenth Century, *in* How India Clothed the World, supra, at 281, 281–83; see also Letter from Philip Francis to Welbore Ellis, Sec'y at War (Jan. 13, 1777), Mss Eur E15, at 467, 468–70 (on file with BL) (warning that Company policy was destroying textile manufacturing in Bengal).

[182] See Bowen, supra note 18, at 18–19.

[183] See Vaughn, supra note 18, at 386–87 n.181, 545.

[184] William Pulteney, Speech to the House of Commons (May 18, 1772), *in* 17 Parliamentary History, supra note 84, at 471, 472.

[185] Id. at 473.

[186] [John Campbell], A Collection of Letters Relating to the East India Company, and to a Free Trade 24–25 (London, W. Owen 1754).

plans for developing Scotland's impoverished Western Isles[187] and Britain's new colony in Senegal.[188] Whether in Asia, Africa, America, or Britain itself, Whigs offered the same plan for colonial development: economic integration and cultural assimilation, underpinned by a common law for all British subjects.

B. The Purpose of Transplanting English Law

In most of its new colonies—the Ceded Islands, the Floridas, and Senegal—Britain continued its earlier policy of transplanting English law. As with earlier efforts to impose English law, transplantation presented challenges and generated local conflicts.[189] Nonetheless, Whigs and Tories agreed that, at least in some cases, the benefits of transplantation justified the costs.

The West Indian island of Grenada offers perhaps the clearest example of Britain's continued willingness to impose English law on new conquests. When Grenada surrendered to British forces in 1762, its articles of capitulation guaranteed that French law would remain in place until Britain settled on a long-term legal policy.[190] Grenadians did not have long to wait: Grenada's first British governor declared French laws void only a few days after he arrived.[191] From the start, officials sought "to render the civil Constitution of [Grenada], as nearly as possible, similar to that of" other British colonies and "to check in their Infancy, all irregular and unnecessary deviations from the Laws and Constitution of the Mother Country."[192] As in other colonies, officials adapted English law to fit local circumstances.[193] Most importantly, members of the island's Catholic majority were permitted to serve as jurors, contrary to ordinary

[187] 1 John Campbell, A Political Survey of Britain 631–33 (London, Printed for the author, and sold by Richardson [and 9 others] 1774).

[188] Brown, supra note 104, at 275 (citing 2 Campbell, supra note 187, at 633). For Senegal (i.e., Senegambia), see infra notes 208–211 and accompanying text.

[189] See supra notes 66–70 and accompanying text.

[190] See [James Harris], Hints Relative to the Division and Government of the Conquered and Newly Acquired Countries in America (June 1, 1763), Shelburne Papers, vol. 48, folder 45, at 543, 552–53 (on file with WLCL); Memorandum of Lord Chief Justice Mansfield [to Lord Egremont?] (Jan. 13, 1763), PRO 30/47/6 (on file with TNA).

[191] Peter Marshall, The Incorporation of Quebec in the British Empire, 1763–1774, *in* Of Mother Country and Plantations, supra note 71, at 42, 48.

[192] A Sketch of a Report with Observations on the Commission and Instructions for the Governor of Granada ([1764?]), Shelburne Papers, vol. 49, folder 20, at 293, 294–95 (on file with WLCL).

[193] Imperial officials modeled many local regulations on those of Barbados. Id. at 302.

English law.[194] Although that decision provoked a backlash from some of the island's Protestants, officials in London insisted that this limited concession was the surest path to an anglicized legal system.[195] French Grenadians, for their part, seemed pleased with the arrangement.[196]

Britain's decision to introduce English law to Grenada reflected a political consensus that developing the sugar-rich West Indies would benefit the empire economically.[197] Politicians did not always agree on the details of how those islands should be developed. The prudence and morality of slavery, in particular, divided many politicians (not always along party lines).[198] But politicians nonetheless united in thinking that the West Indies would benefit from an influx of English settlers, which would require the attraction of English law.[199] For instance, although the Tory John Shebbeare favored legal pluralism in Quebec, he urged Britain to anglicize West Indian law, because "[o]ur laws and rules of government" would allow planters to be more productive than France's "cramping regulations."[200] Tories like Shebbeare were willing to develop the West Indies, unlike Quebec, in part because they believed that planters' fear of slave revolts and external attack would guarantee their loyalty to London.[201]

[194] Muller, supra note 43, at 127.

[195] See Andrew Jackson O'Shaughnessy, An Empire Divided: The American Revolution and the British Caribbean 124–25 (2000); Alexander Wood Renton, French Law Within the British Empire, 10 J. Soc'y Comp. Legis. 93, 93 (1909).

[196] See Anderson, supra note 15, at 490.

[197] See, e.g., Objects To Be Attended to in Granting Lands in the Newly Acquired Islands ([after 1763]), Shelburne Papers, vol. 74, at 63, 63 (on file with WLCL); Some Hints for the Better Settlement of the Ceded Islands ([1763]), Shelburne Papers, vol. 48, folder 46, at 567, 569 (on file with WLCL) [hereinafter Hints].

[198] See Brown, supra note 104, at 33–35, 155–57; Pincus, supra note 117, at 121–27; Sebastiani, supra note 105, at 41–42.

[199] Muller, supra note 43, at 37; Hints, supra note 197, at 567–69; see also Robert Melvill, Some General Heads Submitted Concerning the Most Eligible Plan of Government for the New Acquired Islands . . . , Shelburne Papers, vol. 74, at 51, 51–52, 55 (on file with WLCL) (listing benefits of establishing a general government).

[200] [John Shebbeare], One More Letter to the People of England 16–17 (London, J. Pridden 1762). For Shebbeare's support of the Quebec Act, see John Shebbeare, An Answer to the Queries, Contained in a Letter to Dr. Shebbeare 30–31 (London, S. Hooper & T. Davies [1775]).

[201] See O'Shaughnessy, supra note 195, at 36, 49–50 (arguing that the British West Indies remained loyal to Britain during the American Revolution in part because of white planters' reliance on the imperial army to protect against slave revolts).

Security concerns also shaped legal policy in the Floridas.[202] Whigs and Tories agreed on the need to encourage anglophone immigration to those colonies to build them up as buffers against Spanish or French aggression.[203] Moreover, unlike in Quebec, there was little danger that the Floridas would develop manufacturing. To the contrary, those colonies needed additional settlers even to be able to export food and raw materials to Britain and its Caribbean colonies.[204] Accordingly, Whigs and Tories agreed on the need to transplant English law in order to attract immigrants.[205] The Tory administrator William Knox, for instance, argued that British subjects would be more likely to settle in Florida if they could "know that they are immediately to have the Benefit of the Laws of Great Britain."[206] George Johnstone, the Whig governor of West Florida, agreed. "Establishing the Civil Government of this Province agreeably to the laws of Great Britain & the precepts of her Constitution is one of the principal objects which his Majesty & his Ministers had in view in sending me here," he told a local military commander.[207]

Britain's willingness to transplant English law was not limited to the Americas. Whigs and Tories also agreed that Britain should impose English law on the former French colony of Senegal, now made part of British Senegambia. Imperial officials hoped that English law would shape Senegambia into an American-style settler colony.[208] Although its climate

[202] In East Florida, the decision to transplant English law was facilitated by the departure of its Spanish population. In West Florida, however, many French settlers remained. See Calloway, supra note 16, at 152–56.

[203] See id. at 155–57; Clarence Edwin Carter, Great Britain and the Illinois Country, 1763–1774, at 135 (1910).

[204] See Robin F.A. Fabel, The Economy of British West Florida, 1763–1783, at 6–7, 138–40 (1988).

[205] See, e.g., Harris, supra note 190, at 552–53 (arguing that because the Floridas would likely "be settled either by foreign Protestants, or the King's natural born subjects," the colonial constitution should be modeled on that of "Georgia, or Nova Scotia . . . without any material alteration"); cf. supra note 61 and accompanying text (noting seventeenth-century efforts to use English law to attract settlers).

[206] [William Knox], Hints Respecting the Settlement of Florida 8, 9 ([1763]), William Knox Papers, box 9, folder 3 (on file with WLCL). His proposal also argued for freedom of religion, which would attract non-Protestant settlers. Id. at 8–9.

[207] Letter from George Johnstone, Governor of W. Fla., to Major Robert Farmar (Jan. 7, 1765), Gage Papers, vol. AS 30 (on file with WLCL).

[208] See Smith, supra note 62, at 268–69; Matthew P. Dziennik, 'Till These Experiments Be Made': Senegambia and British Imperial Policy in the Eighteenth Century, 130 Eng. Hist. Rev. 1132, 1146–47 (2015).

seemed unfavorable for European settlement,[209] Senegambia's British governor believed that it could attract both British and African settlers. The latter, argued the governor, would support British rule as long as the government "secur[ed] their property" under a transparent rule of law.[210] The proposal for a West African settler colony received support not only from the typically pro-development Whigs but also from prominent Tories, including Treasury official Thomas Whately and the political economist Malachy Postlethwayt, who had previously supported the slave trade but now sought to incorporate Africans into European commercial networks.[211]

In short, Britain transplanted English law to the Ceded Islands, Senegambia, and the Floridas because politicians agreed that those provinces should be developed as settler colonies on the American model. Those colonies differed widely from each other and from other British colonies with respect to their geography, their resource endowments, and the nature of non-British populations. The one thing they had in common was a consensus among British policymakers in favor of introducing English law.

IV. RETHINKING TOLERATION

Although Whigs and Tories agreed about extending English law to some colonies, they laid out starkly different proposals for Bengal and Quebec. Why did Tories win? In part, their success reflected broader political trends: for most of the 1760s and 1770s, Tories were the party in power. But even so, they remained a minority party,[212] and achieving their

[209] See Acemoglu et al., supra note 38, at 1398; Entry of April 1767, *in* Calendar of Home Office Papers of the Reign of George III: 1766–1769, at 167–70 (Joseph Redington ed., London, Her Majesty's Stationery Office 1879), http://www.british-history.ac.uk/home-office-geo3/1766-9/pp165-170.

[210] Dziennik, supra note 208, at 1146 (citing Letter from Charles O'Hara, Governor of Senegambia, to H.S. Conway, Sec'y of State (May 28, 1766), Shelburne Papers, vol. 81, ff. 103–18 (on file with WLCL)).

[211] See Brown, supra note 104, at 272–73. The colony of Senegambia ultimately failed, partly due to remarkably bad leadership. See Dziennik, supra note 208, at 1149–50 ("Of the nine officials to hold senior office in Senegambia . . . , three were dismissed, one died in office, one had a mental breakdown, one was later executed for murder, and one . . . was overthrown in a violent coup . . . ."). France reconquered the colony in 1779. Id. at 1150.

[212] In the late 1760s, Tory-aligned MPs probably made up a third of the House of Commons. See Duke of Newcastle, Parliamentary Lists (Mar. 2, 1767), Add MS 33001 (on file with BL); Lord Rockingham, [Analysis of Personnel of House of Commons] (Dec. 20, 1766), WWM/R/86 (on file with SA). Another group—denigrated as "Swiss" by Rockingham, after

goals required them either to recruit independents to their cause or to divide potential opponents.[213] One way Tories managed to do this in the case of legal pluralism was to frame it as a moral issue. Some Tories described the preservation of local laws as a humanitarian duty that conquerors owed to the conquered. Others used the language of rights. But although the details varied, Tories successfully reshaped contemporary notions of religious and cultural toleration, so even many Whigs came to believe that Britain had an obligation to preserve the laws of non-British subjects.

Tories' moral arguments led Whigs to clarify what kind of legal pluralism they found most troubling. Instead of attacking legal pluralism in general, Whigs began to focus on a few areas where legal uniformity seemed most critical, such as civil procedure and commercial law. In doing so, Whigs proposed a new framework for sustaining a diverse but united empire. Although that compromise failed to gain traction in the short term, it had an enduring influence on later American and British thinking about the role of law in empire-building.[214]

A. Legal Pluralism, Natural Rights, and Humanitarianism

Most Tories supported colonial legal pluralism because of its political-economic consequences.[215] But for some, such as Lord Chief Justice Mansfield, preserving local laws was also a duty. When Mansfield learned that Britain had introduced English law to Quebec in 1764, he attacked the decision as both "rash and unjust."[216] Quebec's Governor Carleton agreed. Imposing English law on Canada, he wrote, was "[a] Sort of Severity, if I remember right, never before practiced by any Conqueror."[217]

the famous mercenaries—could be counted on to back any government-supported measures. Since the Tories were in power during the late 1760s and 1770s, they could generally count on "Swiss" support. But even so, that gave Tories a bare majority at best.

[213] Cf. Ian R. Christie, Wars and Revolutions: Britain 1760–1815, at 30–33 (1982) (estimating that the majority of MPs lacked a party affiliation).

[214] See Adam S. Hofri-Winogradow, Zionist Settlers and the English Private Trust in Mandate Palestine, 30 Law & Hist. Rev. 813, 814–15 (2012).

[215] See supra Section III.A.

[216] Letter from Lord Chief Justice Mansfield to George Grenville (Dec. 24, 1764), *in* 2 The Grenville Papers 476, 476–77 (William James Smith ed., 1852).

[217] Letter from Guy Carleton to Lord Shelburne, supra note 142, at 289.

Tories' deontological defenses of legal pluralism came in two varieties: humanitarian appeals to empathy and invocations of natural rights.[218] Both of these approaches appeared in an exchange between Mansfield and Warren Hastings, the first governor-general of Bengal. Hastings was one of the original architects of legal pluralism in Bengal, and he worried that Parliament might try to overturn his work.[219] Hastings and his colleagues had previously defended legal pluralism in consequentialist terms,[220] but as he lobbied London to defend legal pluralism, he began to adopt the language of rights. In a letter asking for Mansfield's help, Hastings described the Company's policy as securing "the rights of a great nation in the most essential point of civil liberty, the preservation of its own laws."[221] In the same letter, Hastings twice more used the language of rights, insisting on Indians' "right to possess . . . the protection of their own laws,"[222] which he described as "the most sacred and valuable of [their] rights."[223] Two years later, in another letter to Mansfield, Hastings again invoked "the rights of the people" to their own laws.[224] Over time, this rights-talk worked its way into the Company's official vocabulary.[225]

[218] Robert Travers has identified a third kind of principled argument for legal pluralism in Bengal: ancient constitutionalism. See Travers, supra note 7, at 7–9. As Travers shows, British officials translated the longstanding concept of an ancient English constitution into the claim that India enjoyed an ancient constitution of its own, which Britain had a duty to preserve or restore. But ancient constitutionalism operated primarily in the context of debates about what kind of legal pluralism Britain should administer, not debates about whether pluralism was appropriate at all.

[219] See Letter from Warren Hastings to Robert Palk (Nov. 11, 1772), Add MS 29127, at 49r, 49v (on file with BL).

[220] See infra note 243. In 1773, for instance, when the Company censured an employee for suing an Indian landowner under English law, it argued not that the landowner's rights had been violated, but that such suits might reduce tax revenues. See Board's Minute (May 21, 1773), IOR/P/2/3, at 275v–276 (on file with BL).

[221] Letter from Warren Hastings to Lord Chief Justice Mansfield (Mar. 21, 1774), *in* 1 G.R. Gleig, Memoirs of the Life of the Right Hon. Warren Hastings, First Governor-General of Bengal 399, 399 (London, R. Bentley 1841).

[222] Id. at 400.

[223] Id. at 403.

[224] Letter from Warren Hastings to Lord Chief Justice Mansfield (Jan. 20, 1776), *in* 2 Gleig, supra note 221, at 20, 21.

[225] See, e.g., Letter from Governor-General & Council to EIC Ct. of Dirs. (Feb. 29, 1780), Mss Eur E36, at 637, 655 (on file with BL) (describing efforts to introduce English law as a campaign "to deprive the Natives of those Rights, which they have hitherto enjoyed under every change of Government"); John Day, EIC Advocate Gen., Memorandum (Dec. 27, 1782), IOR/H/423, at 389, 391 (on file with BL) (warning that it would violate Indians' "natural rights" to subject them to English law); Francis Russell, Solicitor to the Bd. of Control, Heads of Defects in Matters of Law and Judicature in India (Mar. 20, 1794), IOR/H/414, at

Describing legal pluralism as a right had obvious tactical advantages.[226] But Mansfield declined to adopt Hastings's language. Mansfield did not explain why; but he may have been concerned that rights-talk ran contrary to a long line of judicial precedents (including one opinion by Mansfield himself) that had affirmed Britain's right to abrogate the laws of conquered peoples.[227] Mansfield may also have been reluctant to promote a new kind of rights claim that colonial subjects might later turn against their rulers. Whatever the reason, Mansfield replied to Hastings with a different defense of legal pluralism: humanitarian empathy. "[N]o measure could be more barbarous, in every sense of the Epithet," Mansfield wrote, "than to change the Laws of any People, except by very slow degrees, & in consequence of long Experience."[228] Mansfield assumed that "Positive Laws & Usages are, in themselves, indifferent," since people "at all times and in all places" agree about the basic principles of "Right & Wrong."[229] Nonetheless, people prefer the laws they know, and legal change was therefore painful.[230] Reforms might sometimes be necessary, but only a "barbarous" conqueror would fail to recognize their emotional cost.

This kind of humanitarian argument became a staple of Tory rhetoric.[231] Solicitor General Alexander Wedderburn, for instance, argued that

81, 91–93 (on file with BL). Lawyers soon clarified what kind of right was at stake: because Indian laws were religious laws, legal pluralism was fundamentally about protecting the conscience of Indians. See A[rchibald?] Macdonald, Observations on the Subject of English Judicature in India (Dec. 31, 1782), IOR/H/411, at 91, 91–92 (on file with BL); see also Bernard S. Cohn, Law and the Colonial State in India, *in* History and Power in the Study of Law 131, 140–47 (June Starr & Jane F. Collier eds., 1989) (describing legal pluralism as rooted in the theory that India was a theocratic society); Jakob De Roover & S.N. Balagangadhara, Liberty, Tyranny and the Will of God: The Principle of Toleration in Early Modern Europe and Colonial India, 30 Hist. Pol. Thought 111, 136–37 (2009) (describing the development of religious toleration in British India).

[226] Rights were not necessarily trumps in the eighteenth century, but rights of conscience were presumptively immune from governmental interference. See Jud Campbell, Republicanism and Natural Rights at the Founding, 32 Const. Comment. 85, 92 & n.34 (2017) (reviewing Randy E. Barnett, Our Republican Constitution: Securing the Liberty and Sovereignty of We the People (2016)).

[227] See Campbell v. Hall (1774) 98 Eng. Rep. 1045, 1047–49; 1 Cowp. 204, 209–12 (KB).

[228] Letter from Lord Chief Justice Mansfield to Warren Hastings ([1775]), Add MS 39781, at 2r, 2r (on file with BL).

[229] Id. For Mansfield's use of natural law, see Lieberman, supra note 93, at 95–97; James Oldham, English Common Law in the Age of Mansfield 88–90 (2004).

[230] Letter from Mansfield to Hastings, supra note 228, at 2r.

[231] For Bengal, see, for example, Verelst, supra note 147, at 145 (asserting that "humanity, justice, and sound policy will equally demand" legal pluralism in Bengal).

although Britain had the right to impose English law on Quebec, "it would be more humane" to leave *Canadiens* their own laws.[232] The Quebec Act, he told Parliament, would be "a recompense for the evils of war," ameliorating the trauma of conquest by limiting its effects.[233] Attorney General Edward Thurlow defended the Quebec Act in similar terms, telling the Commons that "humanity, justice, and wisdom equally conspire to advise you to leave [the laws] to the people just as they were."[234]

These arguments represented an important expansion of Britain's humanitarian tradition. During the first half of the eighteenth century, British diplomats and politicians had developed a policy of intervening on behalf of religious minorities in other countries.[235] Although Britain's humanitarian interventions initially focused on the plight of Protestants, by 1750 Britain were also pressuring foreign governments to stop targeting Jews and Catholics. In doing so, British officials appealed both to natural law and to empathy for the oppressed.[236] In one sense, then, Tories' appeal to natural rights and humanitarian empathy simply extended an earlier tradition of concern for minorities. In another respect, however, Tory arguments marked a crucial innovation.

Earlier humanitarian appeals had focused on "the victims of bodily depredation," with the paradigmatic cases being the "imprisonment, torture, or exile" of religious minorities.[237] Because earlier iterations of humanitarianism had focused on physical violence, early eighteenth-century politicians had found it perfectly acceptable to insist on legal uniformity

[232] Alexander Wedderburn, Speech in House of Commons (June 13, 1774), *in* 5 Proceedings and Debates, supra note 126, at 226, 226.

[233] Alexander Wedderburn, Speech in House of Commons (May 26, 1774), *in* 4 Proceedings and Debates, supra note 126, at 465, 466.

[234] Edward Thurlow, Speech in House of Commons (May 26, 1774), *in* 4 Proceedings and Debates, supra note 126, at 453, 455–56.

[235] Catherine Arnold, Affairs of Humanity: Sovereignty, Sentiment, and the Origins of Humanitarian Intervention in Britan and Europe (2017) (unpublished Ph.D. dissertation, Yale University) (on file with author).

[236] Id. at 5–6, 29–30.

[237] Catherine Arnold, Civility, Toleration, and "Human Rights as Empathy," Immanent Frame (Jan. 27, 2017), http://blogs.ssrc.org/tif/2017/01/27/civility-toleration-and-human-rights-as-empathy [https://perma.cc/V632-P8A8]; see also Lynn Hunt, Inventing Human Rights: A History 70–112 (2007) (describing early humanitarian arguments as focused on judicially sanctioned torture); Samuel Moyn, Theses on Humanitarianism and Human Rights, Humanity J. (Sept. 23, 2016), http://humanityjournal.org/blog/theses-on-humanitarianism-and-human-rights [https://perma.cc/E3KP-YLFX] (noting that humanitarianism typically focuses on "bodily violation").

at home, even as they objected to religious oppression abroad.[238] The same Whig ministry that intervened on behalf of persecuted Jews in Bohemia in the 1740s[239] aggressively worked to anglicize Scots law around the same time.[240] Tories in the 1770s rejected that limited understanding of humanitarianism by equating the imposition of English law with physical violence. Thomas Bernard, for example, argued that introducing English law to Quebec would be akin to proselytizing heretics "by *fire* and *faggot*."[241] Bernard's readers might have found it odd to conflate the introduction of civil juries with an *auto-da-fé*, but he urged them to overcome their skepticism through greater empathy: "Let us then put ourselves, for a moment, in the situation of our conquered Canadian subjects."[242]

For many Tories, these invocations of humanitarianism may well have been sincere. But several considerations suggest that they served primarily to justify a policy Tories had first embraced for instrumental reasons. First, Tories were less inclined to make deontological arguments for legal pluralism when they failed to advance Tories' political-economic agenda. For example, Mansfield reacted with shock to forcibly anglicizing the laws of Quebec—but not, for example, those of Grenada. Second, some Tories—particularly Warren Hastings—did not begin to articulate a deontological defense of legal pluralism until after they had already adopted that policy for expressly instrumental reasons.[243]

Finally, and perhaps most importantly, Tory humanitarianism was more aggressive about protecting Canadian and Indian laws than Canadians and Indians themselves may have preferred. As Lauren Benton and other historians of colonial law have emphasized, colonial subjects in

[238] Cf. Arnold, supra note 235, at 401–02 (discussing Britain's policy of coercing Irish Catholics).

[239] Id. at 349–50.

[240] See supra Section II.B.

[241] Bernard, supra note 174, at 36.

[242] Id. at 35.

[243] Hastings initially emphasized that the East India Company's preservation of Hindu and Islamic law did not "preclude the right . . . to establish new regulations upon any occasion where they may be required." [Warren Hastings], Regulations Proposed for the Government of Bengal ([1772]), *in* M.E. Monckton Jones, Warren Hastings in Bengal, 1772–1774, at 153, 157 (1918); see also Letter from President & Council, Ft. William (Calcutta) to EIC Court of Dirs. (Jan. 6, 1773), IOR/E/4/31, at 227, 230 (on file with BL) (stating that the EIC could change local laws if "any Inconvenience should be found to arise from" them). He first articulated a rights-based defense of legal pluralism two years later. See supra notes 221–224 and accompanying text.

many empires have proved adept at adapting to and exploiting new legal systems.[244] Quebec and Bengal were no exception, and non-British litigants frequently resorted to English courts whenever they could gain entry to them.[245] Indeed, some Indians and French Canadians actively petitioned for greater access to English law, partly due to their keen understanding of legal pluralism's political-economic consequences.[246] This is not to say that English law was universally beloved. Local elites often preferred the old laws that protected their social and political preeminence, and some kinds of law were closely linked to questions of religious and cultural identity. But as the next Section explains, the Tory program of legal pluralism exceeded what many of Britain's newest subjects wanted.

B. What Kind of Legal Pluralism Mattered?

Some kinds of legal pluralism mattered more than others. The disagreement between Whigs and Tories concentrated on the kinds of law that each side perceived as most crucial to economic and political development. This distinction emerged with respect to both Bengal and Quebec, but its specifics differed for each colony. For the sake of brevity and clarity, this Section focuses on the Canadian case.[247]

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[244] Lauren Benton, Historical Perspectives on Legal Pluralism, *in* Legal Pluralism and Development: Scholars and Practitioners in Dialogue 21, 25 (Brian Z. Tamanaha, Caroline Sage & Michael Woolcock eds., 2012); see also Marc Galanter, The Aborted Restoration of "Indigenous" Law in India, 14 Comp. Stud. Soc'y & Hist. 53, 65 (1972) (describing the operation of English law in independent India).

[245] See Mitch Fraas, supra note 68; Donald Fyson, The Conquered and the Conqueror: The Mutual Adaptation of the *Canadiens* and the British in Quebec, 1759–1775, *in* Revisiting 1759, supra note 7, at 190, 205.

[246] See, e.g., Daniel Blouin & William Clajon, Recueil de Pièces traduites de l'Anglais . . . (July 8, 1771), Gage Papers, vol. AS 138, folder 17 (on file with WLCL); Proposals of Inhabitants of Detroit, About Erecting Courts of Justice There ([1766 or 1767]), Gage Papers, vol. AS 60 (on file with WLCL); supra note 70 (describing an Indian complaint that the law applied in an East India Company court was insufficiently English). In the nineteenth and twentieth centuries, Indian litigants and lawyers often demanded increased access to English law, especially English courts and procedures. See Abhinav Chandrachud, An Independent, Colonial Judiciary: A History of the Bombay High Court During the British Raj, 1862–1947, at 23–25 (2015); Mitra Sharafi, Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947, at 202–04 (2014).

[247] Discussions concerning Bengal also distinguished among different kinds of law. As in Quebec, local inhabitants seemed less concerned to protect their traditional laws in "matters of Debts, Commercial Disputes, and the Various Petty Contests & differences which Daily occur amongst Men of Business." Letter from Samuel Middleton & George Hurst to President & Council of Ft. William (Apr. 6, 1772), IOR/P/1/51, at 336v, 337v (on file with BL); see

Debates about legal pluralism in Quebec came to focus on civil procedure, commercial law, and torts.[248] On one hand, Tories showed little inclination to preserve French criminal law, which would have done little to advance their political-economic agenda,[249] and which struck even many Tories as insufficiently protective of individual freedom.[250] On the other hand, many Whigs were willing to preserve French laws of inheritance, real property, and domestic relations, as long as Quebec received other aspects of English law.[251]

Jain, supra note 109, at 455; infra note 257 (discussing family law). But in Bengal, the East India Company had inherited a preexisting regime of legal pluralism, in which the Mughal Empire had imposed Islamic public law while allowing Hindus to resolve their own intrareligious disputes. See J. Duncan M. Derrett, Religion, Law and the State in India 229 (1968). As a result, Company officials had to decide not only whether to implement legal pluralism but also where to draw the line between Hindu and Islamic jurisdictional claims in light of preexisting arrangements. See, e.g., Nandini Chatterjee, Hindu City and Just Empire: Banaras and India in Ali Ibrahim Khan's Legal Imagination, 15 J. Colonialism & Colonial Hist. (2014), https://muse.jhu.edu/article/542521; Letter from Naib Dewan ([Apr.] 1772), IOR/P/1/51, at 339 (on file with BL).

[248] These modern terms map roughly onto eighteenth-century understandings. Amalia Kessler has recently shown that "the category of procedure" crystalized only in the mid-nineteenth century. See Amalia D. Kessler, Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877, at 11 (2017). Nonetheless, eighteenth-century lawyers and merchants frequently referred to the "mode . . . for deciding of trying questions" or the "method of determining disputes," phrases that encompassed not only trials by jury but also other aspects of what lawyers today would think of as civil procedure. See infra notes 255, 267; see also, e.g., John Dunning, Speech in the House of Commons (June 10, 1774), *in* 5 Proceedings and Debates, supra note 126, at 221, 221. This Article uses "commercial law" as shorthand for the constellation of laws governing commercial exchange, especially laws related to contract and debt. Finally, this Article uses "tort" to describe "actions for the reparation of injuries received, such as actions of false imprisonment, and of slander, and of assault." See infra note 255. Such actions were important mostly for addressing official misconduct. See infra note 262 and accompanying text.

[249] Cf. John H. Langbein, Albion's Fatal Flaws, Past & Present, Feb. 1983, at 96, 119 ("From the standpoint of the rulers, . . . the criminal justice system occupies a place not much more central than the garbage collection system.").

[250] Tories asserted that *Canadiens* were eager to receive English criminal law because it was "a more refined, a more merciful law, than the law of France." Lord North, Speech in the House of Commons (May 26, 1774), *in* 4 Proceedings and Debates, supra note 126, at 445, 447. Compare Alexander Wedderburn, Report 11 ([1772]), R2903-0-4-E, Edmund Burke Fonds (on file with Nat'l Archives of Can.) (describing French criminal law as "incompatible with an English Government of any sort"), with Alexander Wedderburn, Commons Debate (May 26, 1774), *in* 4 Proceedings and Debates, supra note 126, at 465, 468 ("I would not have compelled the Canadians to adopt the criminal law [of England], if they had found it as an hardship."). I thank Michel Morin and Aaron Willis for directing me to the copy of Wedderburn's report in the National Archives of Canada.

[251] Radical Whigs initially objected to French land tenures. See, e.g., John Adams, Notes of Debates in the Continental Congress, (Oct. 17[?], 1774), *in* 2 Diary and Autobiography of

Whigs' distinction between acceptable and unacceptable legal pluralism originated with a group of moderate, "establishment" Whigs, who suggested that Britain should anglicize only those laws that were necessary to secure Canadians' political and economic integration into the British Empire. According to these establishment Whigs, the laws of real property, inheritance, and domestic relations were less central to that task. This distinction was first advanced by a series of prominent Whig lawyers, including Britain's attorney and solicitor general,[252] Quebec's chief justice,[253] and Quebec's attorney general.[254] These lawyers soon convinced their allies that a limited extension of English law—one focused on the commercial law, torts, and civil procedure—would be enough to block Tories' political-economic agenda.[255]

Establishment Whigs did not explain how they determined which areas of law mattered, but their distinction seems to have derived from two related concerns. First, British officials believed that although *Canadiens* were especially attached to their customs concerning "Descent of estates & conveyance of landed property,"[256] they were more inclined to adopt English procedure and commercial law.[257] As a result, establishment

John Adams, supra note 154, at 154, 154 (objecting to the preservation of "feudal Law" in Quebec); see also Case of the British Merchants, supra note 173, at 209 (arguing that the "policy of the crown of Great-Britain" had always been to impose English law without "the least mixture of the" preconquest legal system).

[252] Charles Yorke & William De Grey, Report of Attorney and Solicitor General Regarding the Civil Government of Quebec (Apr. 14, 1766), *in* 2 Constitutional History, supra note 129, at 174–78.

[253] See Neatby, supra note 153, at 106.

[254] Letter from Francis Maseres to Sir John Eardley Wilmot (Aug. 16, 1773), OSB MSS File, folder 9999 (on file with BRBML); Maseres to Sutton, supra note 127, at 108.

[255] For instance, a group of British merchants trading to Quebec wrote that they were "most especially anxious" to have Parliament introduce English law related

> to matters of navigation, commerce, and personal contracts, and the method of determining disputes upon those subjects by the trial by jury, and likewise . . . to actions for the reparation of injuries received, such as actions of false imprisonment, and of slander, and of assault, and whatever relates to the liberty of the person.

Case of the British Merchants, supra note 173, at 211; see also To the Printer, Pub. Advertiser (London), May 19, 1774, at 6 ("[A]re the Trials to be by Juries? . . . [H]ow are Debts to be proved by People residing in Great Britain against People in Quebec? What is to be the Interest of Money in that Country, and what Damages on Bills of Exchange?"). In contrast, the merchants had no objection to retaining French law regarding "tenures and descents of land." Case of the British Merchants, supra note 173, at 209.

[256] [William Dowdeswell], Observations on Mr Maseres[']s letters to Mr T. Townshend (Nov. 11, 1766), William Dowdeswell Papers, folder 10 (on file with WLCL).

[257] See, e.g., Letter from Philip Yorke, 2d Earl of Hardwicke to Lord Rockingham, Prime Minister (June 30, 1766), WWM/R/1/638 (on file with SA) (suggesting "that the Canadians

Whigs hoped that their compromise might win the affection of Britain's new subjects while gradually introducing them to English legal culture.[258] At the same time, Whigs hoped that by allowing *Canadiens* to keep the laws they loved most, they could satisfy politicians who were inclined toward legal pluralism on humanitarian grounds.[259]

Second, Whigs perceived laws governing land tenures, inheritance, and domestic relations as less important than other areas of law for shaping Quebec's political and economic development.[260] In contrast, tort, commercial law, and civil procedure would play a vital role in its economic

liked our free & impartial Forms of Judicature, & only desired to be left to their old Laws & Customs for private Property"); Maseres to Sutton, supra note 127, at 108; see also Michel Morin, Blackstone and the Birth of Quebec's Distinct Legal Culture 1765–1867, *in* Re-Interpreting Blackstone's *Commentaries*: A Seminal Text in National and International Contexts 105, 112 (Wilfrid Prest ed., 2014) (suggesting that *Canadiens* were relatively willing to accept English commercial law); Testimony of Guy Carleton (June 2, 1774), *in* 5 Proceedings and Debates, supra note 126, at 3, 3 (same); Testimony of the Marquis de Lotbinière (June 3, 1774), *in* 5 Proceedings and Debates, supra note 126, at 61, 61 (same). Similarly, some proponents of English law in Bengal conceded that it would be unwise or unjust to interfere with laws concerning domestic relations or religion. See, e.g., 3 Alexander Dow, The History of Hindostan from the Death of Akbar, to the Complete Settlement of the Empire Under Aurungzebe, at cxlii–cxliii (London, T. Becket & P. A. de Hondt 2d ed. 1772) (arguing that it was "absolutely necessary for the peace and prosperity of the country, that the laws of England . . . should prevail" in general, but that certain "regulations, with regard to [Indians'] women and religion, must never be touched").

[258] See Edmund Burke, Notes for Speech on the Canada Bill (1774), WWM/Bk P/6/5 (on file with SA).

[259] See John Glynn, Speech in the House of Commons (June 10, 1774), *in* 5 Proceedings and Debates, supra note 126, at 185, 185; Isaac Barré, Speech in the House of Commons (June 2, 1774), *in* 5 Proceedings and Debates, supra note 126, at 17, 17; Dunning, supra note 248, at 221. It is unclear whether this attachment to property and family law reflected purely cultural factors or a sense that the intrinsic nature of some kinds of law would make them particularly hard to change. Cf. Yun-chien Chang & Henry E. Smith, An Economic Analysis of Civil Versus Common Law Property, 88 Notre Dame L. Rev. 1, 20–21 (2012) (explaining why property law is often more resistant to change than procedural law).

[260] The Quebec Act authorized the use of either French- or English-style wills, which suggests that Tories agreed that the introduction of English inheritance law would be relatively insignificant for the colony's political economy. See Quebec Act 1774, 14 Geo. 3 c. 83, § 10. Adam Smith's Wealth of Nations—published two years after the Quebec Act's passage—helps to explain why Whigs and Tories might have been flexible about inheritance rules. Smith thought that because French inheritance law distributed land more equally than the English rule of primogeniture, French law might have helped early colonial development by keeping land prices low. See 2 Smith, supra note 167, at 572. This was the same strategy pursued by many British North American colonies when they rejected primogeniture. See id. In other words, in North America, French and English law tended to converge toward a model that discouraged the formation of large estates. Moreover, Smith thought that in most colonies, inheritance was probably a less important mechanism for land transfer than alienation. See id. at 572–73.

and political life.[261] Tort law mattered primarily because suits against governmental agents were a crucial means of redressing official misconduct.[262] Commercial law was self-evidently important to merchants.[263] And civil procedure mattered principally because it protected civil juries.[264] Together, these three areas of law would do most of the work of determining what kind of colony Quebec would become. As a result, when it came to those core subjects, Whigs insisted that Britain transplant English law even if *Canadiens* objected.[265] This was especially true of civil procedure.[266] For instance, Fowler Walker, a Whig barrister and the lobbyist for Quebec's anglophone merchants, acknowledged that some *Canadiens* might object to the "tediousness" of English modes of proceeding. He nonetheless suggested "that they should consider those *delays as the price which they pay for & the Criterion* of their liberty."[267] He attributed the sentiment to Montesquieu—offering yet another instance in which *The Spirit of the Laws* could be invoked to defend a program of legal uniformity.[268]

V. IMPLICATIONS

Britain's decision to encourage legal pluralism in Bengal and Quebec inaugurated a new era of empire. For the first time, Britain's projection of

[261] Whigs viewed land tenures as less important for development than procedure or commercial law—but not unimportant. Adam Smith, for instance, argued that English land tenures had been crucial to the early success of British North America. See 2 Smith, supra note 167, at 573. In addition, merchants were very concerned about whether the Debt Recovery Act, 1732, 5 Geo. 2 c. 7, extended to Quebec. That statute, which made real property equivalent to chattel property for the purpose of satisfying colonial debts, was seen as having an important effect on credit. See Claire Priest, Creating an American Property Law: Alienability and Its Limits in American History, 120 Harv. L. Rev. 385, 427–28 (2006); To the Printer, supra note 255, at 6.

[262] See supra notes 154–155 and accompanying text.

[263] See supra note 255.

[264] For the importance of juries, see supra notes 152–156.

[265] See Edouard Fabre-Surveyer, The Struggle for English Commercial Law in Canada, 34 Com. L. League J. 616, 623 (1929).

[266] Nonetheless, many Whigs were willing to tweak English procedure to accommodate French sensibilities, such as by compensating jurors or removing the requirement that juries decide cases unanimously. See Testimony of William Hey, Chief Justice of Quebec, in the House of Commons (June 2, 1774), *in* 5 Proceedings and Debates, supra note 126, at 35; cf. supra note 69 and accompanying text (describing how English courts in the 1740s had modified oath-taking to accommodate Hindu litigants).

[267] Fowler Walker, Considerations on the Present State of the Province of Quebec (Mar. 1, 1766), Add MS 35915, at 45 (on file with BL).

[268] Id.

power depended not on the extension of English law but on its restriction. Colonial legal policies remained contested for as long as the British Empire endured, and policymakers and colonial subjects continued to question the prudence and justice of legal pluralism.[269] Nonetheless, Tories had established an enduring framework. After the eighteenth century, the question became not whether Britain's conquered colonies would be juridically distinct, but how.[270]

This historical argument offers two broader lessons about the role of legal institutions in shaping development outcomes. The first concerns efforts to evaluate the quality of legal institutions today. The second lesson relates to legal pluralism's normative value.

A. Evaluating Legal Institutions

Most scholars agree that a country's well-being depends at least partly on its institutions.[271] But efforts to identify which institutions promote development have proved more controversial.[272] In particular, scholars continue to debate whether some legal systems lead to better political and economic outcomes than others.[273]

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[269] See infra notes 317–320 and accompanying text.

[270] See C.A. Bayly, Imperial Meridian: The British Empire and the World, 1780–1830, at 159–60 (1989).

[271] See, e.g., Daron Acemoglu & James A. Robinson, Why Nations Fail: The Origins of Power, Prosperity, and Poverty (2012); Justin duRivage & Claire Priest, The Stamp Act and the Political Origins of American Legal and Economic Institutions, 88 S. Cal. L. Rev. 875, 878–80 (2015); Douglass C. North & Barry R. Weingast, Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England, 49 J. Econ. Hist. 803 (1989); Taisu Zhang, Property Rights in Land, Agricultural Capitalism, and the Relative Decline of Pre-Industrial China, 13 San Diego Int'l L.J. 129, 199 (2011). Although discussion continues about institutions' importance relative to other factors, few scholars would disagree that institutions matter. See, e.g., Prasannan Parthasarathi, Why Europe Grew Rich and Asia Did Not: Global Economic Divergence, 1600–1850, at 84–85 (2011); Jared Diamond, What Makes Countries Rich or Poor?, N.Y. Rev. Books (June 7, 2012), http://www.nybooks.com/articles/2012/06/07/what-makes-countries-rich-or-poor [https://perma.cc/VJ92-75B7] (reviewing Acemoglu & Robinson, supra); Jeffrey D. Sachs, Government, Geography, and Growth: The True Drivers of Economic Development, 91 Foreign Aff., Sept.–Oct. 2012, at 142 (same).

[272] See Daniels et al., supra note 6, at 112–16; Kevin E. Davis, Legal Indicators: The Power of Quantitative Measures of Law, 10 Ann. Rev. L. & Soc. Sci. 37, 42 (2014).

[273] See, e.g., Timur Kuran, The Long Divergence: How Islamic Law Held Back the Middle East (2011); Ryan Bubb, The Evolution of Property Rights: State Law or Informal Norms?, 56 J.L. & Econ. 555, 588–89 (2013); Kevin E. Davis & Michael J. Trebilcock, The Relationship Between Law and Development: Optimists Versus Skeptics, 56 Am. J. Comp. L. 895 (2008); Tom Ginsburg, Does Law Matter for Economic Development? Evidence from East

The idea that law matters for economic growth has a long history.[274] In the nineteenth century, Max Weber wondered why England, with its apparently irrational common law, industrialized before continental countries with seemingly more sensible civil legal systems.[275] Later writers turned Weber's "England problem" on its head by arguing that the common law actually *promotes* economic development by constraining state expropriation or protecting free markets.[276] Douglass North and Barry Weingast, for instance, argue that "the primacy of the common law courts over economic affairs" set the stage for the Industrial Revolution in England by shielding private property from the Crown.[277]

Over the last twenty years, the "legal origins" theory has added to the common law's luster.[278] That theory has evolved, but its core thesis is that common-law and civil-law systems tend to produce different kinds of legal rules and that the common-law versions generally lead to better economic outcomes.[279] This theory has shaped international aid efforts for most of the twenty-first century, particularly through its influence on the World Bank.[280] Nearly every aspect of the legal origins theory has

Asia, 34 Law & Soc'y Rev. 829 (2000) (reviewing Katharina Pistor & Philip A. Wellons, The Role of Law and Legal Institutions in Asian Economic Development, 1960–1995 (1999); Kanishka Jayasuriya, Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions (1999); Robert S. Brown & Alan Gutterman, Asian Economic and Legal Development: Uncertainty, Risk, and Legal Efficiency (1998)).

[274] See Curtis J. Milhaupt, Beyond Legal Origin: Rethinking Law's Relationship to the Economy—Implications for Policy, 57 Am. J. Comp. L. 831, 831–32 (2009).

[275] See Joshua Getzler, Theories of Property and Economic Development, 26 J. Interdisc. Hist. 639, 645–46 (1996). Weber himself seems to have concluded that England's expensive and adversarial procedure inadvertently spurred industrialization by favoring capitalists with the resources and energy to navigate the common law. Id.

[276] See, e.g., 1 F.A. Hayek, Law, Legislation and Liberty: Rules and Order 94 (1973).

[277] North & Weingast, supra note 271, at 829; see also Ron Harris, Could the Crown Credibly Commit to Respect Its Charters? England, 1558–1640, *in* Questioning Credible Commitment: Perspectives on the Rise of Financial Capitalism 21, 28–31 (D'Maris Coffman, Adrian Leonard & Larry Neal eds., 2013) (extending the "credible commitment" thesis to corporate charters in the late sixteenth and early seventeenth centuries).

[278] See, e.g, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, The Economic Consequences of Legal Origins, 46 J. Econ. Lit. 285 (2008) (summarizing the theory). For complementary analyses, see, for example, Edward L. Glaeser & Andrei Shleifer, Legal Origins, 117 Q. J. Econ. 1193 (2002); and Paul G. Mahoney, The Common Law and Economic Growth: Hayek Might Be Right, 30 J. Legal Stud. 503 (2001).

[279] See Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, Law and Finance After a Decade of Research, *in* 2 A Handbook of the Economics of Finance: Corporate Finance 425, 427 (George M. Constantinides, Milton Harris & René M. Stulz eds., 2013).

[280] See World Bank, World Development Report 2002: Building Institutions for Markets 65–66 (2002); see also Michaels, supra note 12, at 771 (describing the influence of the legal

attracted criticism, from its description of the differences between common and civil law to its empirical conclusions about the superiority of common-law economies.[281] But although the legal origins theory has lost much of its influence, it continues to shape the agendas of many scholars.[282]

Perhaps the most influential critique has come from Daron Acemoglu and James Robinson (sometimes writing with Simon Johnson). Like the legal origins theorists, Acemoglu and Robinson think that institutions matter. But they argue that the presence or absence of English law is unimportant for a country's long-term development.[283] Instead, what matters is whether a country's institutions are "extractive" or "inclusive."[284] Moreover, unlike the legal origins theory—which assumes that European empires invariably spread their own laws wherever they went—Acemoglu and Robinson focus on institutional variation among colonies. They attribute this variation to each colony's initial conditions, particularly the density of indigenous populations and the mortality rates of European settlers. In places where Europeans were able to settle in relatively large numbers, they constructed "neo-Europes" with European-style institutions. Low European settlement, in contrast, led to "extractive states" with institutions that served mostly to funnel wealth back home.[285]

origins theory); Holger Spamann, Empirical Comparative Law, 11 Ann. Rev. L. & Soc. Sci. 131, 135–36 (2015) (same).

[281] See, e.g., Berkowitz et al., supra note 32; Daniels et al., supra note 6; Ron Harris & Naomi R. Lamoreaux, Contractual Flexibility Within the Common Law: Organizing Private Companies in Britain and the United States (Nov. 23, 2016), https://ssrn.com/abstract=2874780; Klerman & Mahoney, supra note 7; Roe & Siegel, supra note 33; Holger Spamann, Legal Origin, Civil Procedure, and the Quality of Contract Enforcement, 166 J. Institutional & Theoretical Econ. 149 (2010). For a response to some of these criticisms, see La Porta et al., supra note 279.

[282] World Bank, World Development Report 2017: Governance and the Law 87–88 (2017). For the continuing relevance of legal origins, see, for example, Daniel Berkowitz & Karen B. Clay, The Evolution of a Nation: How Geography and Law Shaped the American States 16–59 (2012); and Lucas Kowalczyk & Mila Versteeg, The Political Economy of the Constitutional Right to Asylum, 102 Cornell L. Rev. 1219, 1276–80 (2017).

[283] Daron Acemoglu & James Robinson, What Are Institutions?, Why Nations Fail (Oct. 29, 2013), [https://perma.cc/SJG3-MWQN] (citing Acemoglu et al., supra note 38; Daron Acemoglu & Simon Johnson, Unbundling Institutions, 113 J. Pol. Econ. 949 (2005)).

[284] See generally Acemoglu & Robinson, supra note 271 (arguing that inclusive economic institutions lead to more persistently inclusive political ones).

[285] Acemoglu et al., supra note 38, at 1370; see also Daron Acemoglu, Simon Johnson, & James A. Robinson, Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution, 117 Q. J. Econ. 1231, 1234–35 (2002) (describing features of "extractive institutions").

Because of this causal story, Acemoglu and Robinson's approach is sometimes known as the "endowments" or "institutional transplants" thesis.[286]

The legal origins and endowments theories reach antithetical conclusions about the importance of English law. But they agree in treating colonial legal institutions as the predictable product of initial conditions, rather than the contingent result of political conflict. The legal origins theory has generally assumed that European empires uniformly imposed their own laws everywhere—an assumption that is plainly inconsistent with the reality of colonial legal pluralism.[287] The endowments theory makes the opposite move; by focusing on the importance of initial conditions in each colony, its framework implicitly assumes that legal pluralism was inevitable.[288] (Acemoglu, Johnson, and Robinson do not expressly address colonial legal pluralism, but other scholars have plausibly

[286] See also Engerman & Sokoloff, supra note 38, at 44 (referring to initial conditions in colonies as "factor endowments"). Some authors have tried to synthesize the legal-origins and endowments approaches. See, e.g., Daron Acemoglu & Simon Johnson, Unbundling Institutions, 113 J. Pol. Econ. 949, 950 (2005); Ross Levine, Law, Endowments and Property Rights, 19 J. Econ. Perspectives 61, 62 (2005); Oto-Peralías & Romero-Ávila, supra note 12, at 563–64.

One recent variation on the endowments thesis is Sean Gailmard, Building a New Imperial State: The Strategic Foundations of Separation of Powers in America, 111 Am. Pol. Sci. Rev. 668 (2017). Gailmard argues that the British Empire designed colonial institutions to solve an agency problem with colonial governors, who might have been tempted to extract more rents from colonists than the Crown preferred. Although this problem arose everywhere, "the specific agency problem differed across colonies with different economic endowments," because different endowments created different opportunities for rent-extraction. Id. at 681. As a result, the Crown tailored colonial institutions to each colony's economic endowments. Specifically, the Crown created strong colonial assemblies in places where returns on settler investment were moderate (i.e., the future United States), while limiting or blocking assemblies where returns were very high (the Caribbean) or very low (Canada). This Article agrees with Gailmard that colonial institutions reflected a strategic political choice that linked institution outcomes with economic development. But the history of the eighteenth-century British Empire also suggests that Gailmard's article takes too deterministic a view of economic endowments, which were the product, not just the cause, of variation in institutional outcomes.

[287] See Daniels et al., supra note 6, at 153; Oto-Peralías & Romero-Ávila, supra note 12, at 563–64.

[288] Acemoglu et al. expressly reject determinism: although high settler mortality "influenced" institutional outcomes and "stacked" the deck "against the creation of Neo-Europes," it did not dictate particular institutional outcomes. Acemoglu et al., supra note 38, at 1370; see also Acemoglu & Robinson, supra note 271, at 432 (denying that their work entails "any . . . kind of determinism"). Yet the logic of their argument makes it hard to avoid drawing deterministic conclusions. See Acemoglu et al., supra note 38, at 1370 (offering a schematic summary of their argument); cf. Acemoglu & Robinson, supra note 271, at 433 ("North America followed a different institutional trajectory than Peru *because* it was sparsely settled before colonization . . . ." (emphasis added)).

interpreted their work as explaining why European settlers transplanted their legal systems to some colonies but not others.[289]) By treating colonial legal systems as the predictable product of initial conditions, the legal origins and endowment theories have both been able to treat the postcolonial world as a natural experiment about law and development. If European empires did not have any particular agenda when they imposed different laws on different places, then they effectively set up a randomized trial about the economic impact of different kinds of law.

That view needs to be revised.[290] At least in the eighteenth-century British Empire, colonial laws did not emerge automatically from initial conditions but rather as the result of a contingent and contested policy choice. As a result, there was at least sometimes a correlation between the kind of law that the British Empire imposed and the kind of economy that was supposed to develop, and it can no longer be assumed that legal institutions were exogenous to development outcomes. This is not to say that the legal origins or endowments theories must be discarded. For instance, Acemoglu and his coauthors acknowledge that initial endowments were "*not* the only, or even the main, cause of variation in institutions"; their empirical approach requires only that differences in settler mortality

[289] See Adam S. Chilton & Eric A. Posner, The Influence of History on States' Compliance with Human Rights Obligations, 56 Va. J. Int'l L. 211, 230 (2016); Oto-Peralías & Romero-Ávila, supra note 12, at 569. Acemoglu et al. seek to explain why European empires "tried to replicate European institutions" in some colonies but not others. Acemoglu et al., supra note 38, at 1370. Since civil or common law is one such "European institution," it seems reasonable to interpret their work as offering a theory about legal transplants.

[290] This argument builds on the work of other scholars who have discussed colonial legal systems as the product of imperial policymaking. Daniel Klerman and coauthors, for instance, have found that the identity of a country's former colonizer—and, specifically, whether a postcolonial country was previously controlled by Britain or France—is "a better predictor of postcolonial growth rates than legal origin." Klerman et al., supra note 1, at 405. In interpreting that finding, these authors persuasively highlight the need to consider each empire's policy choices, not just the institutions those choices produced. But in doing so, their article does not fully consider the extent to which legal origin may itself have been a policy choice. For instance, the article does not consider how or why colonies might have "officially or unofficially retained substantial parts of their native legal system." See id. at 381 n.3. Other critics of legal origins have taken a similar approach, even when focusing expressly on the effects of legal pluralism. For instance, Ronald Daniels, Michael Trebilcock, and Lindsey Carson argue that modern rule-of-law outcomes in former British colonies depend partly on the extent to which indigenous and English laws were integrated into a single system. This is a powerful insight about the postcolonial legacy of legal pluralism, but their article expresses no view as to why Britain might have adopted different policies for each colony. See Daniels et al., supra note 6, at 129 n.68. As a result, the potential endogeneity of legal policy is left mostly unexplored.

rates were "*a source of* exogenous variation."[291] It seems plausible that, when the broader history of the British Empire is considered (including the nineteenth and twentieth centuries), this low bar will be met.[292] Nonetheless, it seems worth asking how we might update existing theories of law and development in light of this Article's historical argument.

At first glance, the history of the eighteenth-century British Empire does seem to support the claim that law matters for development—and, more precisely, the claim that the common law leads to better development outcomes than other legal systems. To be sure, this Article has not tried to prove that Britain's legal policy actually changed any colony's economic or political trajectory. But contemporary politicians certainly believed that English law would have far-reaching political and economic effects. Moreover, merchants lobbied hard for the common law, and they changed their investment decisions in response to whatever law Britain imposed.[293] Of course, people in the eighteenth century were not infallible observers of their own society any more than we are today. But to the extent that we think we have something to learn from people like John Adams, Edmund Burke, or Lord Mansfield, it seems prudent to take their ideas about legal pluralism seriously.

[291] Acemoglu et al., supra note 38, at 1371 n.4.

[292] Nonetheless, settler mortality may be a weaker instrument than hitherto believed. Cf. Spamann, supra note 280, at 142 (discussing the difficulty in correlating legal development origins to any one variable). For other methodological critiques of the endowments literature, compare David Y. Albouy, The Colonial Origins of Comparative Development: An Empirical Investigation: Comment, 102 Am. Econ. Rev. 3059 (2012), with Daron Acemoglu, Simon Johnson & James A. Robinson, The Colonial Origins of Comparative Development: An Empirical Investigation: Reply, 102 Am. Econ. Rev. 3077 (2012).

[293] Scholars of corporate and contract law often use the revealed preferences of sophisticated actors to shed light on the relative desirability of different legal regimes. See, e.g., Lisa Bernstein, Custom in the Courts, 110 Nw. U. L. Rev. 63, 109 (2015); Theodore Eisenberg & Geoffrey P. Miller, The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts, 30 Cardozo L. Rev. 1475, 1476 (2009). It is unclear whether merchants today prefer the common law. See Mariana Pargendler, The Role of the State in Contract Law: The Common-Civil Law Divide, 43 Yale J. Int'l L. 143, 182 (2018) ("Although quite different in important dimensions, both English law and Swiss law appear to be the most popular governing laws of choice among sophisticated business parties in international arbitration proceedings."). Compare Stefan Voigt, Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory, 5 J. Empirical Legal Stud. 1, 15 (2008) (arguing that more international merchants prefer Swiss or French law than U.S., Canadian, or English law), with Exorbitant Privilege, The Economist, May 10, 2014, at 59 (reporting that "American and English law and lawyers have a stranglehold on cross-border business").

But even if the legal origins theory is right that law matters, it has misunderstood why. The theory's most recent refinement suggests that common-law and civil-law systems lead to different development outcomes because they embody different assumptions about the role of the state. For instance, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer have contrasted "the policy-implementing focus of civil law versus the market-supporting focus of common law."[294] What matters, in other words, is the contrasting "style[] of social control" that each legal system evinces, rather than any particular substantive or procedural features.[295] On this view, the common law is better because it supports a less statist approach to governing.[296]

The dichotomy between statist civil law and free-market common law has a rich history in comparative legal scholarship.[297] But it does not quite capture why English law mattered in the British Empire. To be sure, English law offered important protections against certain kinds of authoritarianism and expropriation.[298] Common-law suits were the chief means of redressing official misconduct, and civil juries played an important part

[294] La Porta et al., supra note 279, at 478; see also Mahoney, supra note 278, at 505 (arguing that "quite apart from the substance of legal rules, there is a sharp difference between the ideologies underlying common and civil law, with the latter notably more comfortable with a centralized and activist government").

[295] La Porta et al., supra note 279, at 455.

[296] Cf. John C. Coffee, Jr., The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control, 111 Yale L.J. 1, 61–64 (2001) (arguing that the common law was more hospitable than the civil law to private ordering, including arbitration). This view of the common law as minimizing the state's role aligns with what Peter Evans described as neoutilitarian and public-choice theories of the state, which stress the need to minimize the state's policy-implementing role in order to close off opportunities for rent-seeking. See Peter B. Evans, Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State, 4 Soc. F. 561 (1989).

[297] See, e.g., Mirjan R. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process 3–13, 71–84 (1986); John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 18 (2d ed. 1985); cf. Robert W. Gordon, Hayek and Cooter on Custom and Reason, 23 Sw. U. L. Rev. 453, 454 (1994) (describing Hayek's contrast between "'English' or 'bottom-up'" systems, which he favored, and "'French' or 'top-down'" systems, which he did not). But cf. Pargendler, supra note 293, at 185–87 (agreeing that the common law is associated with a smaller role for the state, but suggesting that "legal traditions are not the cause but rather the result of distinct styles of social and government organization").

[298] Cf. La Porta et al., supra note 279, at 455–56 (suggesting that the civil law and the common law represent different solutions to the "twin problems" of "disorder" and "state abuse"). In addition, other aspects of the English constitutional tradition, such as a powerful elected legislature, could have provided additional protection. See Gailmard, supra note 286, at 669.

in protecting merchants from predatory state agents.[299] But that is not quite the same thing as saying that the common law was less statist or less "policy-implementing." To the contrary, Whigs favored the common law precisely because of its "policy-implementing" consequences, which included strengthening merchants at the expense of large landowners, hastening cultural assimilation, encouraging anglophone immigration, and fostering civic consciousness. One might convincingly characterize some of these consequences as "market-supporting." But it seems perverse to describe Whigs' efforts to use the common law to supplant seigneurial power—whether in Bengal, Quebec, or the Scottish Highlands—as the victory of private ordering over the state.[300] Moreover, Whigs assumed that the very act of transplanting English law would have required, or at least have been accompanied by, significant state intervention.[301] In short, while the common law was government-limiting in some respects, it was policy-implementing in others.

Instead of being uniquely *laissez-faire*, two other considerations made the common law seem to favor development. The first was its signaling function. Transplanting English law made it clear that Britain wanted to support a particular kind of commercial development. Of course, prospective settlers and investors might have found English law to be attractive in itself; but it also indicated that the British state was likely to offer other kinds of support. For this reason, Fowler Walker, the Whig barrister and lobbyist, described the initial imposition of English law on Quebec as "nothing more than a royal Invitation to his Majesty's subjects to settle."[302] Of course, the invitation could be withdrawn, as the Quebec Act

[299] See supra note 154; cf. Edmund Burke, Commons Debate (June 10, 1774), in 5 Proceedings and Debates, supra note 126, at 208 ("No merchant thinks himself armed to protect his property, if he is not armed with English law.").

[300] Cf. Pincus, supra note 117, at 16–18 (arguing that radical Whigs favored "activist," pro-development policies).

[301] For example, one anonymous Whig proposed that "for every Englishman that goes to the Asiatic continent, let three or four Indian infants be brought over in the same vessel," to be raised in England or British North America. This program of state-directed migration would train a corps of Indians who, "early habituated to the laws of England," would then be able to introduce English laws to Bengal. "Brecknock," Political Observations, or Remarks, Taken from the Last London Print of May 20, 1767, N.Y. Gazette, Aug. 3–10, 1767, at 1–2; cf. Taisu Zhang, Cultural Paradigms in Property Institutions, 41 Yale J. Int'l L. 347, 411 (2016) (noting that large-scale legal transplants often involve a substantial expansion of state power).

[302] Fowler Walker to Lord Dartmouth (Oct. 16, 1765), Add MS 35914, 39–40, (on file with BL); see also Thomas Townshend, Jr., Commons Debate (May 26, 1774), *in* 4 Proceedings and Debates, supra note 126, at 442–43 (discussing "those subjects that had been invited by the Proclamation that told them they were to have the law of England").

showed. But doing so was costly—as the Quebec Act also showed. The Crown could grant English law by proclamation, but only Parliament could take it away.

Conversely, the absence of English law became a self-fulfilling prophecy of underdevelopment. Withholding English law suggested that the British state would withhold other kinds of support. And if British merchants believed that legal pluralism would be bad for a colony's economy, then their belief made it so when they avoided investing in legally plural jurisdictions. As a result, even if French, Hindu, or Islamic law were intrinsically benign, their persistence in the British Empire might still have retarded development, thanks to the preferences, prejudices, and assumptions of British subjects.[303]

Prevailing theories of law and development have mostly tried to measure the objective effects of different legal systems.[304] In doing so, they have started from the shared assumption that variations among colonial legal systems were exogenous to development policy. This Article offers a reason to question both of these moves. On one hand, this Article's historical narrative highlights the subjective effect of legal difference. In the British Empire, law shaped development not only through its objective characteristics, but also by signaling the state's intentions and by playing on the prejudices and preferences of contemporary economic agents. On the other hand, this Article has shown that the British policymakers consciously deployed different kinds of law to shape development outcomes. As a result, variations among colonial legal systems did not create a natural experiment about the political and economic consequences of different kinds of law. It may well be possible for future researchers to untangle the effect of English law per se from the effect that it may have had due to contemporary assumptions about legal difference. But doing so will require scholars to consider a new possibility: that some kinds of law may outperform others thanks to a kind of placebo effect, in which the

[303] Cf. Acemoglu & Robinson, supra note 271, at 43 (emphasizing that economic development depends partly on investors' confidence in state institutions). Daniel Oto-Peralías and Diego Romero-Ávila have shown that colonial legal pluralism is often associated with worse postcolonial economic outcomes in former British colonies. Oto-Peralías and Romero-Ávila, supra note 12, at 614–15. But because their paper assumes that Britain "did not seek to transfer its legal rules and institutions to territories politically organized and densely populated at the time of colonization," it is unable to explain why legal pluralism was problematic. See id.

[304] Not all scholars have ignored the political side of legal transplants. See, e.g., Mariana Pargendler, Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil, 60 Am. J. Comp. L. 805 (2012).

desirability of a particular kind of law depends at least in part on what observers expect it to achieve.

These two dynamics—the common law's role as a signal and the self-fulfilling prophecy of law and development—are not the only reasons that English law mattered. Eighteenth-century merchants cared about civil juries as checks on potentially hostile judges.[305] English law may have offered other intrinsic advantages. But any attempt to measure these advantages must account for the dynamics of legal pluralism—whether a colony's laws were "considerably different from [laws] of the neighbouring Colonies,"[306] as one contemporary lawyer put it.

B. Toleration as a Tool of Empire

Theories of law and development can create an uncomfortable dilemma. If the common law—or any other legal system—turns out to be measurably superior to the alternatives, then developing countries face a stark choice between maximizing economic growth and maintaining their own customs. Understandably, many scholars saw this dilemma as troublingly imperialistic, and they sought to find a way around it.[307]

It is not surprising, then, that development experts have started to reject Western legal imperialism and to reconcile their commitment to economic growth with a greater respect for legal and cultural diversity. In the immediate aftermath of decolonization, reformers tended to treat legal pluralism as an unfortunate obstacle to modernization.[308] More recently, however, scholars and development planners now tend to describe pluralism as "neither inherently good nor bad."[309] In essence, the World Bank has caught onto what theorists of multiculturalism have been saying for years.[310]

[305] But cf. Klerman et al., supra note 1, at 399–400 (finding no evidence that juries "had any effect on subsequent growth" in former colonies).

[306] Maseres to Sutton, supra note 127, at 110.

[307] See, e.g., Daniels et al., supra note 6, at 176; Jedidiah Kroncke, Law and Development as Anti-Comparative Law, 45 Vand. J. Transnat'l L. 477 (2012)

[308] See Halliday, supra note 3, at 262–63.

[309] World Bank, supra note 282, at 84; accord Caroline Sage & Michael Woolcock, Introduction, *in* Legal Pluralism and Development, supra note 244, at 1, 2–3.

[310] See, e.g., James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (1995); Ralf Michaels, On Liberalism and Legal Pluralism, *in* Transnational Law 122, 123 (Miguel Maduro, Kaarlo Tuori & Suvi Sankari eds., 2014) (summarizing multiculturalist arguments for legal pluralism).

The recent acceptance of legal pluralism in an international context coincides with American courts' rehabilitation of their own country's history of colonial legal pluralism. When the United States annexed several Caribbean and Pacific islands following the Spanish-American War, it declined to fully extend the U.S. Constitution or U.S. law to its new possessions.[311] Traditionally, historians and legal scholars have described this adoption of legal pluralism—especially as crystalized in the *Insular Cases*—as the product of racism, imperial exploitation, and the lamentable abandonment of America's earlier anticolonial commitments.[312] Recently, however, some judges and commentators have offered a revised history of U.S. colonial legal policy. In their telling, legal pluralism was a wise decision for multiculturalism that avoided the deadening homogenization of an imperial American law.[313]

The example of the British Empire suggests a need to proceed down this path with caution. To be sure, other scholars have already flagged some of legal pluralism's potential risks.[314] From feminist critiques of the cultural defense to progressive attacks on religious exemptions, judges and scholars have frequently warned that a uniform legal regime can play an indispensable role in safeguarding the rights of vulnerable

[311] See Kal Raustiala, Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law 34, 77 (2009); Mark S. Weiner, Teutonic Constitutionalism, *in* Foreign in a Domestic Sense, supra note 36, at 48, 64–65.

[312] See, e.g., Burnett & Marshall, supra note 36, at 11–12; Andrew Kent, The Jury and Empire: The *Insular Cases* and the Anti-Jury Movement in the Gilded Age and Progressive Era, 91 S. Cal. L. Rev. 375, 387–93 (2018) (summarizing this perspective); Gerald L. Neuman, Whose Constitution?, 100 Yale L.J. 909, 964 (1991).

[313] See, e.g., Zachary S. Price, Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction, 113 Colum. L. Rev. 657, 688–89 (2013) (describing *Boumediene v. Bush*, 553 U.S. 723, 757 (2008)); cf. Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1884 (2016) (Breyer, J., dissenting) (linking the preservation of Spanish law in Puerto Rico to the island's political autonomy); Tuaua v. United States, 788 F.3d 300, 310 (D.C. Cir. 2015) (declining to extend birthright citizenship to American Samoa in part because doing so might endanger the territory's "traditional, racially-based land alienation rules"); see generally Developments in the Law—American Samoa and the Citizenship Clause: A Study in *Insular Cases* Revisionism, 130 Harv. L. Rev. 1616, 1696–1703 (2017) [hereinafter Developments] (summarizing the rehabilitation of the *Insular Cases*). This revisionism sits uneasily with recent accounts of how the Kingdom of Hawai'i voluntarily adopted Anglo-American law in the nineteenth century—not merely as a foreign imposition, but as a means of furthering Hawaiian agency under pressure. See Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (2000); Carol Weisbrod, Kites and the Sabbath: Legal Transplants and Pluralism in Hawai'i (2014).

[314] See Developments, supra note 313, at 1702–03.

individuals.[315] But this Article raises a different concern: that legal pluralism can help the state oppress the very groups whose rights it purports to protect.

In the eighteenth-century British Empire, many Tories embraced legal pluralism because it would help Britain exploit its colonial subjects. But that policy prevailed thanks partly to the rhetoric of rights and humanitarianism. That rhetoric had a basis in truth: some colonial subjects did in fact want to keep their own laws. Nonetheless, Tories' arguments originated primarily with British policymakers and politicians, who exaggerated the demands and needs of colonial subjects in order to advance their own agenda.

It seems unlikely, to say the least, that the World Bank or well-meaning law professors have praised legal pluralism for similarly authoritarian ends. And, of course, legal pluralism can offer irreplaceable benefits for minority groups that seek to preserve a distinctive way of life.[316] It would be foolish to deny the damage that an unwanted common law can inflict. Eighteenth-century Whigs and the Continental Congress recognized as much when they sought to preserve French property and inheritance rules in Quebec and Illinois. But the Whig compromise was neither an uncritical celebration of pluralism nor a blind pursuit of uniformity. Rather, it was a painstaking attempt to balance the very real costs of assimilation against the equally real danger of political and economic subordination.

CONCLUSION

This Article has offered a new explanation for how and why Britain transplanted English law to the colonies it acquired during the eighteenth century. It has argued that Britain used colonial legal policy to further a specific development agenda. Imperial officials transplanted English law only to those colonies that they had chosen to develop along the lines of British North America. In contrast, they used legal pluralism to ensure political subordination and to encourage the development of extractive economies. These decisions were not inevitably determined by each colony's material endowments or the natural dynamics of empire. Britain

[315] See, e.g., Katherine Franke, Religious Accommodation's Roots in Legal Pluralism, States of Devotion (Apr. 21, 2014), [https://perma.cc/23F2-KEUA]; Sharafi, supra note 3, at 146. These critics build on a long liberal tradition of deploying state power to police intragroup exploitation. See Levy, supra note 74, at 29–31; Will Kymlicka, Two Models of Pluralism and Tolerance, 13 Analyse & Kritik 33, 52 (1992); Michaels, supra note 310, at 124.

[316] See Levy, supra note 74; Muñiz-Fraticelli, supra note 42, at 25–28.

sought to create an extractive state in Quebec despite its temperate environment, while it sought to create settler colonies in the tropical climates of West Africa and the West Indies. Instead, each colony's legal system depended on a contest between rival political parties about what kind of empire Britain should become.

The eighteenth-century debates on which this Article has focused form only one part of a broader story about the legal legacy of empire.[317] During the nineteenth and twentieth centuries, Britain periodically revisited its approach to colonial law in response to new demands from colonial subjects, new ideological trends, and political realignments.[318] In the early nineteenth century, the rise of liberal and evangelical universalism led many Britons to reimagine their empire as an agent of reform, whose legitimacy depended on infusing the Indian legal system with English principles.[319] Meanwhile, in Canada, the rebellions of 1837–38 convinced many imperial officials that Britain's earlier policy of fostering a distinctive *Canadien* identity had been a mistake, and that Canada's future

[317] Although this Article focuses on the eighteenth-century British Empire, it invites a broader reconsideration of colonial law. The conflicts that divided the British Empire—over political economy, governance, and the meaning of toleration—had analogies elsewhere. See du Rivage, supra note 112, at 40–42; Pincus, supra note 117, at 68–73. It seems likely, then, that those analogous conflicts also helped to shape colonial institutions. For instance, eighteenth-century Spanish officials debated the degree to which Latin American law should conform to Castilian standards, and whether that law should be administered by specialized tribunals or courts of general jurisdiction. See Christopher Peter Albi, *Derecho Indiano* vs. the Bourbon Reforms: The Legal Philosophy of Francisco Xavier de Gamboa, *in* Enlightened Reform in Southern Europe and Its Atlantic Colonies, c. 1750–1830, at 229, 231 (Gabriel Paquette ed., 2009); Brian P. Owensby, Between Justice and Economics: "Indians" and Reformism in Eighteenth-Century Spanish Imperial Thought, *in* Legal Pluralism and Empires, supra note 3, at 143, 143. Scholarship on France's imperial legal regime is less plentiful, but there, too, there is evidence that imperial policymakers disagreed about the desirability of legal pluralism. See Laurie M. Wood, Across Oceans and Revolutions: Law and Slavery in French Saint-Domingue and Beyond, 39 Law & Soc. Inquiry 758, 764, 773–75 (2014); Miranda Frances Spieler, The Legal Structure of Colonial Rule During the French Revolution, 66 Wm. & Mary Q. 365, 369–70, 408 (2009). These examples suggest that political ideology and partisan conflict have played an underappreciated role in shaping colonial law—and, therefore, postcolonial institutions—across multiple European empires.

[318] See, e.g., David Skuy, Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century, 32 Mod. Asian Stud. 513 (1998); D.A. Washbrook, India, 1818–1860: The Two Faces Of Colonialism, *in* 3 The Oxford History of the British Empire 395 (Andrew Porter & William Roger Louis eds., 1999).

[319] See Karuna Mantena, Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism 21–55 (2010); Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought 7–8 (1999); Jennifer Pitts, A Turn to Empire: The Rise of Imperial Liberalism in Britain and France 101–62 (2005).

stability demanded anglicization.[320] Such reevaluations of legal pluralism recurred for as long as the British Empire lasted[321]—and even after it ended.[322] Although these later developments produced major shifts in colonial law, they never fully erased the juridical distinction that emerged between anglicized and legally plural colonies. Indeed, in some places, legal pluralism has proved more durable than the empires that created it.[323] And even where legal pluralism itself has faded, its economic and political legacy often persists. As a result, understanding legal pluralism remains a vital project.

[320] See Roger K. Ward, Bijuralism as an Assimilation Tool: Lord Durham's Assessment of the Louisiana Legal System, 63 La. L. Rev. 1127, 1128–31 (2003).

[321] See Coen G. Pierson, Canada and the Privy Council (1960); Mantena, supra note 319, at 89–118.

[322] See, e.g., Galanter, supra note 244, at 54–59 (describing debates about whether independent India should preserve English institutions or restore traditional forms of justice).

[323] See, e.g., Lerner, supra note 4.