

Quebec, Bengal, and the Rise of Authoritarian Legal Pluralism

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In the 1770s and 1780s, many writers argued that although English law was the best in the world, it was unsuitable for export to Britain's colonies. "Laws which are fit for a free country," they explained, "are, for that very reason, incompetent for a country where the government is arbitrary and despotical"¹ Jeremy Bentham disagreed, but he offered another argument for not sending the common law abroad:

1. That the English law is, a great part of it, of such a nature as to be bad every where.
2. but that it would not only be, but appear, worse in Bengal than in England.
3. that a system might be devised which, while it were better for Bengal, would also be better even for England at the same time.²

Bentham's collaborator John Lind made a similar point about Canada.³ Supporters of the Quebec Act claimed that *Canadiens* would accept juries only if Britain changed their traditional size (*Canadiens*

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Abbreviations:

BL: British Library

TNA: The National Archives of the United Kingdom

BRBL: Beinecke Rare Book and Manuscript Library, Yale University

WCL: William L. Clements Library, University of Michigan

¹ Bentham, "Place and Time," 180 (critiquing this claim).

² Ibid., 181. Bentham's position on law in India is too complicated to develop fully here. On one hand, he drafted a "Proposal for an East Indian Code" which called on Indians to accept British law; on the other, he ridiculed proposals to impose *all* of English law. *See generally* Engelmann and Pitts, "Bentham's 'Place and Time.'"

³ For Lind's friendship with Bentham, see W.P. Courtney & M.E. Clayton, "Lind, John (1737–1781)," *DNB*, <http://www.oxforddnb.com/view/article/16672>.

wanted an odd number of jurors) and requirement of unanimity.⁴ “Instead of refusing them a jury on this account,” Lind suggested, “some have thought it would have been wiser, and better to have modeled our own juries in the plan they held out to us.”⁵

Bentham and Lind’s observations offer new ways to conceptualize the Quebec Act’s restoration of French civil law. They suggest how the Act emerged from a broader debate over the place of English law in the British Empire. Bentham and Lind envisioned colonial law as part of a pan-imperial debate over legal policy, in which developments in one jurisdiction might inform changes elsewhere.⁶ They looked far beyond Quebec to Minorca, Granada, and especially Bengal, where the East India Company (EIC) administered Hindu and Muslim law, and England itself, where judges and legislators insulated courts martial from common law review⁷ and considered ways to steer commercial litigation away from Westminster Hall.⁸

Rather than approaching Bengal and Quebec as radically novel legal situations, Bentham and Lind treated Britain’s old and new colonies as commensurable.⁹ Many of their contemporaries

⁴ Lind, *Remarks on the Principal Acts*, 473–74.

⁵ *Ibid.*

⁶ *See, e.g.*, Bourke, “Edmund Burke and the Politics of Conquest”; Conway, “Consequences of Conquest”; Halliday, *Habeas Corpus*, 274–80; Muller, “Bonds of Belonging”; Stanbridge, “Quebec and the Irish Catholic Relief Act of 1778”; Travers, *Ideology and Empire*, 49–50; Welland, “Commercial Interest and Political Allegiance.”

⁷ *See infra* note 26 and accompanying text.

⁸ *See* Burset, “Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire”; Horwitz and Oldham, “Arbitration.”

⁹ *Cf.* Fraas, “‘They Have Travailed Into a Wrong Latitude,’” 2 (critiquing the assumption that India “represented a radically different place from Philadelphia or Gibraltar”).

agreed, comparing Quebec, in particular, to the earlier conquest of New York.¹⁰ From this perspective, the retention of non-English law in Britain’s new colonies was not the inevitable response to a new kind of colonial difference, but rather a political choice. Legal policies in Bengal and Quebec (including the Illinois Country) emerged from a debate between two visions of colonial development. Policymakers believed that granting English law to the new colonies would encourage the formation of commercial economies, vibrant civil societies, and political and economic integration with Britain. Because politicians disagreed about the desirability of those outcomes, they disagreed about the desirability of exporting English law. Their disagreement centered on English commercial law and civil juries, which were seen as particularly important mechanisms for shaping colonial development. Though questions of religious toleration and respect for local custom played an outsized rhetorical role in public debates, the key substantive issue focused on the kind of institutions should govern commercial transactions and public law.

Focusing on the politics of legal policy allows us not only to reframe the Quebec Act but also to refine our understanding of legal pluralism—situations in which multiple legal systems coexist in a single political field, in this case the British Empire.¹¹ Histories of legal pluralism typically

¹⁰ See, e.g., *The Expediency of Securing Our American Colonies by Settling the Country Adjoining the River Mississippi*, 8; Notes on the Affairs of Quebec ([1767?]), WCL (recommending that reform of Quebec’s laws follow “what was done in . . . New York immediately after it was conquered from the Dutch”); Lord Shelburne to Board of Trade (May. 17, 1767), WCL (suggesting that “civil government” in Quebec “might . . . be regulated by the model of New York, Virginia, or any of the other Provinces”).

¹¹ Legal pluralism “is generally defined as a situation in which two or more legal systems coexist in the same social field.” Merry, “Legal Pluralism,” 870. I use the term more narrowly to mean *mandatory legal pluralism*—a legal regime that (1) establishes hard boundaries between legal systems, so that litigants have little choice about what law applies; and (2) is state-centered (rather than emerging informally). For other definitions, see Benton, *Law and Colonial Cultures*, 11–12; and Halliday, “Laws’ Histories: Pluralisms, Pluralities, Diversity.”

focus on the open-ended and unplanned ways in which colonial legal orders emerged from social and political conflict, and on how the strategies of individual litigants helped produce outcomes “that neither side precisely embraced or predicted.”¹² The Quebec Act is certainly a case in point in some respects. But the story told here reemphasizes partisan and ideological conflict, which resulted in a plural legal order that both sides predicted, and that one side embraced. Though local legal actors played crucial roles in colonial state formation, they operated within a legal framework that depended ultimately on metropolitan politics.

This chapter also builds on recent discussions of legal pluralism by highlighting the tension between pluralism’s oppressive and liberating aspects.¹³ The Quebec Act simultaneously offered unprecedented religious freedom to Catholic *Canadiens* and subjected them to a political economic regime that subordinated the province’s development to broader imperial needs—an aspect of the Act sometimes underemphasized by scholars inclined to celebrate its liberality.¹⁴

I. Britain’s Pursuit of Legal Uniformity

British policy in Quebec and Bengal departed from earlier efforts to develop a unified imperial legal system. That is not to say English law had ever been uniform across the colonies—or

¹² Benton, *Law and Colonial Cultures*, 148; *see also id.* at 149 (“The paradox of pursuing anticolonial strategies that reinforced colonial rule must have been as apparent to participants as it was unavoidable.”); Dewar, “Litigating Empire,” 52 (quoting Braddick, *State Formation in Early Modern England*, 47); Rupert, “Seeking the Waters of Baptism,” 218.

¹³ *See* Benton and Ross, “Empires and Legal Pluralism,” 2; Halliday, “Laws’ Histories: Pluralisms, Pluralities, Diversity,” 262; Sharafi, “Justice in Many Rooms Since Galanter,” 139.

¹⁴ *See* works cited in Christie, “A Government Fit for British Subjects” (noting historians’ debate whether the Act was an “unqualified liberal act of justice” or “authoritarian”); Trépanier, “Pour une assimilation raisonnable”; Tully, *Strange Multiplicity*.

even within England itself.¹⁵ But the very heterogeneity of English law gave it the flexibility to accommodate new situations, so that colonial laws might differ from England’s without being “repugnant” to its fundamental principles.¹⁶

Policymakers treated the unity of imperial law as a political imperative, believing, in the words of Edward Coke, that “union of lawes is the best meanes for the unity of countries.”¹⁷ Accordingly, England imposed its law on Wales¹⁸ and Ireland.¹⁹ Until 1707, many Scots feared they were next,²⁰ and with reason: English statesmen accepted the survival of Scots law in the Union only because they thought it would disappear naturally.²¹ England also extended its law overseas, including to New York after its conquest in 1664, despite delays due to local resistance and the Glorious Revolution.²² Similarly, the EIC obtained a new charter in 1726 to anglicize its courts in

¹⁵ See Blackstone, *Commentaries on the Laws of England* 4.*411; Greene, “By Their Laws Shall Ye Know Them,” 253; Hulsebosch, *Constituting Empire*, 58.

¹⁶ See Bilder, *Transatlantic Constitution*; Smith, *Appeals to the Privy Council from the American Plantations*, 656.

¹⁷ Coke upon Littleton 141.b; see also Hale, *History of the Common Law*, 58.

¹⁸ Laws in Wales Act, 1542, 35 Henry 8, c. 26; Laws in Wales Act, 1535, 27 Henry 8, c. 26. Robert Chambers, who succeeded Blackstone as Vinerian chair at Oxford before joining the Supreme Court of Judicature at Calcutta, considered treated this legislation extraordinarily successful. Chambers, *Lectures on the English Law*, 1.276.

¹⁹ Newark, “Notes on Irish Legal History,” 126–38.

²⁰ Maclean, “The 1707 Union,” 67–68.

²¹ Ford, “Legal Provisions,” 117, 139–40.

²² Hoffer, *Law and People in Colonial America*, 32; Hulsebosch, *Constituting Empire*, 48; Johnson, “The Advent of Common Law in Colonial New York”; Nelson, “Legal Turmoil in a Factious Colony,” 120–21; Voorhees, “English Law Through Dutch Eyes.” The contrast between the conquests of Canada and New Netherland is noted in Decroix, Gilles, and Morin, *Les tribunaux d’arbitrage*, 250 n.853.

India.²³ And in Britain itself, the 1745 Jacobite rebellion prompted a renewed interest in anglicizing parts of Scottish law.²⁴ If the British Empire of the 1740s was “Protestant, commercial, maritime, and free,” that “freedom found its institutional expression” in English law, diversely applied.²⁵

That vision of legal uniformity came under attack in the 1740s, however, as some politicians sought to reduce some subjects’ access to common law courts. Most controversially, Britain reduced civilian courts’ jurisdiction over courts martial, ensuring that soldiers and seamen would be governed by a relatively separate legal system from civilians.²⁶ Meanwhile, a coalition of Indian elites and EIC

²³ Fraas, “They Have Travailed Into a Wrong Latitude,” 12; Sood, “Sovereign Justice in Precolonial Maritime Asia,” 51.

²⁴ See Harris, *Politics and the Nation*, 168, 218; Marshall, “Empire and Authority,” 112.

²⁵ Armitage, *Ideological Origins of the British Empire*, 8, 103. A few British possessions—Newfoundland, Gibraltar, and Minorca—did lack English law. Greene, “The Perils of Success,” 97. But the exceptions prove the rule. Newfoundland was officially “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.” Bannister, *Rule of the Admirals*, 4, 15. Gibraltar and Minorca were essentially military garrisons, the latter “no more than a British fleet to which an island was appended.” Marshall, “The Incorporation of Quebec in the British Empire, 1763-1774,” 44. Minorca did have a civilian population governed by Spanish law. But into the 1760s, observers treated that situation as the regrettable consequence of its capitulation, rather than sound policy. See Conway, “Consequences of Conquest,” 44; Gregory, *Minorca, the Illusory Prize*, 86; Queries Relating to Minorca [n.d.], WCL. Furthermore, Minorcans could still invoke English civil law. Maseres, *The Canadian Freeholder: Volume II*, 281–87; *Mostyn v. Fabrigas*, (1773) 96 Eng. Rep. 1021, 1 Cowp. 161 (K.B.).

²⁶ See Navy Bill, 1749, 22 Geo. 2, c. 33; *Barwis v. Keppel*, (1766) 95 Eng. Rep. 831 (K.B.); Kinkel, “Disciplining the Empire,” 151–62; Rosen, “Civilian Courts,” 14–16. Nonetheless, officers remained amenable to suits for abuse of authority, and King’s Bench continued to issue writs of habeas corpus for illegally impressed sailors. Halliday, *Habeas Corpus*, 34–37, 206–07; Rosen, “Civilian Courts,” 16 n.78; Strassburg, “Civilian Judicial Review of Military Criminal Justice,” 4.

officials obtained a new EIC charter in 1753 that sharply limited Indians' access to English courts in India.²⁷

These efforts had a common inspiration: an authoritarian Whig program to render British governance more disciplined and efficient.²⁸ Authoritarian Whigs were a loose ideological grouping more than a party; indeed, even contemporaries struggled to assign them party labels.²⁹ Nonetheless, they shared several beliefs about law's role in governing Britain and its empire. Like other Whigs, authoritarian Whigs considered the common law as an important pillar of Britain's revolutionary settlement. But they also saw social disorder as a growing threat to that settlement, both because disorder made Britain vulnerable and because mob-dominated juries compromised the Glorious Revolution's promise of impartial justice.³⁰ Eventually, these concerns led many authoritarian Whigs to conclude that only by limiting the sphere of the common law could they defend the promise of English law more generally.

²⁷ Fraas, "They Have Travailed Into a Wrong Latitude," 14.

²⁸ I take the term "authoritarian Whig" from duRivage, "Taxing Empire," 42–56; Kinkel, "Disorder, Discipline, and Naval Reform"; and Kinkel, "The King's Pirates?"; *see also* Vaughn, "Politics of Empire" (discussing the rise of authoritarian politics with respect to India); Welland, "Interest Politics," 223 (describing the Quebec Act as an "authoritarian moment").

²⁹ *See* Christie, "Party in Politics in the Age of Lord North's Administration," 59; Marshall, "Empire and Authority," 110 ("Even if there was no new Toryism as a major force in politics in the 1760s, authoritarian Tory ideas still found an outlet ..."), Many authoritarian Whigs followed the Duke of Bedford and Lord North, *cf.* Bowen, *Revenue and Reform*, 172; Brewer, *Party Ideology and Popular Politics at the Accession of George III*; Bromwich, *The Intellectual Life of Edmund Burke*, 130, but the loyalty of others was harder to identify. Henry Legge described Lord Mansfield, the leading authoritarian Whig jurist, as "the Tory head of a Whig body." Poser, *Lord Mansfield*, 135; *see also* Campbell, *Lives of the Chief Justices*, 2.578 (noting that Mansfield's principles were called Whig under George II and Tory under George III).

³⁰ *See* Fraas, "They Have Travailed Into a Wrong Latitude," 355; Kinkel, "The King's Pirates?," 24.

Authoritarian Whigs' efforts alarmed radical and establishment Whigs, who argued that only a universally accessible common law could protect constitutional rights. Like authoritarian Whigs, radicals were an ideological group more than a party, though many clustered around William Pitt the Elder and John Wilkes.³¹ In contrast to authoritarians' fear of social disorder, radicals worried primarily about executive tyranny, against which politically conscious juries were an essential defense.³² Moreover, many radicals feared that legal pluralism in India and the military presaged efforts to circumscribe common law jurisdiction elsewhere. (One writer wondered, only half-jokingly, whether gentry would use courts martial to collect rent and settle property disputes.³³)

These nascent divisions notwithstanding, formal legal pluralism remained a marginal issue through the 1750s. Most politicians continued to believe that English law should govern most, if not all, British subjects.³⁴ Foreign observers expected the same. In 1759, General Montcalm, anticipating his defeat on the Plains of Abraham, assumed that “[i]f the English conquer, they will have the conquered become English.”³⁵ Montcalm considered this idiotic: “Ought not they to consider, that Laws ought to be relative to Climates, manners of the People, and wise according to differences in Circumstances?”³⁶ But whatever the wisdom of legal pluralism, he was sure Britain would ignore it.

³¹ See duRivage, “Taxing Empire”; Vaughn, “Politics of Empire”; Welland, “Interest Politics.”

³² See Brewer, “Wilkes and the Law”; Kinkel, “Disorder, Discipline, and Naval Reform,” 1746–77.

³³ *The Preservation of Westminster-Hall the Concern of Three Kingdoms*.

³⁴ Indeed, some authoritarian Whigs initially pursued greater legal uniformity between Britain and its colonies. Kinkel, “The King’s Pirates?,” 9.

³⁵ Louis Joseph de Montcalm-Gozon, *Translations and Abstracts of Correspondence . . .*, 1757, 1759, WCL.

³⁶ *Id.* Montcalm’s comments are similar to those found in Montesquieu’s *Spirit of the Laws* (1748). The book powerfully influenced British debates on colonial legal policy, though even those who

At first, Montcalm was right. At the capitulation of Montreal, General Jeffery Amherst rejected a request that Quebec “continue to be governed according to the custom of Paris, and the Laws and usages established for this country.”³⁷ *Canadiens* were to “become Subjects of the King,” which meant becoming subject to English law.³⁸ Britain acted accordingly after the war, giving Quebec a legal system “as near as may be agreeable to the Laws of England.”³⁹ As in older colonies, administrators adapted English law to local circumstances,⁴⁰ such as by relaxing anti-Catholic penal laws.⁴¹ But officials described these measures as temporary concessions to ease the eventual transition to English law. In the paradoxical formulation of Acting Governor Paulus Aemilius Irving, allowing courts temporarily “to adhere to the Coutume de Paris in their Decisions” would be “a certain, though moderate, method to introduce our Laws ... into the Province.”⁴² Temporary legal pluralism might be necessary to facilitate the transition to British rule—as it had been in New York, for instance⁴³—but the ultimate goal remained legal uniformity.

agreed with Montesquieu’s conclusions often critiqued his reasoning. *See, e.g.,* Bourke, “Edmund Burke and the Politics of Conquest”; Travers, *Ideology and Empire*, 49–50.

³⁷ Articles of Capitulation (Sept. 8, 1760), *in* Shortt and Doughty, *Constitutional History*, 21, 27.

³⁸ *See id.*

³⁹ Royal Proclamation of 1763, *in* Shortt and Doughty, *Constitutional History*, 163; *see also* Ordinance Establishing Civil Courts (1764), *in* Short & Doughty, *Constitutional History*, 149.

⁴⁰ *Cf.* Hulsebosch, *Constituting Empire*, 16.

⁴¹ Ordinance Establishing Civil Courts (1764), *in* Shortt and Doughty, *Constitutional History*, 149; An Ordinance, To Alter and Amend an Ordinance of His Excellency the Governor and His Majesty’s Council of This Province, Passed the Seventeenth Day of September 1764 (July 1, 1766), *in* Short & Doughty, *Constitutional History*, 172.

⁴² Paulus Aemilius Irving to the Lords of Trade (Aug. 20, 1766), *in* Shortt and Doughty, *Constitutional History*, 187.

⁴³ *See supra* note 10 and accompanying text.

II. Authoritarian Legal Pluralism

In the 1770s, however, the traditional pursuit of legal uniformity yielded to a new commitment to legal pluralism. Under Warren Hastings, the EIC erected a court system that preserved Hindu and Muslim law in the newly acquired territories of Bengal, Behar, and Orissa, thus solidifying the separation between European and non-European litigants.⁴⁴ The Regulating Act of 1773 largely confirmed his policy.⁴⁵ The following year, the Quebec Act restored French civil law to Canada.

These policies reflected the new prominence of the authoritarian Whig legal agenda. During the 1760s, the rise of radical politics generated a backlash that converted many establishment Whigs to the authoritarian cause,⁴⁶ including Lord Chief Justice Mansfield⁴⁷ and Solicitor General Alexander Wedderburn,⁴⁸ who curbed their prior commitments to common law universalism and embraced

⁴⁴ Travers, *Ideology and Empire*, 117–18; see *supra* note 27 and accompanying text.

⁴⁵ The Regulating Act, 1773, 13 Geo. 3, c. 63, authorized the King to establish a Supreme Court of Judicature, which was to have jurisdiction only over “British subjects” and others who submitted to its jurisdiction. After conflict erupted over who counted as a British subject and what law the court should apply, Parliament passed another statute in 1781 clarifying that India would have a “dual legal system” and limiting the extent of English law. Jain, *Outlines of Indian Legal History*, 120–29; Travers, *Ideology and Empire*, 202; see also Muller, “An Empire of Subjects,” 195–259 (discussing conflicts over the definition of “British subject”).

⁴⁶ See Marshall, “Empire and Authority,” 110; Vaughn, “Politics of Empire,” 512–13.

⁴⁷ Although Mansfield came from a Jacobite family, Langford, *A Polite and Commercial People*, 222, he initially embraced a conventional Whig legal agenda: supporting the elimination of heritable jurisdictions in Scotland, Holdsworth, “Lord Mansfield,” 228; advising the EIC in the 1740s that Hindus in India needed to follow English procedures in administering estates, Fraas, “They Have Travailed Into a Wrong Latitude,” 312; and arguing that Hindus should be able to testify under oath in English courts—an argument that became a widely quoted defense of common law jurisprudence, Oldham, *English Common Law*, 9.

⁴⁸ Wedderburn came to London in the 1750s “firmly opposed to the illiberal character of Tory political thought”; but in the 1760s, he became increasingly concerned about “popular

legal pluralism as a tool of imperial and social discipline. Both men played key roles in forming legal policy for Bengal and Quebec.⁴⁹

Though policies in Quebec and Bengal had important differences,⁵⁰ they reflected fundamentally similar visions of imperial governance. Authoritarian Whigs wanted to ensure that colonies remained politically and economically subordinate to Britain. That meant limiting participatory politics, isolating colonies from each other, and encouraging dependent economies, rather than permitting the free flow of goods and credit.⁵¹ Radical Whigs rejected these goals, as did many establishment Whigs, a moderate group centered on the Marquess of Rockingham.⁵² Radical and establishment Whigs opposed legal pluralism for different reasons and with different intensities. The former wanted the rapid and total anglicization of British colonies, often at the price of intolerance (particularly for Catholics); the latter were more interested in gradually integrating the

licentiousness” and grew attracted to authoritarian politics. Vaughn, “Politics of Empire,” 513. His conversion was gradual, however, and he maintained ties with the Rockinghamites into the 1770s. Indeed, Wedderburn’s 1772 report on Quebec was much closer to the moderate vision later articulated by Edmund Burke than the authoritarian bill Wedderburn defended in 1774. *See* Shortt and Doughty, *Constitutional History*, 1.434.

⁴⁹ Gleig, *Memoirs*, 1.398–99; Lawson, *Imperial Challenge*, 120, 173 n.18; Mansfield to George Grenville (Dec. 24, 1764), in Smith, *Grenville Papers*, 2.476; *infra* note 97 and accompanying text (noting Wedderburn’s defense of the Quebec Act); *see also* Morin (correcting the misattribution of one document to Mansfield).

⁵⁰ The Quebec Act, for instance, subjected all residents to English criminal and French civil law, while EIC regulations and the Regulating Act created separate jurisdictional rules for European and Indian litigants. The question of sovereignty in Bengal—Crown, Company, or Mughal—further complicated matters, though it was certainly possible to declare British sovereignty while administering non-British laws. *See* Travers, *Ideology and Empire*, 117–18.

⁵¹ *Cf.* Welland, “Commercial Interest and Political Allegiance.”

⁵² For the Rockingamite Whigs, *see* Brewer, *Party Ideology and Popular Politics at the Accession of George III*, 77–95.

colonies in a manner more sensitive to local customs and religious toleration.⁵³ But the two groups united in rejecting the political and economic consequences of the Quebec Act.⁵⁴

Authoritarian Whigs embraced legal pluralism partly to divide colonial subjects. Keeping subjects under diverse laws would hinder alliances among colonial groups, thus fragmenting colonial politics and inhibiting resistance to metropolitan control. In India, this meant dividing Muslims from Hindus, castes from each other, and natives from Britons. In Quebec, it meant deterring the integration of Quebec with its southern neighbors.

Contemporaries agreed that dissimilar laws would divide colonial subjects.⁵⁵ As early as 1760, Benjamin Franklin had hinted at this consequence of legal pluralism by commenting on the Roman Empire’s policy of using legal difference to segregate subjects.⁵⁶ Francis Maseres, too, recognized that if Quebec kept “laws and customs considerably different from those of the neighbouring Colonies,” it would make it harder for *Canadiens* to “Join with those Colonies in rejecting the Supremacy of the Mother country.”⁵⁷ But while Franklin and Maseres came to see this disunion as problematic, authoritarian Whigs embraced it as a tool of colonial discipline. Canada would be most useful to Britain, Governor Guy Carleton argued, if it remained “not united in any common

⁵³ Cf. Faulkner, “Burke’s First Encounter with Richard Price” (contrasting Rockinghamite and radical responses to the Quebec Act).

⁵⁴ Cf. duRivage, “Taxing Empire,” 22 (noting the alliance of radical and establishment Whigs in opposing authoritarian Whig tax policy).

⁵⁵ Cf. Benton, *Law and Colonial Cultures*, 12–15 (noting jurisdiction’s power to reinforce cultural boundaries).

⁵⁶ Franklin, *The Interest of Great Britain Considered*, 39–41.

⁵⁷ Francis Maseres to Richard Sutton (Aug. 14, 1768), in Wallace, *Maseres Letters*, 110.

principle, interest, or wish with the other Provinces.”⁵⁸ Lord Lyttelton, defending the Quebec Act in Parliament, noted with approval that the “political separation of Canada from the rest of America might be a means of dividing their interests” from their southern neighbors.⁵⁹ “[D]o you wish ... to combine the heart of the Canadian with that of the Bostonian?” asked Sir William Meredith of those who would unite Massachusetts and Quebec under a single law.⁶⁰ For authoritarian Whigs worried about rebellious New England, the answer was clearly no.

James Grant offered a similar argument against introducing English law to Bengal. Though he acknowledged discomfort with creating “a most odious & invidious distinction” among British subjects, he insisted on the “necessity that all British subjects in India ... be separated from the native inhabitants,” lest “the unaccustomed dangerous draught” of English law “produce intoxication & turn into a curse & our own destruction.”⁶¹ Luke Scrafton likewise noted that religious and caste divisions among Indians had facilitated their conquest and “prevent[ed] their uniting to fling off the yoke” of foreign rule.⁶²

Opponents of legal pluralism, in contrast, argued that placing Canada and Bengal under English law would both acknowledge the equality of all British subjects and effect their further integration. William Bolts, for instance, insisted that Indians and Britons were equally “British

⁵⁸ Guy Carleton to Lord Hillsborough (Nov. 20, 1768), in Shortt and Doughty, *Constitutional History*, 1.325, 326.

⁵⁹ Cobbett, *Parliamentary History*, 17.1406.

⁶⁰ Meredith, *Letter to the Earl of Chatham*, 35.

⁶¹ James Grant to Lord Shelburne, State of the British Affairs in India at the Commencement of the Year 1780, & Continued to the 15th of October Following (Nov. 30, 1780), WCL.

⁶² Scrafton, *Reflections*, 26.

subjects” and “members of the same body-politic,” who deserved the protection of the same laws.⁶³ Similarly, an opponent of the Quebec Act, writing in response to Meredith, argued that just as imposing English law on Ireland and Wales enabled their political integration with England, introducing English law to Quebec would “make the rising generation look upon themselves as Englishmen.”⁶⁴

For authoritarian Whigs, dividing colonial subjects was just one way in which non-English law encouraged obedience. French law, wrote Carleton, “established Subordination, from the first to the lowest” and “secured Obedience to the Supreme Seat of Government from a very distant Province.”⁶⁵ Attorney General Edward Thurlow agreed: under French law, “all orders of men habitually and perfectly knew their respective places.”⁶⁶ Authoritarian Whigs hoped legal pluralism would operate similarly in India. An anonymous proposal to deploy African soldiers in Bengal advised that “[l]aws similar to those they were used to in their own Country ... will make them ... True, Faithful, and Obedient to Command.”⁶⁷ English law, in contrast, would “instantly emancipate

⁶³ Bolts, *Considerations*, iv, 90.

⁶⁴ *A Letter to Sir William Meredith*, 27; see also Cobbett, *Parliamentary History*, 17.1362 (statement of John Glynn) (discussing the unifying power of law in Wales); Bourke, “Edmund Burke and the Politics of Conquest,” 417; Willis, “Rethinking Ireland and Assimilation,” 9-10.

⁶⁵ Guy Carleton to Lord Shelburne (Dec. 24, 1767), in Shortt and Doughty, *Constitutional History*, 201, 202.

⁶⁶ Edward Thurlow, “Report of Attorney General” (Jan. 22, 1773), in Short & Doughty, *Constitutional History*, 305.

⁶⁷ Observations Relative to Sending Negroe Soldiers to Africa (Apr. 20, 1771), BL.

[Indian subjects] from subjection to” Britain⁶⁸ and “introduce[] a Levelling Principle among People accustomed to the most rigid Subordination of Rank and Character.”⁶⁹

The emancipatory power of English law derived partly from juries, which could take on representative functions in the absence of a colonial assembly. Quebec’s grand jury, for instance, claimed, as “the only Body representative of the Colony,” “a right to be consulted, before any Ordinance . . . be pass’d into a Law.”⁷⁰ Civil juries could also act politically, particularly in cases involving seditious libel or official misconduct.⁷¹ As General Thomas Gage cautioned, it was too easy for an agitator motivated by “spite and malice” to “support[] and buoy[] up the People to commence frivolous and vexations Suits against the Officers, who were carrying on the King’s Service.”⁷² EIC officials, too, worried that rambunctious juries would harass Company agents.⁷³ The surest way to check juries’ interference with government was to impose a juryless legal system—an impulse that also found expression in English law during this time.⁷⁴

⁶⁸ Verelst, *English Government in Bengal*, 144.

⁶⁹ *Observations Upon the Administration of Justice in Bengal*, 8.

⁷⁰ Shortt and Doughty, *Constitutional History*, 154.

⁷¹ See Brewer, “Wilkes and the Law,” 154; cf. Mashaw, *Creating the Administrative Constitution*, 63, 76 (noting that tort suits were the normal remedy for official misconduct).

⁷² Thomas Gage to Henry Bouquet (June 2, 1765), WCL; see also John Wilkins to Thomas Gage (June 9, 1771), WCL (complaining about “the Schemes that are laid to Engage me in Litigious Suits of Law”).

⁷³ See *Present State of the British Interest in India*, 46.

⁷⁴ Lord Mansfield worked to curb juries’ discretion, especially in political cases (though he accepted juries’ utility in some respects). Lieberman, *Province of Legislation Determined*, 99–121; Oldham, *English Common Law*, 12–70. Because the Quebec Act retained English criminal law, the province retained its grand jury—to the regret of some. Marriott, *Laws for the Province of Quebec*, 62.

Finally, authoritarian Whigs believed that legal pluralism would encourage the development of economies conducive to colonies' political dependence.⁷⁵ Authoritarian Whigs supported economic development; indeed, they were behind many of the period's major economic reforms.⁷⁶ But they also wanted to ensure that colonial economic growth did not undermine social and political order. That meant limiting what they perceived as excessive consumption and discouraging colonial manufacturing, which competed with British products and reduced colonies' dependence on the mother country.⁷⁷

Authoritarian Whigs saw the suppression of manufacturing in North America as essential for restoring political control—especially after Americans began using boycotts to protest imperial policies. Imperial officials realized that colonies' political resistance depended on their economic self-sufficiency, and particularly on their ability to substitute local manufactures for British imports.⁷⁸ It was essential, then, to end Americans' efforts to “manufacture for themselves.” “Surely ... 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,” Gage wrote to Secretary at War Lord Barrington. “The disposition the Americans have shown, I think shou'd teach ... one instructive lesson, which is

⁷⁵ Cf. Benton, *Law and Colonial Cultures*, 22, 261–62 (discussing the relationship between legal pluralism and political economy); Willis, “Rethinking Ireland and Assimilation,” 22 (noting links between legal policy and political economy in Ireland and Quebec).

⁷⁶ See, e.g., Clark, “Insurance as an Instrument of War in the 18th Century”; Hay, “Moral Economy, Political Economy and Law,” 98; Poser, *Lord Mansfield*, 4.

⁷⁷ duRivage, “Taxing Empire,” 46; Kinkel, “The King’s Pirates?,” 9, 12.

⁷⁸ See Breen, *The Marketplace of Revolution*, xviii.

to keep them weak as long as they can, and avoid every thing that can contribute to make them powerfull.”⁷⁹

Though Quebec was less economically developed than its southern neighbors, observers believed that it would soon develop manufacturing.⁸⁰ Accordingly, authoritarian Whigs looked for ways to steer the colony away from manufacturing and towards resource extraction, which would ensure the colony’s continued dependence on British markets.⁸¹ “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,” Hillsborough observed in 1768. At the same time, he and Carleton both worried “that positive prohibition” of manufacturing was “equally impracticable and impolitic,” and they looked for another “means of diverting the Peoples attention from employments less beneficial to this Kingdom.”⁸² Authoritarian Whigs soon found a solution in legal pluralism. “It is an object of great consideration ... that the returns to Great Britain are all made in raw materials to be manufactured here,” observed Advocate General James Marriott. That purpose, he continued, “must direct the spirit of any code of laws” for Quebec.⁸³

A related policy pertained in India. Though authoritarian Whigs were less concerned with suppressing manufacturing than restraining unregulated commerce and raising revenue,⁸⁴ the EIC

⁷⁹ Thomas Gage to Lord Barrington (Mar. 10, 1768), WCL.

⁸⁰ See, e.g., *York Chronicle and Weekly Advertiser* (Aug. 1, 1773), 26; Francis Maseres to Fowler Walker (Nov. 19, 1767), in Wallace, *Maseres Letters*, 61.

⁸¹ See Lawson, *Imperial Challenge*, 113–14.

⁸² Lord Hillsborough to Guy Carleton (Nov. 15, 1768), TNA.

⁸³ Marriott, *Laws for the Province of Quebec*, 47, 48.

⁸⁴ Vaughn, “Politics of Empire,” 533–34.

was willing to sacrifice Bengal’s thriving textile industry⁸⁵ if necessary to secure greater short-term income and a stable political order. Philip Francis, a member of the Supreme Council in Bengal and harsh critic of EIC political economy, described the effects of Company policy clearly: “Instead of supplying the rest of the World with the Manufactures of Bengal you will find e’er [sic] long that raw Materials make the Chief Article of Exportation.”⁸⁶ As he complained to Lord North, “[E]very Consideration of prudence is absorbed in the Idea of unlimited Revenue, & immediate Returns.”⁸⁷ In contrast, if Britain were to place India under English law, with English juries—“the Magna Charta, the palladium, and true security of Indian liberty and property”—then “arts, manufactures, and commerce” would immediately thrive, although perhaps at the cost of short-term revenue collections.⁸⁸

Extractive colonial economies also promised to address another authoritarian Whig concern: Britain’s ailing fisc. Authoritarian Whigs believed Britain’s economic health and its national security required the nation “to reduce her unnecessary Expences to be extremely oeconomical.”⁸⁹ By extracting as much wealth as possible from the colonies in the form of raw materials and taxes, authoritarian Whigs hoped to cure Britain’s fiscal troubles while avoiding the political unrest higher taxation would cause at home.⁹⁰ Furthermore, an economy based on resource extraction would

⁸⁵ See Darwin, *After Tamerlane*, 193.

⁸⁶ Philip Francis to Welbore Ellis (Jan. 13, 1777), Mss Eur E15, p. 467, BL.

⁸⁷ Philip Francis to Lord North (Feb. 14, 1777), Mss Eur E15, p. 521, BL.

⁸⁸ *Present State of the British Interest in India*, 148.

⁸⁹ William Knox, Hints Relative to Our Commerce (Nov. 9, 1764), WCL.

⁹⁰ duRivage, “Taxing Empire,” 88; Vaughn, “Politics of Empire,” 4.

require less initial investment in colonial institutions than industrialization, which would have required a substantial state investment in improved infrastructure.⁹¹

These concerns pertained not only to Bengal and Quebec but also to the Illinois Country. Even before the signing of the Treaty of Paris, radicals in Britain and America had promoted the creation of new settlements in the American interior.⁹² Though in the short term these settlements were expected to produce raw materials for Britain,⁹³ radicals hoped eventually to transform the region into a vibrant consumer market funded by local manufacturing.⁹⁴ That was precisely the outcome authoritarian Whigs wanted to avoid: a self-sufficient colony far from metropolitan control.⁹⁵

The best way to avoid such an outcome—in Quebec or Illinois—was to discourage new settlement, particularly by Protestant merchants likely to attract capital.⁹⁶ “It is not the interest of Britain that many of her natives should settle” in Canada, Wedderburn argued.⁹⁷ Gage agreed: “It is

⁹¹ See Acemoglu and Robinson, *Why Nations Fail*, 202; Vaughn, “Politics of Empire,” 539.

⁹² Carter, *Great Britain and the Illinois Country, 1763-1774*, 103, 107–09.

⁹³ Phineas Lyman, Plan Proposed by Genl Phineas Lyman, for Settling Louisiana, and for Erecting New Colonies Between West Florida and the Falls of St. Anthony ([1763-69]), WCL.

⁹⁴ See, e.g., George Morgan, In Behalf of the Inhabitants at the Illinois, Some Reasons Why the Distillation of Spirits from Grain Ought to be Encouraged at the Illinois, Humbly Offer'd to the Consideration of His Excellency General Gage ([1769]), WCL.

⁹⁵ Thomas Gage to Lord Hillsborough (Nov. 10, 1770), Gage Papers, Vol. ES 19, WCL; George Turnbull to Thomas Gage (Jan. 10, 1767), WCL; Representation of the Lords of Trade to the Principal Secretary of State (Mar. 7, 1768), WCL.

⁹⁶ Cf. Lennox.

⁹⁷ Shortt and Doughty, *Constitutional History*, 1.424, 430.

really time to fall upon Means to stop the Emigrations” to North America.⁹⁸ But simply prohibiting settlement was insufficient, as demonstrated by the futility of the Proclamation of 1763.⁹⁹ Instead, just as in their efforts to discourage manufacturing, authoritarian Whigs looked to legal pluralism to discourage activity that they were unable or reluctant to forbid directly.¹⁰⁰ In Illinois, this took the form of delaying the creation of any civil government whatsoever. “I conceive the Establishment of a regular Government at the Illinois, would be the most hurtfull of any, as it would tend to increase a Settlement, that it’s more for our Interest to annihilate,” Gage confided to Hillsborough.¹⁰¹

Barrington agreed. English institutions like juries were necessary in the older colonies “because without them Englishmen would not settle in the County & make it populous & flourishing.” But because “the interior parts of America ought to be a Desert, & all British Settlement discouraged,” it would be better to have “no species of Civil Government whatever.”¹⁰²

Ultimately, Gage and his superiors decided that Illinois needed some civil government after all, if only to control its existing inhabitants. But authoritarian Whigs continued to refuse to introduce English law. Instead, they made the region part of Quebec—and thus subject to French law, “with the avowed purpose of excluding all further settlement therein.”¹⁰³ The region’s potential settlers understood the Act’s purpose clearly. “[T]he designed Operation of that most execrable Quebec Act,” Silas Deane wrote to Patrick Henry, was to halt “Settlements of True and well

⁹⁸ Thomas Gage to Lord Barrington (Dec. 2, 1772), WCL.

⁹⁹ *Cf.* Beaulieu.

¹⁰⁰ *See supra* note 82 and accompanying text.

¹⁰¹ Thomas Gage to Lord Hillsborough (May 6, 1772), WCL.

¹⁰² Lord Barrington to Thomas Gage (Aug. 1, 1768), WCL.

¹⁰³ Knox, *Justice and Policy*, 42–43; *see also* Bernard, *Appeal to the Public*, 55; Neatby, *Quebec*, 134.

principled Protestants Westward.”¹⁰⁴ The First Continental Congress explicitly linked the Act’s population control objectives to its legal policy, complaining that it “discourage[ed] the settlement of British subjects in that wide extended country,” because colonists feared the “influence of civil [law] principles.”¹⁰⁵

Authoritarian Whigs hoped that French law would discourage investment as well as settlement. As early as 1765, merchants trading to Quebec had insisted on the need for English courts to protect their interests.¹⁰⁶ 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.”¹⁰⁷ “[I]f we had supposed the French laws ... to be still in force there, or to be intended to be revived,” the merchants complained after the Quebec Act’s passage, “we would not have had any commercial connections with the inhabitants of the said province, either French or English.”¹⁰⁸ “No English merchant thinks himself armed to protect his property,” Edmund Burke told Parliament, “if he is not armed with English law.”¹⁰⁹ Politicians would normally have taken these complaints seriously. “Merchants concerned in the Trade thereof must be the best Judges of the Advantages or Disadvantages likely to result to them from” any laws affecting Quebec, Carleton

¹⁰⁴ Silas Deane to Patrick Henry (Jan. 2, 1775), WCL.

¹⁰⁵ Taylor, *Papers of John Adams*, 2.397.

¹⁰⁶ *E.g.*, The Memorial & Petition from the Merchants & Traders of the City of London Trading to Canada on Behalf of Themselves & Others (Apr. 18, 1765), TNA; Memorial of Fowler Walker, Agent on Behalf of the Merchants, Traders, and Others the Principal Inhabitants of the Cities of Quebec and Montreal, 1765, TNA.

¹⁰⁷ The Memorial of the Merchants and Other Inhabitants of the City of Quebec (Apr. 10, 1770), TNA.

¹⁰⁸ Maseres, *Canadian Freeholder*, 361.

¹⁰⁹ Cavendish, *Debates*, 288.

had once told the Board of Trade.¹¹⁰ Now, however, authoritarian Whigs conveniently ignored merchants' assessment.

Radical and establishment Whigs, in contrast, paid close attention to merchants' complaints because they opposed the Quebec Act's economic aims. Instead of subordinate colonies fit only to extract resources and revenue, radicals sought to develop anglicized, commercial colonies similar to existing North American settlements.¹¹¹ Because radicals "understood the colonies as an indispensable market for British manufactures," they believed that Britain's economic health depended on "an empire of settlement" in which colonial consumers would be prosperous enough to purchase British goods.¹¹² Their plan depended on relatively free trade and, especially, population growth in the new colonies.¹¹³

The Quebec Act's opponents agreed with authoritarian Whigs that English law would encourage settlers to transfer their persons and property to the new colonies.¹¹⁴ This, in fact, had been a central goal of the Proclamation of 1763 and subsequent instructions to Governor Murray.¹¹⁵

¹¹⁰ Guy Carleton to Board of Trade (Nov. 21, 1767), TNA.

¹¹¹ See, e.g., *A Collection of Letters Relating to the East India Company, and a Free Trade*, 18, 24–25.

¹¹² duRivage, "Taxing Empire," 68.

¹¹³ E.g., William Johnson to Henry Seymour Conway, WCL; *id.* at 73 (connecting population to consumption of British manufactured goods); Objects To Be Attended to in Granting Lands in the Newly Acquired Islands, WCL; Phineas Lyman to Lord Shelburne ([after Aug. 1766]), WCL.

¹¹⁴ See, e.g., Cobbett, *Parliamentary History*, 17.471 (statement of William Pulteney) (discussing the likely effects if English law were extended to Bengal); Marriott, *Laws for the Province of Quebec*, 14–15 (noting that the 1763 proclamation establishing English law looked like an effort to attract immigrants to unpopulated regions).

¹¹⁵ Commission of Captain-General & Governor in Chief of the Province of Quebec (Nov. 28, 1763), in Shortt and Doughty, *Constitutional History*, 123; Board of Trade to George III (June 8, 1763), in *Ibid.*, 97, 106; see also Marriott, *Laws for the Province of Quebec*, 14–15 (wondering whether the Proclamation "had been copied inadvertently . . . from . . . some other unsettled British colony," as

Imperial officials knew that they could not achieve this goal without offering legal institutions similar to those in other colonies. Moreover, settlement, economic growth, and institutional development would be mutually reinforcing. More trade meant the colony could support more freeholders; and more freeholders “would increase that grand creative foundation of the state” by giving a broader base of representative government.¹¹⁶ Over time, Quebec would lose its French character, turning “Canadian society” into “a near image of that of Britain.”¹¹⁷ One analyst, eager to accelerate the process, recommended founding a new capital (subtly named “*British Town*”) to be settled primarily by Englishmen who would introduce “the English language, the English manners, & a Spirit of Industry, among the French Canadians.”¹¹⁸ This radical proposal for assimilation was just what Montcalm had predicted before his defeat,¹¹⁹ before authoritarian Whigs installed their new policy of legal pluralism.

it seemed “that the reflection never entered the thoughts of the drawers up of this proclamation, that Canada was a conquered province, full of inhabitants, and already in the possession of a legal establishment”).

Radicals especially emphasized *Protestant* settlement. Memorandum to the Board of Trade, Some Thoughts on the Settlement and Government of Our Colonies in North America (Mar. 10, 1763), WCL. Accordingly, for many radical commentators, a major problem with the Quebec Act was that it would not only repel settlement by Protestants, but might attract Catholic immigration. *See, e.g.*, Alexander Hamilton, “Remarks on the Quebec Bill,” in Syrett and Cooke, *Hamilton Papers*, 1.175.

¹¹⁶ *A Letter to Sir William Meredith*, 5; *see also* Maurice Morgann, *An Account of the State of Canada from its Conquest to May 1766 ([1766-1767?])*, WCL.

¹¹⁷ *See* Lawson, *Imperial Challenge*, 43.

¹¹⁸ Memorandum to the Board of Trade, Some Thoughts on the Settlement and Government of Our Colonies in North America (Mar. 10, 1763), WCL. The same memorandum recommended settling the American interior.

¹¹⁹ *See supra* note 35.

III. How the Legal Pluralism Worked

Not all aspects of legal pluralism were equally controversial. In fact, politicians were willing to compromise on many of the Quebec Act's provisions. On one hand, most of its opponents were willing to tolerate Catholicism¹²⁰ and to allow *Canadiens* to retain their accustomed land tenures and inheritance laws.¹²¹ On the other hand, some of the strongest supporters of legal pluralism agreed that Britain should introduce English criminal law¹²² and freedom of testation.¹²³ The real disagreement over legal pluralism concerned commercial law and civil procedure, particularly civil juries.

Protests against the Quebec Act frequently asserted the importance of establishing English commercial law and civil juries. A group of merchants trading to Quebec, for instance, said they were “most especially anxious” to retain those parts of English law

which relate to matters of navigation, commerce and personal contracts, and the method of determining disputes upon those subjects by the trial by jury, and likewise for those parts of it which relate to actions for the reparation of injuries received,

¹²⁰ Even American radicals, who sometimes adopted the most extreme anti-Catholic language, were willing to accept Catholic freedom of worship. *See, e.g.,* Syrett and Cooke, *Hamilton Papers*, 1.169. Moreover, lawyers agreed that anti-Catholic penal laws did not extend to Quebec. *E.g.,* Fletcher Norton & William De Grey, Report of Attorney & Solicitor General Re Status of Roman Catholic Subjects (June 10, 1765), in Shortt and Doughty, *Constitutional History*, 171.

¹²¹ *E.g.,* Maseres, *Account of the Proceedings*, 135–37; Monk, *State of the Present Form*, 69.

¹²² This is perhaps because authoritarian Whigs treated criminal law as relatively unimportant means of shaping colonial development. *Cf.* Langbein, “Albion’s Fatal Flaws,” 119 (“The criminal law is simply the wrong place to look for the active hand of the ruling classes. From the standpoint of the rulers, I would suggest, the criminal justice system occupies a place not much more central than the garbage collection system.”).

¹²³ Some *Canadien* proponents of the Quebec Act even claimed freedom of testation as a right. Morin, “Discovery and Assimilation,” 62. The Act itself permitted property to be devised either according to Canadian or English law, even though some authorities argued that the 1760 capitulation implicitly protected French modes of landholding and testation. *See ibid.*, 58.

such as actions of false imprisonment and of slander, and of assault, and whatever relates to the liberty of the person¹²⁴

The merchants, in other words, wanted English commercial law, civil procedure, and public law. (Private suits were the normal remedy against officers who abused their authority, so the merchants' request for common-law tort actions has something of a public-law flavor.¹²⁵) In contrast, the merchants were willing to accept French law regarding “tenures and descents of land.”¹²⁶ Indeed, they argued that “the revival of the French laws in these particulars” would promote the eventual anglicization of the colony by encouraging the Canadians to “acquiesce very cheerfully in the general establishment of the laws of England”¹²⁷—precisely the argument Irving had made a decade earlier.¹²⁸

This focus on commercial and procedural law was a frequent theme in discussions of legal pluralism in Quebec. John Lind warned his readers not to “confound[] two things perfectly distinct and independent”: laws relating to inheritance and property, on one hand, and civil procedure, on the other.¹²⁹ The 1764 instructions to Governor Murray had proposed a similar distinction,¹³⁰ as did

¹²⁴Maseres, *Canadian Freeholder*, 362; see also *Public Advertiser* (May 19, 1774) (“How are Debts to be proved by People residing in Great Britain against People in Quebec?”). The merchants wished “most of all for the writ of habeas corpus, in cases of imprisonment.” *Ibid.* But the Quebec Act did not exclude the writ, though confusion persisted until the Legislative Council promulgated a habeas corpus ordinance in 1784. See Halliday, *Habeas Corpus*, 275–81.

¹²⁵ See *supra* note 71 and accompanying text.

¹²⁶ Maseres, *Account of the Proceedings*, 363.

¹²⁷ *Id.*

¹²⁸ See *supra* note 42 and accompanying text.

¹²⁹ Lind, *Remarks on the Principal Acts*, 471.

¹³⁰ Shortt and Doughty, *Constitutional History*, 163 n.1. Lord Hillsborough had interpreted the Proclamation of 1763 as retaining “the Laws and Customs of Canada, with regard to Property,” but

Britain’s attorney and solicitor general,¹³¹ Chief Justice William Hey,¹³² and Attorney General Francis Maseres.¹³³ Member of Parliament William Dowdeswell, though a staunch defender of civil juries, likewise agreed that imposing English law related to “Descent of estates & conveyance of landed property, would be grievous.”¹³⁴

The differential treatment of commercial law and civil procedure persisted after the passage of the Quebec Act. Establishment Whigs often excepted property and inheritance law when advocating for the Act’s repeal or revision.¹³⁵ For the opposite reason, Carleton—absolutely committed to the authoritarian Whig agenda—strenuously resisted any effort to soften the Act’s impact by introducing elements of English commercial law,¹³⁶ despite receiving royal encouragement to do so.¹³⁷ Inhabitants of the new United States thought about pluralism in the same way. The

implementing English civil procedure. Lord Hillsborough to Guy Carleton (Mar. 6, 1768), in *ibid.*, 207. His reading is textually implausible but conceptually reasonable: as he pointed out, this was precisely how English courts handled property in Kent and other locations where “particular customs prevail” regarding real estate. *Ibid.*, 208.

¹³¹ Charles Yorke & William De Grey, Report of Attorney and Solicitor General Regarding the Civil Government of Quebec (Apr. 14, 1766), in Shortt and Doughty, *Constitutional History*, 174, 175, 178.

¹³² Neatby, *Quebec*, 106.

¹³³ Francis Maseres to Sir John Eardley-Wilmot (Aug. 16, 1773), BRBL

¹³⁴ [William Dowdeswell], Observations on Mr Maseres Letters to Mr T. Townshend (Nov. 11, 1766), WCL; Cobbett, *Parliamentary History*, 17.43–44; Patrick Woodland, “Dowdeswell, William (1721–1775),” *DNB*, <http://www.oxforddnb.com/view/article/7959>.

¹³⁵ *E.g.*, Maseres, *Account of the Proceedings*, 135–37; Monk, *State of the Present Form*, 69.

¹³⁶ Neatby, *Quebec*, 160.

¹³⁷ Instructions to Governor Carleton (1775), in Shortt and Doughty, *Constitutional History*, 419, 423 (suggesting that Carleton explore a local ordinance making “the Laws of England . . . if not altogether, at least in part the Rule for the decision” for contracts and torts). The instructions came via Lord Dartmouth, secretary of state for the colonies. Dartmouth had managed the drafting of the

Northwest Ordinance of 1787, which covered some of the same territory as the Quebec Act, essentially codified the compromise the Act’s opponents had offered. “French and Canadian inhabitants” of the American interior would continue to enjoy their own laws “relative to the descent and conveyance of property,” but civil procedure would be “according to the course of the common law,” including “the trial by jury.”¹³⁸

This not to say that property law was absent from the debates of the 1770s. Indeed, policymakers in Bengal saw secure land tenures as fundamental to that colony’s development.¹³⁹ But they also believed that without a civil procedure capable of protecting property, substantive rights would be meaningless.¹⁴⁰ Furthermore, even with respect to Quebec, many radical Whigs attacked the retention of French property law as feudal and oppressive.¹⁴¹ But these were truly radical demands that typically linked French property law with feudalism and popery, often hysterically.¹⁴²

Quebec Act, but it is unclear to what extent he supported its underlying policy. Indeed, Dartmouth resisted some aspects of the authoritarian Whig agenda, having at one point supported an assembly for Quebec, Lawson, *Imperial Challenge*, 72. Accordingly, his efforts to encourage the introduction of elements of English commercial law may have been an effort to soften what he saw as the Quebec Act’s less desirable effects. Under Governor Haldimand in the 1780s, some elements of English procedure were introduced, though merchants continued to ask that civil juries and English commercial law be fully implemented. Fabre-Surveyer, “The Struggle for English Commercial Law in Canada,” 622–23.

¹³⁸ Northwest Ordinance of 1787, art. II, 1 Stat. 50.

¹³⁹ See generally Guha, *A Rule of Property for Bengal*.

¹⁴⁰ *Present State of the British Interest in India*, 48

¹⁴¹ See, e.g., Continental Congress, Letter to the Inhabitants of the Province of Quebec (1774), in *Journals of the Continental Congress, 1774-1779* (Worthington Chauncey Ford ed., 1904), 1.105; “From the London Gazette,” *Pennsylvania Packet* (Sept. 12, 1774), 2.

¹⁴² John Adams, for instance, wrote these agitated notes:

CANADA BILL.

Many radicals would certainly have preferred the total abolition of French law; but establishment Whigs more inclined to compromise almost invariably saw English juries and commercial law as more fundamental than land tenure or religion.¹⁴³ (By the late 1780s, even those merchants who wanted new lands granted in free and common socage accepted that *seigneurs* could keep their existing tenures.¹⁴⁴)

Canadiens' preferences played an ancillary role in this debate. Though many Anglophone and Francophone subjects engaged in fervent campaigns for their preferred laws,¹⁴⁵ imperial decision-makers proved adept at citing only those petitions that supported their preferred agenda; Carleton

Proof of Depth of Abilities, and Wickedness of Heart.
 Precedent. Lords refusal of perpetual Imprisonment.
 Prerogative to give any Government to a conquered People.
 Romish Religion.
 Feudal Government.
 Union of feudal Law and Romish Superstition.
 Knights of Malta. Orders of military Monks.
 Goths and Vandals—overthrew the roman Empire.
 Danger to us all. An House on fire.

John Adams, “[Notes of Debates in the Continental Congress],” in Butterfield, *Diary and Autobiography of John Adams*, 2.154.

¹⁴³ For the contrast between radicals’ anti-Catholicism and establishment Whigs’ more tolerant approach, see Faulkner, “Burke’s First Encounter with Richard Price.” The one place where establishment Whigs did focus on property law was the Debt Recovery Act, 5 Geo. 2, c. 7 (1732), which encouraged the use of land as collateral. Here, however, the concern was not with land tenures, but whether real property would be “answerable by the French Laws in Quebec for simple Contract Debts, as in other Colonies.” “To the Printer of the Public Advertiser,” *Public Advertiser* (May 19, 1774). In other words, the concern was not with land per se but as an enabler of credit. (Imperial administrators believed that the Debt Recovery Act had been an important driver of colonial economic growth. Priest, “Creating an American Property Law,” 427–28.)

¹⁴⁴ Report of the Merchants of Quebec by Their Committee to the Honorable Committee of Council on Commercial Affairs (Jan. 5, 1787), TNA.

¹⁴⁵ See Trépanier, “Pour Une Assimilation Raisonnable.”

was especially inclined to substitute the wishes of *seigneurs* for those of *Canadiens* more generally.¹⁴⁶ As a result, authoritarian Whigs were able to insist that the Quebec Act's elimination of civil juries merely respected *Canadiens'* wishes,¹⁴⁷ even though most French inhabitants had no objection to jury trials¹⁴⁸ and, in Illinois, even petitioned for them.¹⁴⁹ Similarly, authoritarian Whigs ignored many *Canadiens'* willingness to accept English commercial law.¹⁵⁰ Moreover, authoritarian Whigs had no compunction about imposing English criminal law, even though many *Canadiens* did indeed dislike it.¹⁵¹ The same was true in Bengal, where the introduction of English criminal law scandalized some local inhabitants, even as the EIC insisted on its desire to respect local sensibilities.¹⁵² This is not to claim that policymakers did not sincerely wish to accommodate Britain's new subjects or that petitions carried no weight. But ultimately, legal pluralism depended more on political economy than toleration.

¹⁴⁶ Neatby, *Quebec*, 127, 141.

¹⁴⁷ E.g., Meredith, *Letter to the Earl of Chatham*, 19–20; “Letter to the Editor,” *Public Advertiser* (1774).

¹⁴⁸ Fyson, “The Conquered and the Conqueror,” 205; Willis, “Rethinking Ireland and Assimilation,” 9–10; Notes on the Affairs of Quebec ([1767?]), WCL.

¹⁴⁹ Thomas Gage to John Wilkins (Mar. 9, 1772), WCL; Thomas Gage to Lord Hillsborough (Apr. 13, 1772), Gage Papers, Vol. ES 22, WCL; Thomas Gage to Lord Hillsborough (Sept. 2, 1772), WCL; Isaac Hamilton to Thomas Gage (Aug. 8, 1772), WCL.

¹⁵⁰ See Morin, “Blackstone and the Birth of Quebec's Legal Culture 1765–1867,” 14; Francis Maseres, Draught of an Intended Report of the Honourable the Governor in Chief and the Council of the Province of Quebec to the King's Most Excellent Majesty in his Privy Council; Concerning the State of the Laws and the Administration of Justice in That Province (1769), in Shortt and Doughty, *Constitutional History*, 228, 242.

¹⁵¹ See Hay, “Meanings of the Criminal Law.”

¹⁵² See Travers, *Ideology and Empire*, 105.

IV. Conclusion: Legal Pluralism in a Diverse Empire

The moderate Whig alternative proposed a new institutional framework for reconciling the increasing diversity of Britain’s subjects with its commitment to a politically and economically integrated empire.¹⁵³ Conquered subjects might have retained their own laws governing religion, property, and inheritance, while uniform commercial and public laws would have integrated them with Britain and its older colonies. This was a new understanding of legal pluralism.¹⁵⁴ Earlier writers, such as Edward Coke and Matthew Hale, had emphasized the importance of a uniform property and inheritance law for economic and political integration.¹⁵⁵ By the 1770s, in contrast, many leading politicians argued that commercial and political institutions alone could unite a diverse empire.

This moderate compromise lost, however, to the more complete form of legal pluralism backed by authoritarian Whigs—not because they were more tolerant of local customs than their

¹⁵³ Cf. Mueller, “As May Consist with Their Allegiance to His Majesty” (noting the Quebec Act as a moment of reinvention of British subjecthood).

¹⁵⁴ Scholars have generally not focused on the new importance of commercial law. *See, e.g.,* Bilder, *Transatlantic Constitution*, 10. Others have insisted on the centrality of land tenures. *See* Ferguson, *Empire*, xxii. The reason, I suspect, is that most scholars have assumed that “property and value were defined exclusively with reference to land”—an assumption that recent scholarship seriously questions. *See* Pincus, “Rethinking Mercantilism,” 11. The differential treatment of commercial law is narrated in Fabre-Surveyer, “The Struggle for English Commercial Law in Canada,” but the article does not explore why commercial law was treated differently. Paul Halliday notes that property law was more likely to vary than laws dealing with personal rights, though his focus is on habeas corpus. Halliday, *Habeas Corpus*, 263.

¹⁵⁵ Bilder, *Transatlantic Constitution*, 32, 34; Hulsebosch, *Constituting Empire*, 27–28; *see supra* notes 16-17. Bilder points out that Francis Bacon offered a different view, in which uniform public law was more important than uniform land tenures; but as she emphasizes, his position was marginal. *See* *ibid.*, 33; *see also* *ibid.*, 20 (discussing James I’s proposal for a uniform Anglo-Scottish commercial law). *But see* Maclean, “The 1707 Union,” 65 (noting the importance of property law in proposals for the 1707 Union).

moderate counterparts, but because they believed that mandatory legal pluralism would serve a particular political and economic agenda, rooted fundamentally in colonial dependence. The authoritarian Whig victory of the 1770s in no way ended the debate over legal pluralism in the British Empire. In both Canada and India, discussion over the proper role of English law persisted through the 1790s and beyond, and the Constitutional Act (1791) and Cornwallis Code (1793) both substantially revised earlier policies. What the Quebec Act and related policies in Bengal did ensure, however, was that the old vision of a legally uniform empire was no longer tenable. From 1774, the question would no longer be whether to embrace mandatory legal pluralism but how.