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Constitutionalism in the periphery: revisiting the roots of self-rule movements in Ireland and India

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Abstract

This article re-examines the constitutionalism that underlay moderate self-rule movements in Ireland and India. We argue that early self-rule movements in India and Ireland were rooted in the same civic republican tradition that also influenced Anglo-American political thought but developed it in ways that have no counterparts in English political thought. These developments left a lasting legacy on constitutional thought in India and Ireland and present a contrast with nineteenth-century British political and constitutional thought. Through an examination of Mill and Dicey's views on empire, we show that constitutional thought in the UK saw a shift away from older republican traditions of politics towards an interests-based constitutionalism, which saw government as being justified by its efficiency in promoting particular interests. We conclude by considering some of the broader implications of our work for the manner in which the British Empire is treated in constitutional scholarship in the present day.

Keywords: constitutional nationalism; Ireland; India; patriotism; British Empire; legal history.

Introduction: rethinking colonial constitutionalism

The purpose of this article is to re-examine the constitutionalism that underlay moderate self-rule movements in Ireland and India. In the received view, these movements represent a failed 'constitutional nationalism'[1] which sought to reshape and reform empire and secure a higher degree of self-rule by working within rather than outside the structures of empire. Constitutional nationalism[2] had deep cultural roots[3] and played a dominant role in shaping early colonial challenges to imperial rule.[4] Ultimately, however, it failed to secure

1 See e.g. C Reid, 'Stephen Gwynn and the failure of constitutional nationalism in Ireland, 1919-1921' (2010) 53 Historical Journal 723.

2 We use the term 'constitutional nationalism' in this introduction in the sense that it has in scholarship on anticolonial movements in the British Empire and, in particular, in Ireland. In the USA, the term is used in a very different way, to describe a nationalism based on 'the conviction that the Constitution defines and embodies the nation's fundamental values'. See e.g. J A Goldstein, 'The American Liberty League and the rise of constitutional nationalism' (2014) Temple Law Review 287.

3 See e.g. C Reid, *The Lost Ireland of Stephen Gwynn: Irish Constitutional Nationalism and Cultural Politics, 1864–1950* (Manchester University Press 2011).

4 See e.g. R English, *Irish Freedom: The History of Nationalism in Ireland* (Macmillan 2006).

an acceptable measure of self-rule,[5] and was supplanted by movements and ideologies seeking a more radical break through extra-constitutional means.

This view is right as far as it goes, but it leaves many questions unanswered about the constitutional thinking that drove self-rule movements. Why did they command so much support and endure for as long as they did, and why did they collapse as rapidly as they did? What role did the link to empire – including not just the metropole, but also the rest of the periphery – play in the constitutional understandings that underpinned these movements? Did they leave any broader legacies in the constitutions of the states that emerged from empire? How does their constitutional legacy in those states fit with the legacy of more radical nationalisms? And – crucially – why did their claims have so little purchase in Britain itself? What was the nature of the disjunction between the constitutional nationalism of the periphery and the imperial constitutionalism of the metropole, and why was it so utterly unbridgeable as to make rapprochement seemingly impossible?

These questions are of interest to historians of empire generally,[6] but they are even more relevant to constitutional history. Over the past three decades, the historiography of empire has been strongly influenced by the realisation that a proper understanding of the colonial experience requires bringing 'metropole and colony, colonizer and colonized' into 'one analytical field'[7] which encompasses not just the patterns of acquiescence, resistance and contestation that imperial rule met with in the colonies, but also the manner in which imperial visions, understandings and justifications were themselves reshaped by the patterns of challenge and contestation they encountered from those they sought to rule.[8] In place of the national–imperial narratives that mark traditional accounts of empire, this approach points to the importance of patterns of connection, interdependence, engagement and agency, between metropole and periphery and between different portions of the periphery, as well as the political vocabularies and frameworks that enabled sharp distinctions between metropole and periphery to be drawn despite those patterns of engagement and interdependence.[9]

This approach has exercised considerable influence over a range of disciplines, but it has had relatively little impact on constitutional theory. Thus, for example, whilst there has been a resurgence of interest in the everyday constitutionalism that underpinned Britain's experience of its empire – the role of pomp, ceremony and pageantry,[10] the actions and approaches of administrators,[11] and the motives and purposes of the high officials as well as the rank and file members of British expatriate communities who built the imperial project[12] – the everyday constitutionalism of those *subject* to Britain's empire has received considerably less attention.

5 The old 'settler' dominions of Australia, New Zealand and Canada are a possible exception to this failure. See e.g. E M Adams, 'Constitutional nationalism: politics, law, and culture on the road to patriation' in L Harder and S Patten (eds), *Patriation and its Consequences: Constitution Making in Canada* (University of British Columbia Press 2015).

6 See e.g. P Bew, *Ideology and the Irish Question: Ulster Unionism and Irish Nationalism 1912–1916* (Clarendon Press 1984) xv–xix.

7 A L Stoler and F Cooper, 'Between metropole and colony: rethinking a research agenda' in F Cooper and A L Stoler, *Tensions of Empire: Colonial Cultures in a Bourgeois World* (University of California Press 1997) 15.

8 Ibid 6.

9 Ibid 3–4.

10 D Cannadine, *Ornamentalism: How the British Saw their Empire* (Allen Lane 2001).

11 D Gilmour, *The Ruling Caste: Imperial Lives in the Victorian Raj* (Farrar, Straus & Giroux 2005).

12 J Darwin, *Unfinished Empire: The Global Expansion of Britain* (Allen Lane 2012); D Gilmour, *The British in India: Three Centuries of Ambition and Experience* (Allen Lane 2018).

The absence of the colonies in most histories of British constitutional thought[13] reflects the fact that world of the metropole and the world of the periphery have long been treated as two different analytical fields, springing from two different constitutional imaginations. The UK's actions in the colonies, in this account, are treated as part of a different story from that of its own constitution, and the constitutional stories of the colonies are typically told in terms of their post-independence national constitution-making.[14] Recent work has begun to challenge this absence. The work on 'New Dominion Constitutionalism', for example, uses a focus on the first half of the twentieth century to highlight the scope for new approaches to British constitutional history in which a close study of reception and adaption at the periphery informs an empire-wide assessment of constitutionalism and supports an understanding of the evolution of the UK's constitutional order.[15]

This article offers a deeper challenge to the assumption that the worlds of the metropole and periphery occupied two distinct analytical fields. As we show, there was in fact a considerable field of 'interdependence and engagement' between the constitutional worlds of the metropole and the periphery, which exercised a lasting influence on the manner in which both conceived of the empire as a field of constitutional action. Three aspects of this conception are at the heart of the analysis we present here. The first is that the early self-rule movements in India and Ireland were rooted in the same tradition of civic republicanism that also exercised a formative influence over transatlantic political thought in the seventeenth and eighteenth centuries. The language they used was overtly republican, and the preoccupations of their early proponents very closely reflect the preoccupations of the civic republican tradition. Secondly, despite these parallels, Irish and Indian actors were not simply adopting British thought. The constitutionalism they developed was a constitutionalism of the periphery, which differed in several ways from English republicanism, in particular in relation to the position of the 'ancient constitution' and the dimensions of civic virtue it emphasised. Thirdly and finally, this early constitutionalism left a lasting legacy not only on constitutional thought in the colonies but also on constitutional thought in the UK itself.

Part 1 of this paper begins by setting out the background to the emergence of early self-rule movements in Ireland and India, and reconstructs the constitutional ideas underlying their actions and the positions its leading proponents took, through an analysis of their speeches and writings. It is, of course, impossible in a single article to present a comprehensive account of the many varieties of political thought that then prevailed in India and Ireland. We focus on the activity of Henry Grattan in Ireland in the last three decades of the eighteenth century, and of Ram Mohan Roy in India in the first three decades of the nineteenth century. Our choice of Grattan and Roy is because of the importance attached to their positions in their own time, as well as the symbolic place that they and the achievements with which they were credited occupied in the subsequent development of constitutional nationalism. As we show through a detailed examination

13 The recent work of Dylan Lino on the importance of empire to Dicey's constitutional thought is a rare exception. D Lino, 'The rule of law and the rule of empire: A V Dicey in imperial context' (2018) 81 Modern Law Review 739; D Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 Oxford Journal of Legal Studies 751.

14 See e.g. M Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press 2020).

15 See especially M Malagodi, L McDonagh and T Poole, 'New Dominion Constitutionalism at the twilight of the British Empire: an introduction' (2019) 17 International Journal of Constitutional Law 1166, and the other papers published as part of the symposium on New Dominion Constitutionalism in that issue.

of their speeches and writings,[16] their constitutional ideas were influenced by the civic republican tradition, but also developed that tradition in ways that have no counterparts in English political thought and which shaped the subsequent development of the self-rule tradition.

In Part 2, we consider the impact the periphery's claims had on constitutional thinking in Britain itself at the time, by contrasting the constitutionalism of those claims with the constitutionalism that underpinned the rejection of those claims by British political and constitutional thinkers. We use an examination of the views of Mill and Dicey on the governance of empire, and their relationship with the general thrust of imperial policy towards Ireland and India, to argue that constitutional thought in the UK saw a shift away from older republican traditions of politics towards an interests-based constitutionalism, which saw government as being legitimised and justified by its efficiency in promoting interests rather than by liberty or consent. This shift led to the intertwining of kindness and coercion in colonial governance and played a significant role in making accommodation with the self-rule movements impossible. We conclude by considering some of the broader implications of our work for the manner in which the Empire is treated within constitutional law in the present day.

1 The context of patriotism: colonial grievance and the demand for participatory rule

India and Ireland occupied distinctive positions within the British Empire in the eighteenth and early nineteenth centuries. Both were at least partial participants in the imperial project. Irish administrators[17] and Indian merchants[18] took advantage of the opportunities for advancement offered by the Empire, and both India and Ireland provided soldiers for the armed forces of the Empire.[19] These circumstances gave the imperial connection a qualitatively different resonance in India and Ireland than it had in other colonies. In addition, India and Ireland were also different from other colonies in constitutional terms. Ireland was technically never a colony even if in practical terms it was frequently treated as precisely that.[20] Before 1801, it was legally a separate kingdom, and after 1801 it was a part of the UK. India, similarly, began under the governance of the East India Company and, after 1858, was governed through the India Office rather than the Colonial Office. As a result, techniques of colonial rule developed for Ireland

16 In focusing in detail on the words of a small number of key thinkers, this article broadly follows the methodology of what has sometimes been called the 'Cambridge school' which focuses on the words used by key individuals and their meaning in their historical context. Although the method was in its origin largely applied to the transatlantic world (a category which would include Ireland), its relevance to the history of South Asia has been shown by the work of C A Bayly (discussed below).

17 K Kenny, 'The Irish in the empire' in K Kenny (ed), *Ireland and the British Empire* (Oxford University Press 2004).

18 S Bose, *A Hundred Horizons: The Indian Ocean in the Age of Global Empire* (Harvard University Press 2009). Nor was this confined to the British Empire. For the transoceanic activity of Indian merchants in the Portuguese world, see P Machado, *Ocean of Trade: South Asian Merchants, Africa and the Indian Ocean, c 1750–1850* (Cambridge University Press 2014).

19 K Jeffery, 'The Irish military tradition and the British Empire' in K Jeffery (ed), 'An Irish empire'? Aspects of Ireland and the British Empire' (Manchester University Press 1996) 94–118; C I McGrath, *Ireland and Empire, 1692–1770* (Pickering & Chatto 2012) 143–166.

20 The question of whether Ireland's position in relation to Britain was akin to that of a colony is a heavily contested one. For the case that it was not, see R F Foster, 'History and the Irish question' (1983) 33 Transactions of the Royal Historical Society 169. For an argument that it was, see C Kinealy, 'At home with the empire: the example of Ireland' in C Hall and S O Rose (eds), *At Home with the Empire: Metropolitan Culture and the Imperial World* (Cambridge University Press 2006) 77–88.

were frequently also deployed in India,[21] and there were structural similarities in the types of issues and grievances surrounding colonial rule in both countries.[22] The mobility of information and individuals across the Empire also meant that movements for self-rule in both countries developed in conscious awareness of each other: Irish and Indian nationalists were familiar with, and regularly commented on, each other's conditions and concerns,[23] and there was considerable personal interaction between them, particularly in the late nineteenth[24] and early twentieth centuries.[25]

A third point of distinctiveness was that both Ireland and India had a strong local deliberative tradition, centred on native political institutions and political frameworks that had a long pedigree. In eighteenth-century Ireland, the Irish Parliament occupied a central place in political life. Apart from its national importance, there were also many close connections and points of contact between it and the local political and discursive worlds of individual counties and boroughs.[26] Much of the struggle around colonial grievances in eighteenth-century Ireland, in consequence, not only took place around the political world of Parliament, but were focused on the position of the Irish Parliament in relation to other imperial institutions. The position in India was not fundamentally dissimilar. Although India had never had any institutions comparable to the Irish Parliament, it nevertheless had a strong tradition of civic engagement with and participation in political affairs, ranging in formality from the *a<u>kh</u>lāq* tradition of political writing[27] to institutions and offices that provided vehicles for broader participation in the functioning of the state. As in Ireland, much of the early struggle around colonial grievances took the form of attempts to translate the opportunities that had formerly been presented by these institutions into the systems of colonial government.

Cumulatively, these factors meant that Ireland and India were fertile ground for a constitutionalism which provided a conceptual basis for the claims that were being made in relation to their deliberative institutions, but also retained room to express the political and cultural value of maintaining a link to empire. In the remainder of this Part, we begin by discussing how and why these factors made India and Ireland fertile ground for a new constitutionalism rooted in civic republicanism (section 1.1). We then discuss how this tradition developed in both Ireland and India, against the backdrop of new forms of British colonial control, which were increasingly coming into conflict with rapidly evolving local ways of thinking about domestic institutions (sections 1.2 and 1.3), and conclude by examining its legacies (section 1.4).

21 T Ballantyne, 'The sinews of empire: Ireland, India and the construction of British colonial knowledge' in T McDonough (ed), *Was Ireland a Colony? Economics, Politics and Culture in Nineteenth-Century Ireland* (Irish Academic Press 2005) 145–164.

22 C A Bayly, 'Ireland, India and the empire: 1780–1914' (2000) 10 Transactions of the Royal Historical Society 377, 378.

23 T G Fraser, 'Ireland and India' in K Jeffery, *An Irish Empire* (n 19) 77–92.

24 S B Cook, *Imperial Affinities: Nineteenth Century Analogies and Exchanges between India and Ireland* (Sage 1993).

25 K O'Malley, *India, Ireland and Empire: Indo-Irish Radical Connections, 1919–64* (Manchester University Press 2008).

26 D A Fleming, *Politics and Provincial People: Sligo and Limerick, 1691–1761* (Manchester University Press 2010); T P Power, *Land, Politics, and Society in Eighteenth-century Tipperary* (Oxford University Press 1993).

27 See section 1.1 below.

1.1 Republicanism, patriotism and empire: the challenge of constitutionalism in the periphery

The eighteenth and early nineteenth centuries were a period of rapid change in political language and usage, and the meanings of terms and labels could and did evolve quite significantly over the course of a few decades. By the end of the eighteenth century, the label of 'republican' had come to be closely associated with the excesses of the French Revolution, and was disclaimed by many Irish political figures who might have embraced it half a century earlier. Nevertheless, the political thought they represented shows clear marks of the civic republican tradition, as received and interpreted through the lens of seventeenth and eighteenth-century patriot thought.[28]

The organising concepts of republican thought took the form of linked dichotomies. Three of these played a central role in republican thought in the English-speaking world, including in the constitutional thought that developed in Ireland and India. The first was a dichotomy between liberty and slavery. Liberty, as they understood it, falls neither into what we would today regard as 'positive' liberty, nor is it 'negative' liberty. Instead, liberty meant being free of the dominion of another, and lay in freedom from subjugation to the will of another. By definition, a person who was not in a state of liberty was a slave.[29] The second was a dichotomy between being governed by representative institutions and being governed by despotism, or the arbitrary will of an individual. Republicanism did not, unlike in the present day, require the absence of a king. A constitutional monarch was compatible with a republican polity.[30] What mattered, rather, was that powers should be held in well-designed institutions which created the possibility of a self-governing civic life protected from arbitrary power.[31] The third is a dichotomy between civic virtue and corruption. Civic virtue subsists when those occupying public office discharge their functions in a spirit of supporting the public good. Corruption exists when the advancement of the interests of a faction takes priority over the public good.

The third of these points was of particular importance to the patriot tradition. Eighteenth-century Irish campaigners for legislative sovereignty used 'patriot' rather than 'republican' as a broad political description,[32] and Indian campaigners for self-rule would use the label well into the twentieth century. Both were at least partially influenced by the example of the Patriots in the American Revolution.[33] Patriotism, as they saw it, entailed service to one's country not in a spirit of self-interest, but out of a desire to promote public prosperity and the public good. Patriots placed a particularly strong emphasis on the importance of a commitment to the common liberty of the people, an attachment to

28 On republicanism generally, see the work of J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press 1975); J G A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Centur*y (Cambridge University Press 1957).

29 Q Skinner, 'A third concept of liberty' (2002) 117 Proceedings of the British Academy 237.

30 Q Skinner, *Liberty before Liberalism* (Cambridge University Press 1998) 1–57.

31 J G A Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History* (Cambridge University Press 1985) 40.

32 S Small, *Political Thought in Ireland 1776–1798: Republicanism, Patriotism, and Radicalism* (Clarendon Press 2002) 26–33.

33 On the nature and limits of American influence over the Irish Patriots, see ibid 48–61. On India, see C A Bayly, 'Rammohan Roy and the advent of constitutional liberalism in India, 1800–30' (2007) 4 Modern Intellectual History 25.

the political institutions and constitutional arrangements that sustain that liberty, and a spirit of selfless work to improve those institutions and the general state of the country.[34]

These points underpinned the constitutionalism that emerged in both India and Ireland in the wake of the pressures placed on them by British colonial policy. Its fundamental assumptions reflected a vision of empire, governance and legitimacy derived from the civic republican tradition – in particular, the civic republican idea of liberty as non-domination; the role it assigned civic virtue; and the manner in which it conceived of the role of representative institutions. The periphery, however, faced a challenge in importing this tradition for two reasons. Firstly, much of the republican tradition was focused on the potential tyranny of a king, not least because the two key republican moments in England and Scotland – the Civil War and the Glorious Revolution – were prompted by the action of a king.[35] Ireland and India were, however, faced with a situation where the source of their grievances lay not in the actions of a king, but in the actions of a foreign legislature which itself made republican claims. This meant that standard republican thought needed to be reworked to accommodate the idea that a *legislature* could be despotic.

This was not a trivial issue, and it was exacerbated by a second challenge. A central pillar of republican thought in England was the idea of an ancient constitution which had guaranteed liberty to freeborn Englishmen, but which had been corrupted by the passage of time and needed to be restored to its original purity.[36] The Glorious Revolution and other constitutional developments of the seventeenth and eighteenth centuries were seen through that lens of constitutional restoration. In *Entick v Carrington*, Lord Camden provided a classic statement of this position:

> The Revolution only restored this Constitution to it's first Principles. It did nothing more. It did not enlarge the Liberty of the Subject, but only gave it a better Security than it had before. It repair'd the Fabrick & might support or aid it by way of Buttress to it, but it did not rebuild it.[37]

But it was very hard to maintain arguments around an ancient constitution in the context of Ireland and India. Early thinkers in both countries did try to discover an ancient constitution. William Molyneux argued at the close of the sixteenth century that there was a separate Irish Magna Carta which created a similar constitution for Ireland as in England, giving its Parliament and its citizens the same liberties and privileges as were enjoyed in England and making the Irish Parliament equal, rather than subordinate, to the English Parliament.[38] Ram Mohan Roy in Bengal similarly sought to discover a quasi-republican constitution in the history of ancient India. Drawing on ancient legends of a conflict between sages and kings which ended in a massacre and a settlement, he suggested that ancient India had had a balanced constitution based on something akin to a separation of powers.[39]

Yet these efforts were unsatisfactory, for two reasons. Firstly, in comparison with the theory of the ancient constitution in England, the Irish and Indian attempts to locate one

34 See especially M Viroli, *For Love of Country: An Essay on Patriotism and Nationalism* (Clarendon Press 1995).

35 M Dzelzainis, 'Anti-monarchism in English Republicanism' in M van Gelderen and Q Skinner (eds), *Republicanism: A Shared European Heritage* (Cambridge University Press 2002) vol 1, 27–41.

36 Pocock, *Ancient Constitution* (n 28).

37 *Entick v Carrington* (1765) MS Rep, BL Add MS 36206, ff 43v–44r.

38 W Molyneux, *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated* (Dublin 1698).

39 Ram Mohan Roy, 'Modern encroachments on the ancient rights of females' in *The English Works of Raja Rammohun Roy* (Calcutta, Sadharan Brahmo Samaj 1995) vol 1, 1.

had a thinner evidence base. Ancient constitutionalists in England could point not just to Magna Carta, but to a succession of events as evidence of the ancient constitution. As Holt has shown, the 'Six Statutes' of Edward III were as foundational to the constitutional world of seventeenth-century England as Magna Carta itself,[40] and discussions of the provisions of Magna Carta relied not just on the text of the provisions themselves but on subsequent cases and developments that were seen as reflecting the same underlying constitutional principle as the provision.[41] Ireland and India had few, if any, such intervening constitutional moments. The situation for India was, if anything, even more challenging. Magna Carta, at least, was less than five centuries old when Molyneux wrote. Ram Mohan Roy, in contrast, had to go back millennia rather than centuries, and it is therefore unsurprising that the idea does not feature in his later work.

This problem was not unique to Ireland and India. Other European countries, such as the Netherlands, also could not draw on recent constitutional moments, and their use of the ancient constitution took a less particularistic form[42] in which national history – in the case of the Netherlands, the legends of the Batavians in the Roman period – played a very different role.[43] The second, and more troubling, issue was, however, more pronounced in India and Ireland. Both India and Ireland were stratified societies, with strong religious divides that could and did lead to periodic outbreaks of sectarian tension and violence: in Ireland, between Catholics and Protestants[44] and, to an extent, also between Anglicans and 'Dissenters' (as Presbyterians were usually called),[45] and in India, between Hindus and Muslims (and, to an extent, also between Sunni and Shi'a Muslims).[46] In both, ideas grounded in the ancient constitution frequently contributed to exacerbating, rather than ameliorating, the divide.

In Ireland, the rhetoric of the ancient constitution was closely bound up with ideas of Protestant privilege. Arguments based on the ancient constitution tended to cite not just Ireland's long parliamentary tradition, but also the rights of loyal subjects of English descent to a political system on the lines of that prevailing in England.[47] This was carried over from the world of English political ideas, where the idea of the ancient constitution was closely bound up with the idea that the English were a special or elect nation with a distinctive constitutional bias towards liberty,[48] and that this character was tied to Protestantism.[49]

The difficulty with this was that the majority of the people of Ireland were neither English nor Protestant. Some ancient constitutionalists tried to mitigate this through convenient fictions. Molyneux, for example, suggested that there had been so much intermarriage between the English and the Irish in the past that it would be impossible to

40 J C Holt, *Magna Carta* (2nd edn, Cambridge University Press 1992) 10–13.

41 See, generally, F Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300–1629* (University of Minnesota Press 1948).

42 W R E Velema, *Republicans: Essays on Eighteenth-century Dutch Political Thought* (Brill 2007) 69–75.

43 I Schröder, 'The Batavian myth during the sixteenth and seventeenth centuries' in J S Bromley and E H Kossmann (eds), *Britain and the Netherlands Volume V: Some Political Mythologies* (Martinus Nijhoff 1977).

44 Power (n 26) 221–281.

45 J Kelly, 'Inter-denominational relations and religious toleration in late eighteenth-century Ireland: The "Paper War" of 1786–88' (1988) 3 Eighteenth Century Ireland 39.

46 C A Bayly, 'The pre-history of "communalism"? religious conflict in India, 1700–1860' (1985) 19 Modern Asian Studies 177.

47 J Kelly, '"Era of liberty": the politics of civil and political rights in eighteenth-century Ireland' in J P Greene (ed), *Exclusionary Empire: English Liberty Overseas, 1600–1900* (Cambridge University Press 2009) 81.

48 H Cunningham, 'The language of patriotism, 1750–1914' (1981) 12 History Workshop Journal 8, 10.

49 Pocock, *Machiavellian Moment* (n 28) 361–400.

prove that any given person was not English: anybody in Ireland could, therefore, claim the freedoms of Englishmen on the basis that they were of English descent.[50] But in general, the effect of ancient constitutionalism was to entrench sectarian divides. The constitution that was being claimed was fundamentally an English constitution which drew on English ideas of political liberty and, in consequence, necessarily fell victim to doubts about whether it could extend to Catholics.[51] Otherwise reformist Protestants feared that extending liberty to Catholics would compromise the Protestant character of the constitution.[52] The emphasis on the English origins of the ancient constitution also led its supporters to favour a union with the English Parliament. Molyneux, despite his defence of the Irish Parliament, favoured such an outcome,[53] and his call was periodically revived during the eighteenth century.[54] This was the precise opposite result to that which the Patriots sought, but it was a danger inherent in the ancient constitution.

The position in India was not dissimilar. Indian political thought had long associated kings with ritual acts of religious patronage or religious support. These acts and rituals could, however, have sectarian overtones as readily as they could have more syncretic overtones, and they frequently contributed to destabilising relationships between different religions, including denominations within Islam.[55] Nor was this confined to overt acts. Political thought in India, much as in Ireland, was deeply divided on the question of who constituted the political community. The *a<u>kh</u>lāq* literature in the Mughal world, for example, drew an analogy between the state and a human body. The task of the state, in this tradition, was to 'harmonise the conflicting interests of diverse social and religious groups' and provide the pre-conditions for the maintenance of a civil society and support the struggle of individuals to achieve self-perfection.[56] There are strong and obvious affinities between this image of society and the image that underpinned Hobbes' *Leviathan*, and Bayly has argued that it represents a kind of Indian civic republicanism.[57] The resemblance is not coincidental. The *a<u>kh</u>lāq* tradition was influenced by the Byzantine reading of classical Greek ideas and incorporated Greek understandings of *nomos* (borrowed as '*nāmūs*').[58] It also had strong resonances with Hindu and Buddhist traditions of the virtuous *cakravartin* ruler and the responsibility of the state to support the pursuit of self-perfection. Yet, although the *a<u>kh</u>lāq* literature's ideas of justice, co-operation, social harmony and mutual sympathy did move political thought towards tolerance, it could also have the opposite effect. More strident thinkers such as Shah Waliullah repurposed its imagery to argue that the metaphor of the body implied that only Muslims could be part of the political community.[59]

The mixed legacy of the past troubled Indian Patriots well into the twentieth century, confronting them with incompatible traditions and memories of past rulers. While some historical figures such as the early Mughal emperor Akbar and the Mauryan emperor

50 Molyneux (n 38) 20.

51 Small (n 32) 15.

52 Kelly (n 47) 101.

53 Molyneux (n 38) 20.

54 J Kelly, 'The origins of the Act of Union: an examination of unionist opinion in Britain and Ireland, 1659–1800' (1987) 25 Irish Historical Studies 236.

55 Bayly (n 46) 184–189.

56 M Alam, *The Languages of Political Islam in India* (University of Chicago Press 2004).

57 C A Bayly, *The Origins of Nationality in South Asia: Patriotism and Ethical Government in the Making of Modern India* (Oxford University Press 1998).

58 Alam (n 56).

59 S A A Rizvi, *Shah Wali-allah and his Times: A Study of Eighteenth Century Islam, Politics and Society in India* (Ma'rifat Publishing 1980) 309–316.

Asoka lent themselves to a non-sectarian national narrative,[60] other figures central to one religious tradition's view of the past, such as the Maratha king Shivaji and the Mughal ruler Aurangzeb, were considerably more problematic for Indian leaders seeking to craft narratives that appealed to both religious traditions in India.[61]

The result was that patriot constitutionalism in India and Ireland had to deal with questions that had no counterparts in the British republican tradition and had to do so without having the template of an imagined past – an ancient constitution – on which it could draw. The result was a form of constitutional thought based on *aspirational* constitutionalism rather than ancient constitutionalism. Taking up the key patriot themes of service, improvement and institutions that sustain liberty and improvement, its focus was on creating routes for civic participation in governance that would support liberty and a programme of improvement. Section 1.3 discuss the key elements of this constitutionalism in greater depth, but it is first necessary to consider in a bit more detail the issues that led to its emergence.

1.2 Colonial grievances and colonial rule

The immediate context for the rise of patriot constitutionalism in Ireland was the role of the Irish Parliament. The Irish Parliament was an old institution, which had existed since the thirteenth century.[62] Until the late seventeenth century, however, it did not meet regularly. It was summoned when finance was needed or when local grievances needed redress,[63] but the country could be and was governed for extended periods of time without its involvement.[64] The political changes brought about by the Civil War, the Restoration and the Williamite Wars made it an institution that was less representative of the general population but also more active. Catholics were excluded from being elected to Parliament in 1692 and deprived of the franchise altogether in 1728.[65] Presbyterians (or Dissenters) were barred from sitting in Parliament in 1704 although they retained the franchise. This meant that, for much of the eighteenth century, Parliament consisted almost exclusively of individuals who were members of the Church of Ireland and who belonged to the class that would by the end of the century come to be called the Anglo-Irish 'Ascendency'.[66] The dominance of the Ascendency was deeply entrenched in Parliament's processes and even in its visual environment.[67] Notwithstanding this, however, Parliament's power grew. The constant deficits run by the Irish exchequer after the Hanoverian succession led to it being summoned more frequently, and from around

60 B Josh, 'Asoka: historical discourse and the post-colonial Indian state' in P Olivelle, J Leoshko and H P Ray (eds), *Reimagining Asoka: Memory and History* (Oxford University Press 2012).

61 F Hasan, 'Nationalist representations of the Mughal state: The views of Tilak and Gandhi' (2019) 6 Studies in People's History 52.

62 H G Richardson and G O Sayles, *The Irish Parliament in the Middle Ages* (University of Pennsylvania Press 1952).

63 On the activity of the Irish Parliament during this period, see C A Dennehy, *The Irish Parliament, 1613–89: The Evolution of a Colonial Institution* (Manchester University Press 2019).

64 H Kearney, 'The Irish Parliament in the early seventeenth century' in B Farrell (ed), *The Irish Parliamentary Tradition* (Dublin, Gill & Macmillan 1973).

65 J G Simms, 'Irish Catholics and the parliamentary franchise, 1692–1728' (1960) 12 Irish Historical Studies 28.

66 See, generally, U Gillen, 'Ascendency Ireland 1660–1800' in R Bourke and I McBride (eds), *The Princeton History of Modern Ireland* (Princeton University Press 2016).

67 T Hunt, *Ten Cities that Made an Empire* (Allen Lane 2014) 112–113.

1720 it began meeting in regular biennial sessions in a 'quiet constitutional revolution' which give it a central role in scrutinising government expenditure.[68]

Its legislative power was, however, subject to two serious restrictions. Firstly, the English (and later British) Parliament regularly legislated for Ireland without the Irish Parliament's consent. The Oaths Act of 1692,[69] which prevented Catholics from sitting in the House of Commons, was passed by the English Parliament, and in 1714 the British Parliament unilaterally extended the Schism Act,[70] which curtailed dissenting academies, to Ireland. In 1719, it worsened matters with the Declaratory Act,[71] declaring that it had power to legislate for Ireland and that the British House of Lords had appellate jurisdiction over Irish litigation.

Secondly, the Irish Parliament's legislative powers had since 1494 been curtailed by Poyning's law which gave English institutions power to rewrite Irish Bills. Poyning's law provided that Bills could only originate in the Irish Privy Council and not in either House. The Irish Privy Council would send the Bills to the English Privy Council, which could alter or reject them. The Irish Parliament could accept or reject the Bill as amended in England but had no amending power itself. The power to vary or reject Bills was exercised frequently in the eighteenth century and was a serious concern for Patriots.[72] Equally, while the Irish Parliament could exercise some control over the content of legislation by framing heads of Bills which it sent to the Irish Privy Council to convert into a draft Bill and transmit to England,[73] the procedure was cumbersome and slowed down the legislative process, adversely affecting the Irish Parliament's ability to promote commerce and industry.[74] The problem was heightened by a series of laws passed by the English Parliament which restricted Irish economic activity. The Woollen Act of 1699[75] banned the export of Irish wool overseas, and the Cattle Act of 1667[76] closed the English market to Irish beef, pork and bacon, while the Navigation Acts of 1663[77] and 1671[78] prevented Ireland from trading directly with the colonies. The Irish Parliament was largely powerless to intervene, and it was against this background that patriot constitutional ideas began acquiring growing currency in Irish elite opinion.

The grievances that led to demands in India for greater involvement in government can be summarised more briefly. Unlike Ireland, India did not have a parliamentary tradition, but it did have a tradition of local institutions and offices through which elites could participate in government and a traditional vocabulary of ethical government on which elites could draw. The emergence of British rule disrupted these. Former Mughal elites who witnessed the transition to company rule lamented the new rulers' failure to

68 D Hayton, 'Patriots and legislators: Irishmen and their parliaments, c 1689–c 1740' in J Hoppitt (ed), *Parliaments, Nations and Identities in Britain and Ireland, 1660–1850* (Manchester University Press 2003) 104–106.

69 3 W&M c 2.

70 13 Ann c 7.

71 6 Geo I c 5.

72 J Kelly, 'Monitoring the constitution: the operation of Poyning's law in the 1760s' (2001) 20 Parliamentary History 87.

73 Hayton (n 68) 112.

74 Ibid 113–114.

75 10 & 11 W&M c 10.

76 18 Car 2 c 23.

77 15 Car 2 c 7.

78 22 & 23 Car 3 c 26.

adhere to traditional standards and practices.[79] Equally, local assemblies such as the *pañcāyat*, whose discursive and adjudicative role had expanded with the Maratha state, were important pre-colonial vehicles for public participation,[80] but their colonial equivalents, such as the senior judiciary and juries, were closed to Indians. Cornwallis as Governor-General had issued a blanket prohibition on appointing natives to positions of trust and responsibility, believing their character to be deficient.[81] The regular imposition of press censorship meant that other vehicles for public discussion of government were also restricted. Early Indian demands were, accordingly, oriented around recreating opportunities for participation in colonial government.

1.3 Colonial constitutionalism: key themes

The key demands of the Patriot party in the Irish Parliament were achieving free trade, repealing the Declaratory Act, amending the legislative procedure set out in Poyning's law, securing an independent judiciary, and enacting some measure of Catholic relief. Between the late 1770s and 1782, most of these were achieved, culminating in the achievement of full legislative independence in 1782. Catholic representation, in contrast, proved much harder to obtain. Although the vote was conceded in 1793, Grattan's attempt to enable them to sit in Commons failed in 1795, with Fitzwilliam, the viceroy, who was sympathetic to the cause of Catholic emancipation, being recalled to England and replaced by a more hard-line figure. The failure of Catholic representation also marked the final failure of the patriot project. Following the 1798 rebellion, Ireland was incorporated into the UK and the Irish Parliament dissolved. In India, the debates centred around press freedom and reform of the revenue, judicial and legal systems, both to provide opportunity for civic participation in colonial rule, and to create colonial institutions that were responsive to local needs. The renewal of the East India Company's charter in 1832 provided a focus point for these demands as did, in a less obvious way, the passage of the Great Reform Act. Roy played a leading role in this movement, drafting petitions and providing detailed evidence to Parliament. As with the Irish patriot project, however, his attempts also ended in failure, with Parliament making few, if any, concessions to his demands.

The following discussion is organised around the Irish context, primarily because of the greater quantity of documentation available in English. However, it also examines the debates in India, which closely paralleled it. It focuses on two specific themes: firstly, the demand for commercial freedom, its connection with legislative sovereignty, and the vision for imperial links it implied; and, secondly, the nature of the polity, the people it included, and the basis of political obligation. As we show, in each of these areas, Irish and Indian actors drew heavily on patriot conceptions of improvement, liberty, civic pride and sympathy, and the importance of participation to institutional legitimacy.

1.3.1 Reimagining the link: public improvement, civic pride and national liberty

The civic republican tradition in Britain in the eighteenth century was much occupied with a debate that is often termed the 'wealth versus virtue' debate. Was the growth of commerce a corrupting influence on the body politic, or was it a benign influence which

79 R Travers, 'Contested despotism: problems of liberty in British India' in Greene (n 47) 209–210.

80 R O'Hanlon, 'In the presence of witnesses: petitioning and judicial "publics" in western India, circa 1600–1820' (2019) 53 Modern Asian Studies 52.

81 C Sinha, 'Significance of Cornwallis's judicial reforms in Bengal presidency' (1969) 11 Journal of the Indian Law Institute 185, 188.

promoted arts, science, and progress?[82] The issue divided political thinkers in Britain, but in Ireland and India, the debate took on a very different character. Far from being viewed with suspicion as a source of corruption, it was seen as a source of civic pride.

Colonial thinkers were not alone in this shift. It was most fully theorised by Dutch republicans, who argued that the suspicion of wealth in classical republican thought reflected its relationship with societies characterised by 'agriculture, slavery, and militarism'. In modern polities which were based on commerce, it was love for the country and its form of governance that were of greater importance.[83] In addition, the colonial context permitted the corrupting force to be ascribed to British wealth, exercised on British institutions, which made those institutions agents of tyranny vis-à-vis the colonies. Because the interests of British manufacturers were so influential in the British Parliament, Britain imposed restrictive policies on the colonies, stunting their economy for Manchester's sake. The success of local manufacture and commerce, in contrast, was a matter of civic pride and, to patriots, civic pride was crucial to the maintenance of a free constitution.[84] In the wake of the Act of Union, it was the pride in Ireland's commercial progress that Grattan would highlight as one of the Irish Parliament's main achievements. The result was that the British Parliament's restrictions on the wool trade were as much a cause of complaint in Ireland as restrictions on industrialisation in India would be a century later, and in arguing for legislative autonomy Grattan would repeatedly tie the case to restrictions imposed by the British Parliament:

> … where is the freedom of trade? where is the security of property? where is the liberty of the people? I here, in this Declaratory Act, see my country proclaimed a slave! I see every man in this House enrolled a slave! I see the judges of the realm, the oracles of the law, borne down by an unauthorized foreign power, by the authority of the British Parliament against the law![85]

Grattan's language here is explicitly republican in its invocation of slavery and domination, but it embodies a distinctive version of republicanism in which it is not just the individual but also the country that is rendered a slave, and where the dominating power is not another *individual* but another *country*. The nature of the domination Grattan described, however, is also important to understand the aspirational constitutionalism it reflected and the nature of the link which it saw a colony free from domination as maintaining with the imperial power.

As a previous section has discussed, patriot political thought emphasised the importance of selfless devotion to the country and one's fellow citizens. In the eighteenth century, this took the specific form of working for improvement – that is to say, for economic development and national economic progress. Working for improvement was a central part of patriotism and parliamentary public spirit in eighteenth-century Ireland.[86] As Rees has shown, the Irish patriots of the early part of the eighteenth century focused their attention on practical and pragmatic policies of economic development, rather than on constitutional issues.[87] Their achievements were considerable and included the Newry

82 The classic account is I Hont and M Ignatieff (eds), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge University Press 1983).

83 Velema (n 42) 102–105.

84 Viroli (n 34) 27–30.

85 H Grattan, 'Speech in Parliament of 19 April 1780' in *The Speeches of the Right Honourable Henry Grattan in the Irish and in the Imperial Parliament* (Longman 1822) vol 1, 43.

86 T C Barnard, *The Kingdom of Ireland 1641–1760* (Palgrave Macmillan 2004) 67–68.

87 G Rees, 'Sir Richard Cox, 1702–66: patriotism and improvement in mid-eighteenth-century Ireland' (2014) 29 Eighteenth Century Ireland 47.

canal, the first inland canal anywhere in Britain or Ireland,[88] as well as a range of other measures to promote and regulate commerce.[89] The growing prominence of constitutional issues did not disrupt this project. Rather, it reflected a sense that the limitations of the Irish Parliament's powers were a serious hurdle to the furtherance of this project.[90]

The impetus for improvement was built on the role sentiments of fellowship played in patriot political thought. The affection between fellow-citizens that formed the basis of a republic depended on a feeling of affection which in turn built on the sentiment Adam Smith would describe as sympathy.[91] This understanding of the sentiment that binds members of a polity was, in patriot thought, translated into a very distinctive understanding of empire, and of the nature of the links that constituted empire, which saw the links lying in the sympathy generated by shared constitutional values, rather than in hierarchies of command and control or the bonds of allegiance between inferior and superior. The nature of this link was summarised by Grattan in 1782, at the culmination of his campaign for Irish legislative sovereignty:

> This nation is connected with England not by *allegiance* only, but *liberty* … Ireland has British privileges, and is by them connected with Britain; both countries are united in liberty … *Liberty, we say, with England; but at all events liberty.*[92]

This contrasted sharply with the tighter, hierarchical relationship created by the Act of Union:

> … similarity of constitutions is no longer the bond of connection, all are to be swallowed up, according to this doctrine, in one imperial Parliament, whose powers increase as the boundaries of the empire contract, and the spirit of her liberties declines.[93]

Put differently, in patriot thought, the bonds of a shared constitution could and did create a natural and productive link based on sympathy and a shared commitment to civic improvement. A distant shared legislature, however, would be 'free from the influence of vicinity, of sympathy'.[94] The form of relationship created by the Union ran contrary to patriot principles because it was neither 'an identification of interests' nor 'an identification of feeling and of sympathy'. It was, rather, an 'act of absorption' by which 'the feelings of [Ireland] is not identified but alienated'. All that it produced was 'Irish alienation'.[95]

In the light of the subsequent history of Britain, Ireland, India and the rest of the Empire, this dimension of patriot thought appears prophetic, and we will return to the question of why greater account was not taken of it in Part 2 of this article. Before that, however, it is worth noting the parallels with the position taken by Roy.

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88 W A McCutcheon, 'The Newry Navigation: the earliest inland canal in the British Isles' (1963) 129 Geographical Journal 466.

89 E Magennis, 'The Irish Parliament and the regulatory impulse, 1692–1800: the case of the coal trade' (2014) 33 Parliamentary History 54.

90 Hayton (n 68) 119 notes that the number of measures passed by the Irish Parliament relative to the British Parliament declined from one-fifth to 8.5% between 1751 and 1770, contributing to the frustration that fed the demand for legislative independence.

91 On the connection between Adam Smith's theory of sympathy and empire, see J Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press 2005) chapter 1.

92 H Grattan, *Speeches of the Right Hon Henry Grattan* (Eastburn Kirk & Co 1813) lxxxiv–lxxxv.

93 H Grattan, 'Speech in Parliament of 15 January 1800' in *Speeches* (n 85) vol III, 356.

94 Ibid vol III, 366.

95 Ibid, 'Speech in Parliament of 5 February 1800' (n 85) vol III, 393.

India in Roy's era presented a radically different social and political context from Ireland. Unlike Ireland, there were no national institutions or a national polity. Much of the country was still part of one of hundreds of Indian kingdoms. The seventeenth and eighteenth centuries had also been a time of war. The slow collapse of the Mughal state had led to the governors of many formerly Mughal provinces setting themselves up as independent kings, and it had also opened large areas of the country to invasion: large and formerly prosperous cities such as Delhi were pillaged and sacked on more than one occasion.[96] The Maratha expansion into the North came to an end in the 1760s, and was followed by a slow retreat and eventual collapse.[97] Although the British bridgeheads in India – Bengal, Bombay and Madras – were located in relatively calm provinces, they were nevertheless embedded in a region disrupted by military conflict. The British claim to have instituted better governance and established safety was not wholly accurate – British intervention frequently escalated conflict and tended to create what Bayly has accurately termed a 'European military despotism'.[98] Nevertheless, Indian quiescence in the face of that claim should be seen against this background of turbulence.[99]

Roy, like Grattan, did not seek to end the link to Britain. His starting point, again like Grattan's, was in the idea that, for the link with Britain to endure, the people would need to acquire a form of attachment to Britain. The British policy of excluding Indians from positions of responsibility, however, had operated in a way that degraded Indians and caused them to be alienated from the government, rather than encouraging them to feel a bond of attachment to Britain:

> … men of aspiring character and members of such ancient families as are very much reduced by the present system, consider it derogatory to accept of the trifling public situations which natives are allowed to hold under the British Government, and are decidedly disaffected to it.[100]

Roy believed that this reflected a view that Indians were less capable of improvement and possessed a weaker character than Europeans – a view he rejected. Writing, as he put it, in 'very moderate language',[101] he pointed out that Indians 'have the same capability of improvement as any other civilized people'.[102] The difficulty, however, was their reduction to a 'selfish and servile' state which led them to abuse whatever arbitrary power they had.[103] Roy's political activity was directed towards improvement away from this state of things, and a key dimension of that was reducing the degrading alienation and expectation of servility that Indians experienced in everyday life under British rule, of which Roy had personal experience.[104] Indians, Roy pointed out, rarely encountered

96 On the decline of Mughal India in the eighteenth century, see J F Richards, *The Mughal Empire* (Cambridge University Press 1993) 253–281.

97 S Gordon, *The Marathas 1600–1818* (Cambridge University Press 1993) 154–174.

98 C A Bayly, *Indian Society and the Making of the British Empire* (Cambridge University Press 1988) 79.

99 P J Marshall, *Bengal: The British Bridgehead* (Cambridge University Press 1988) 93–136.

100 Ram Mohan Roy, 'Additional queries respecting the condition of India' in *Exposition of the Practical Operation of the Judicial and Revenue Systems of India* (Smit, Elder & Co 1832) 110.

101 Ibid 111.

102 Ibid 108. The statement that Indians were 'civilized' people is likely to have been a response to James Mill who, in his influential *History of British India*, had dismissed Indians as a 'rude' people incapable of advanced government. J Mill, *The History of British India* (Baldwin, Cradock & Joy 1817) 91ff.

103 Ram Mohan Roy, 'Address to Lord William Bentick' in J C Ghoshe (ed), *The English Works of Raja Rammohun Roy* (Calcutta, Srikanta Roy 1901) col II, 329–330.

104 See e.g. the incident described in Ram Mohan Roy, 'Letter to Lord Minto' in *Selected Works of Raja Rammohun Roy* (New Delhi, Government of India Publications Division 1977) 304–306.

Europeans from a position of equality, forcing them into a submissive position.[105] The problem would be reduced if Indians saw

> … that their merits were appreciated, that they might hope to gain an independence by honest means, and that just and honourable conduct afforded the best prospect of their being ultimately rewarded by situations of trust and respectability.[106]

Although Roy engaged closely with Parliament's enquiry into the renewal of the East India Company's charter, he did not have much faith in its ability or willingness to provide relief. Like Grattan, he appears to have held a view that there was little scope for sympathy between Indians and a remote Parliament. In a biographical sketch written after his death, a close associate reported that he felt that in colonial matters

> … the Minister was absolute, and the majority of the House of Commons subservient; there being no body of persons there who had any adequate motive to thwart the Government in regard to distant dependencies of the British crown.[107]

A more practical option was to work with local institutions of British rule in the East India Company to achieve practical measures of progress. Roy saw in commerce a promising template. The security of tenure and commercial opportunities British rule had brought had provided considerable opportunities for improvement.[108] Nevertheless, there were significant blind spots. The government showed considerable indulgence to landlords, but not to the actual cultivators who lived in 'very miserable' conditions, subject to rents which left 'little or nothing for seed or subsistence to the labourer or his family'.[109] The government's failure to address the needs of ordinary Indians troubled Roy, who felt that the potential fragility of Indian loyalty to empire was not properly appreciated by Britain. In a letter to a progressive English friend, Roy expressed himself with somewhat more candour than he did in his published work. Britain, he said, had the choice of having India

> … either useful and profitable as a willing province, and ally of the British Empire, or troublesome and annoying as a determined enemy.[110]

Its lack of attention to the actual needs of Indians, or to the underpinnings of bonds of loyalty, were pushing it in the latter direction.

1.3.2 Constituting a people: governments, popular participation and civic virtue

A second theme in colonial constitutionalism arose out of the need to define who and what constituted the polity. The position of Catholics in Ireland was a particular point of contention and became more contentious after the Constitution of 1782 gave the Irish Parliament the power to remove their disabilities. Successive attempts at Catholic relief were watered down, but disabilities on their ability to lease, own and inherit property were lifted in 1782, and they received the vote on the same terms as Protestants in 1793. Granting them the right to sit in Parliament, however, proved more difficult. The Irish Commons had historically included Catholics as well as Protestants until the Civil War. James I created new boroughs to attempt to entrench a Protestant majority, but was

105 Ibid, 'Remarks on settlement in India by Europeans' 117.

106 Roy, 'Additional queries' (n 100) 105.

107 Anon, 'Ram Mohan Roy' (1933) 12 Asiatic Journal 195, 212.

108 Roy, 'Additional queries' (n 100) 110.

109 Roy, 'Questions and answers on the revenue system of India' in *Exposition* (n 100) 69.

110 Roy, 'Extract from a letter to J Crawford' in *Seleceted Works* (n 104) 297.

forced under pressure to reduce it to a nominal number.[111] Catholics were excluded under Cromwell, but returned to Parliament after the Restoration. The Williamite settlement, however, again excluded them. Although the Articles of Surrender were ambiguous, the Oaths Act of 1692 altered the oath of supremacy to require a rejection of transubstantiation, which had the effect of excluding Catholics from Commons and a range of professions.[112] In 1728, Catholics were deprived of the vote.

Protestant Dissenters (who were mostly Presbyterians) were also not wholly trusted by the Ascendency and were subject to some legal disabilities,[113] but these were considerably less severe than those that applied to Catholics. The main disability that applied to them was the inability to hold civil or military office. This was the result of the introduction of what was called the 'Sacramental Test' in 1704, which barred them from holding civil or military office. They were never, however, subject to the broader range of disabilities that affected Catholics, nor were they ever deprived of the vote. Underlying this was the fact that the 'Protestant constitution' could accommodate Dissenters more easily than it could accommodate Catholics. One of the characteristics of dissenter political discourse was the ease with which it could combine a strong sense of Protestant supremacy with strident criticism of the Ascendency,[114] and the Sacramental Test itself was not a creation of the Irish Parliament. It had been inserted by the English Privy Council into the 1704 statute (which the Irish Parliament had drafted to only apply to Catholics) in exercise of its powers under Poyning's Law.[115] Once introduced, it was staunchly defended by the Church of Ireland,[116] but was ultimately abolished in 1780. Extending full constitutional liberty to Catholics, in contrast, was much more controversial because it sat uneasily with the place Protestantism occupied in the Anglo-Irish constitutional imagination, as a previous section has discussed.

Grattan, however, strongly supported Catholic representation, and his speeches show the importance of patriot constitutionalism to his thought. Grattan argued that, without full Catholic equality, Ireland would not be a polity:

> The question is now … whether we shall be a *Protestant settlement* or an *Irish nation* ... The question is not, whether we shall shew mercy to the Roman Catholics, but whether we shall mould the inhabitants of Ireland into a *people*: for so long as we exclude Catholics from natural liberty and the common rights of men, we are not a *people*.[117]

Underlying this was a characteristically patriot emphasis on the importance of affection for and attachment to institutions, rather than simply obedience to them. In patriot thought, obedience by itself did not and could not form a sustainable basis for a polity. It was, instead, necessary for individuals to love the institutions of their country, and the patriot's task was to ensure that institutions were worthy of the public's affection.[118] Grattan's arguments for Catholic emancipation closely reflect this view:

111 J Ohlmeyer, 'Power, politics and Parliament in Seventeenth-Century Ireland' in M Jansson (ed), *Realities of Representation: State Building in Early Modern Europe and European America* (Palgrave Macmillan 2007) 119.

112 E Kinsella, 'In pursuit of a positive construction: Irish Catholics and the Williamite articles of surrender, 1690–1701' (2009) 24 Eighteenth Century Ireland 11, 20.

113 Gillen (n 66) 57.

114 Small (n 32) 15.

115 J G Simms, 'The making of a penal law (2 Anne, c 6), 1703–4' (1960) 12 Irish Historical Studies 105.

116 D Hayton, *Ruling Ireland 1685–1742: Politics, Politicians and Parties* (Boydell Press 2004) 186.

117 Grattan, 'Speech in Parliament of 20 February 1782' in *Speeches* (n 85) vol I, 102–103.

118 Viroli (n 34) 1, 9–12.

> The relation in which the Protestant stands, makes him a party to the laws; the relation in which the Catholic stands, makes him the object of the law; not party. He is not a party to the law, and the law is a party against him; therefore the laws may be objects of his obedience not his affection.[119]

The failure to provide for Catholics also played a role in Grattan's opposition to the Act of Union:

> This fabric he calls a Union … it is no Union; it is not an identification of people, for it excludes the Catholics … it is an extinction of the constitution, and an exclusion of the people.[120]

The repeated reference to the people, however, has a significance in Grattan's speeches that goes beyond Catholic emancipation. Grattan's view was that it was the people, as distinct from the government, who were the true object of Parliament's duties. In criticising Parliament's opposition to a tax on English absentee landlords, for example, Grattan argued that Parliament was ignoring its duties to the people in pursuit of satisfying the government:

> We had been advised to reject this tax in order to pursue the principle of conciliation; conciliation with whom? The absentees, or the people. It is very remarkable, that, speaking of conciliation and mildness, we should proceed as if we had no people whatsoever; and provided we pleased the court, or that body whom the court espoused, we accomplished every purpose of harmony.[121]

It would be anachronistic to link this to popular sovereignty in the modern sense, but it reflected a point that was fundamental to patriot thought in the English-speaking world. States were fundamentally polities: groups of citizens, linked by common bonds of sympathy and solidarity, and a love of the institutions that created them.[122] Governments were necessary, but always subject to the danger of corruption and the pursuit of personal or factional interests at the expense of those of the polity. A strong culture of civic participation, and institutions to support that culture, was therefore seen by patriots as being an essential aspect of free constitutions.[123]

This was of particular importance in Ireland. The achievement of legislative independence in 1782 was widely believed to have been possible only because of the Irish Volunteers. The Volunteers had originally been formed in 1778 when, with the Army engaged in the North American campaign, Ireland was believed to be vulnerable to French and Spanish invasion in support of the American cause. The membership of the Volunteers was drawn from the propertied and commercial classes, and they explicitly depicted themselves as having been formed 'to guard the constitution'.[124] Although their members' political views varied, they broadly supported both free trade and Irish legislative autonomy, and the concessions obtained from Britain were ascribed to the strength of the Volunteers.[125]

Grattan praised the Volunteers and the role of public associations in inspiring the Commons to act for an object that was in the public interest.[126] This was not, however a

119 Grattan, 'Speech in Parliament of 22 February 1793' in *Speeches* (n 85) vol III, 56.

120 Grattan, 'Speech in Parliament of 14 February 1800' in ibid vol III, 404.

121 Grattan, 'Speech in Parliament of 28 February 1797' in ibid vol III, 295.

122 Viroli (n 34) 10.

123 R Browning, *Political and Constitutional Ideas of the Court Whigs* (Louisiana State University Press 1982) 21–26.

124 N Garnham, *The Militia in Eighteenth-century Ireland: In Defence of the Protestant Interest* (Boydell Press 2012) 113.

125 Ibid 119–122.

126 Grattan, 'Speech in Parliament of 10 November 1779' in *Speeches* (n 85) vol I, 27–29.

reflection of their martial virtue, but of the civic virtue that they displayed by participating in the formulation of policy to the public benefit, a position that was behind Grattan's reluctance to fully support the Volunteers in their later activities. In 1793, he tentatively supported disarming the Volunteers hand-in-hand with genuine constitutional reform. In contrast, when the government introduced a Convention Act, which would entirely ban conventions of the type that had secured legislative independence in 1782, and of the type which Catholic associations and the United Irishmen were then using to press for reform, Grattan said it was:

> … directly adverse to the genius of the constitution, and goes to destroy its resuscitative power, by incapacitating the people from acting in important cases by delegation; the only way, when, in such emergencies, they can act with constitutional energy.[127]

Grattan made this point even more forcefully in 1797, when the government embarked on a policy of coercion in Ulster in response to the activity of the United Irishmen. A Parliament which threw in its lot with ministers in such a situation, Grattan argued, was betraying the people:

> We were called upon to attaint a *people*; to attaint a *people* for high treason, on the charge preferred by a *minister* … An Irish Parliament was called on to take the word of a minister, and on that word to attaint their country of treason.[128]

Whilst the government claimed its opponents were committing treason, it was the government that was guilty of a greater treason:

> The treason of the minister against the liberties of the people was infinitely worse than the rebellion of the people against the minister.[129]

The patriot claim to colonial self-government, in other words, reflected the idea that the state consisted of its people, that its institutions owed their duties to that people, that the people exhibited civic virtue through selfless participation in public affairs, and that a free constitution would prize such participation. A constitution that lacks such institutions not only lacks vehicles for a virtuous citizenry to display their virtue, but also lacks vehicles for aspirational constitutionalism.

These ideas also animated Roy's political campaigns. Roy had an expansive understanding of the polity – one which encompassed not only Indians, but also Europeans resident in India. Calcutta had a population of Indo-Portuguese, and Roy closely followed the progress of the Iberian revolutions. In 1822, Roy organised a celebration for the second anniversary of the proclamation of constitutional government in Portugal, and the interest was reciprocated: the reissue of the 1812 Cadiz constitution was dedicated to Roy by the Spanish reformers who issued it.[130] The events, as Roy saw them, were part of a struggle 'between liberty and tyranny throughout the world'.[131] Roy was also a strong supporter of the Great Reform Act and celebrated its passage, announcing that he would have renounced his connection with England had it not passed.[132]

127 Grattan, 'Speech in Parliament of 17 July 1793' in ibid vol III, 97.

128 Grattan, 'Speech in Parliament of 20 March 1797' in ibid vol III, 300.

129 Grattan, 'Speech in Parliament of 15 January 1800' in ibid vol III, 362.

130 C A Bayly, 'Rammohan Roy and the advent of constitutional liberalism in India, 1800–30' (2007) 4 Modern Intellectual History 25, 26–28.

131 Roy, 'Letter to Mrs Woodford' in *English Works* (n 103) vol II, 354.

132 Roy, 'Letter to William Rathbone' in ibid vol II, 355.

Nevertheless, Roy was frustrated by the 'opposition and obstinacy of despots and bigots'[133] which, he felt, led to Indians having few opportunities to develop an attachment to the institutions of British India, or participate in its government. Britain, he said, had a tendency to make rules for India 'without consulting or seeming to understand the feelings of its Indian subjects', even after half a century of rule over India.[134] Roy's solution to this was institutional. Local institutions and forms of rule had remained stable despite the slow collapse of Mughal and Maratha rule,[135] and they had permitted participation through local assemblies such as the *pañcāyat* and through the ability to hold office in royal government. Much of Roy's campaigning was directed to trying to create similar opportunities for Indians under British rule. The reforms he proposed were modest: he proposed a judiciary consisting of mixed benches of Indians and Europeans,[136] the revival of *pañcāyats* as a legal institution (and not as a merely informal body as they had become under British rule) that discharged the role of the jury,[137] the creation of a local court of appeal to replace the appeal to the Privy Council,[138] and the creation of codes of law for India based on local custom, and in particular 'those principles which are common to, and acknowledged by all the different sects and tribes inhabiting the country'.[139] He also called for an end to the practical discrimination that restricted their access to government jobs (for example, testing candidates on Latin and Greek, or on Christian doctrine), and for Indians to be fully admitted to all professions.

As Bayly has pointed out, in making these points Roy was deeply influenced by the constitutional importance of popular representation in government[140] – a view which, as we have seen, was shared by Grattan. This also applied to the exercise of arbitrary power against other forms of popular participation. Roy took a leading part in the protest against the Press Regulations which had led to suppression of the *Calcutta Journal* and the expulsion of its editor, James Silk Buckingham. In a memorial to the Supreme Court challenging the regulations, Roy argued that the Regulations challenged a fundamental principle of liberty:

> After this sudden deprivation of one of the most precious of their rights … a right which they are not, and cannot be charged with having ever abused, the inhabitants of Calcutta would be no longer justified in boasting … that they are secured in in the enjoyment of the same civil and religious privileges that every Briton is entitled to in England.[141]

It was only through full civic participation that Britain could create a genuine polity in India to which Indians would feel they belong. As Roy put it in evidence submitted to Parliament:

> I have no hesitation in stating … that the only course of policy which can ensure [the Native community's] attachment to any form of government, would be that

133 Roy, 'Letter to Mrs. Woodford' in ibid 354–355.

134 Roy, 'Letter to J Crawford' (n 110) 297–298.

135 Bayly, *Indian Society* (n 98) 7–44.

136 Roy, 'Questions and answers on the Judicial System of India' in *Exposition* (n 100) 14–20.

137 Ibid 21–24.

138 Ibid 36–37.

139 Ibid 43–45, 49–51.

140 C A Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (Cambridge University Press 2012) 61–71.

141 'Press Regulations: Memorial to the Supreme Court' in *Selected Works* (n 105) 96.

> of making them eligible to gradual promotion, according their respective abilities and merits, to situations of trust and respectability in the state.[142]

1.4 The legacies of empire

In their own day, Grattan's and Roy's projects were failures, and the question of whether their actual achievements deserve the position and credit they were subsequently given,[143] and whether their ideas could have formed a workable basis for a reimagined Empire, remain controversial.[144] These debates are, however, orthogonal to the purposes of this article. Our purpose is not to vindicate Grattan's or Roy's ideas, but to locate them within the history of constitutional thought and trace the impact they had on subsequent constitutional thinking in Ireland and India. This is important, not just for its historical interest, but also for what it tells us about the role played in the present day by the constitutional legacies of empire. Much of the recent work on the constitutional legacy which empire left for the colonies has focused on the *institutional* legacies of empire – the institutional structures of government, the locus of governmental power within those structures, and the relationship of those institutions to each other.[145] Our focus, in contrast, is on the *conceptual* dimension of the legacies of empire – specifically, its impact on the political and intellectual vocabulary and frameworks which nationalists of all stripes used to think not just about institutional structures and relations, but about the tasks of government vis-à-vis the citizenry, and the mutual relationship of state, government, citizen and polity.

A first legacy was in relation to the relationship between national liberation movements and the broader Empire. Grattan's and Roy's views were, as we have seen, grounded in a particular view of the imperial link. For subsequent generations of Irish and Indian activists this became a project of *imperial* emancipation, which sought to create a periphery-centred vision of empire and imperial governance grounded in a sense of the commonality of aspirations across the periphery. Indian nationalists, starting with Roy himself, commented frequently on the Irish cause: the phrase 'glorified parish council', which acquired considerable currency during the debates over Scottish devolution in the 1990s, was originally coined by an Indian nationalist, Aurobindo Ghosh, in response to the 1907 Irish Council Bill.[146] Irish nationalists, too, saw themselves as actors on an imperial stage: Parnell repeatedly took up the Boer cause in Parliament, and imperial policies towards South Africa, India and Egypt were the subject of strident criticism by politicians and the popular press.[147] There were also strong interpersonal contacts: the Indian Home Rule League was founded by Annie Besant, an Irish nationalist resident in India, and Indian nationalist MPs at Westminster like Shapurji Saklatvala were among very few voices to oppose the partition of Ireland under the Anglo-Irish treaty.[148]

142 Roy, 'Additional queries' (n 100) 111.

143 J Lee, 'Grattan's Parliament' in Farrell (n 64).

144 For the Irish debate on Grattan, see especially G O'Brien, 'The Grattan mystique' (1986) 1 Eighteenth Century Ireland 177 and the response: W J McCormack, 'Vision and revision in the study of eighteenth-century Irish parliamentary rhetoric' (1987) 2 Eighteenth Century Ireland 7.

145 M Malagodi, L McDonagh and T Poole, 'The dominion model of transnational constitutionalism' (2019) 17 International Journal of Constitutional Law 1283.

146 A Ghosh, 'The Thunderer's challenge' *Bande Mataram* (Calcutta, 24 May 1907), reprinted in *Bande Mataram: Early Political Writings* (Pondicherry, Sri Aurobindo Ashram 1973) 368.

147 P A Townend, *The Road to Home Rule: Anti-imperialism and the Irish National Movement* (University of Wisconsin Press 2016).

148 O'Malley (n 25) 26–28.

A second legacy was the continuity of language and conceptual frameworks in Ireland and India, even among radical nationalists who rejected the moderation of Grattan and Roy. Ghosh, for example, in an early piece criticising moderates, argued in language that mirrored Grattan and Roy that they raised institutions 'to the rank of a fetish'. The effect of doing so was 'simply to become the slaves of our own machinery'.[149] The parallels to Roy's criticism of 'servility' are obvious. Equally, the image of the nation enslaved became a core part of nationalist vocabulary. Tamil nationalist poetry, for example, repurposed the mediaeval tradition of depicting Tamil as a woman to depict India as a woman in chains.[150]

A similar connection can be seen between Grattan and the thinking of pre-partition Sinn Féin. Although Sinn Féin rejected Home Rule as insufficient, it did not at its founding demand a complete break with Empire. Instead, it sought to create a relationship similar to the Austro-Hungarian dual monarchy. This was obviously similar to the 1782 settlement, and Sinn Féin's policy of abstentionism from the UK Parliament was based on an argument from Grattan about the illegitimacy of the abolition of that settlement by the Act of Union. Grattan had argued, citing Locke and Puffendorf, that the Irish Parliament did not have the power to create a legislative union with Britain:

> Parliament is not the proprietor, but the trustee; and the people the proprietor, and not the property … it is appointed for a limited time to exercise the legislative power for the use and benefit of Ireland, and therefore precluded from transferring, and transferring for ever, that legislative power to the people of another country.[151]

Arthur Griffiths echoed this language in his founding manifesto for Sinn Féin. The Irish Parliament still existed, and MPs for Ireland had a constitutional duty to convene as that Parliament rather than as part of the British Parliament.[152] His reliance on Grattan did not, however, reflect any admiration of Grattan, about whom Griffiths was scathing. He saw Grattan as lacking the courage of his convictions[153] and blamed his acquiescence in the disarming of the Volunteers for the downfall of the Irish Parliament.[154] Yet, when seen against the background of the substantial constitutional ground they shared, the disjunction between them seems less about basic constitutionalism and more about the means that might be adopted to secure that constitutionalism – a difference that, in turn, closely parallels eighteenth-century debates about the relative importance of martial and commercial virtue in civic patriotism. The more hard-line nationalist positions taken up by Ghosh and Griffiths, from this perspective, represent not a rejection of the constitutional goals of Grattan and Roy, but rather a reincorporation into them of the tradition of martial virtue that Grattan and Roy rejected.

Focusing on the conceptual, rather than institutional, legacies of empire helps us better understand the impact of patriot thought on the constitutions of Ireland and India, both of which are expressly republican. Consider the Directive Principles, which both the

149 A Ghosh, 'New lamps for old – I', *Indu Prakash* (Calcutta, 7 August 1893), reprinted in *Bande Mataram* (n 146) 6.

150 See e.g. Cu Pārati, 'cutantira tākam', reprinted in Vi Karu Irāmanatan (ed), *Makākavi Pāratiyār kavitaikal* (Chennai, intu patippakam 1992) 51. There is an obvious parallel with the Irish *aisling* poetical tradition, which we, however, do not pursue here.

151 Grattan, 'Speech in Parliament of 5 February 1800' in Speeches (n 85) vol III, 386.

152 A Griffiths, *The Resurrection of Hungary: A Parallel for Ireland* (James Duffy 1904) 89, 92–93.

153 A Griffiths, *The Resurrection of Hungary: A Parallel for Ireland* (3rd edn, Whelan & Son 1918) 87.

154 Ibid 117.

Irish and Indian constitutions share. The following article occurs in both constitutions with nearly identical wording.

> The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.
>
> – Constitution of Ireland, Article 45(1)

> The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
>
> – Constitution of India, Article 38(1)

Coffey has shown that this provision was influenced by the Weimar constitution[155] – an influence that is easily intelligible in view of the ideas shared between the Indian and Irish patriot traditions and the European republican tradition. Against the backdrop of the patriot tradition and the colonial grievance that gave it its power, this provision can be read as a declaration of the significance and importance of aspirational constitutionalism. The patriot tradition emphasised the need to incorporate a constitutionalism of protest which accommodates and channels into the institutions of the body politic the voices and claims of dissenting groups that might otherwise find themselves alienated from the polity. As Khaitan has persuasively argued, the accommodation of dissenting groups and voices is a key purpose of the Directive Principles.[156] Indeed, in the Indian context they arguably build – precisely as Roy did – on ideas common to *a<u>kh</u>lāq*, the vedantic (and Buddhist) conception of the role of the state in self-perfection and the characteristically patriot idea of the state as a vehicle for improvement. A similar point could be made about the more radical ideas about 'extern ministers' and popular initiatives in the 1922 constitution of the Irish Free State,[157] the original vision of a single unified civil service in revolutionary Ireland, which would have let a county clerk rise to the level of the secretary of one of the great Departments of state,[158] and the debates in the early years of independent India of what the executive structures of the Westminster-style constitution would actually mean in the new dispensation.[159] At their core, these provisions sought to create a more organic polity which would give the public a stake in the institutions of government that was simultaneously greater, more direct, and more developed than the institutions of the British constitution had ever permitted. This helps give more context to a key finding that has emerged from recent historical work on the path to independence, which has shown how many independent countries did not simply adopt but actively sought to repurpose the institutions of imperial rule to their own ends.[160] The constitutionalism of the periphery, in other words, developed and embedded

155 D K Coffey, 'The influence of the Weimar constitution on the common law world' (2019) 27 Rechtsgeschichte – Legal History 222.

156 T Khaitan, 'Directive principles and the expressive accommodation of ideological dissenters' (2018) 16 International Journal of Constitutional Law 389.

157 On the background to these provisions, see B Kissane, 'The constitutional revolution that never was: democratic radicalism and the Sinn Féin movement' (2009) 104 Radical History Review 77.

158 M Maguire, *The Civil Service and the Revolution in Ireland 1912–38: 'Shaking the Blood-stained Hand of Mr Collins'* (Manchester University Press 2008) 96.

159 H Kumarasingham, 'The Indian version of first among equals: executive power during the first decade of independence' (2010) 44 Modern Asian Studies 709.

160 See e.g. Kumarasingham's discussion of the very different significance which dominion status had to the three South Asian dominions: H Kumarasingham, 'The "tropical dominions": the appeal of dominion status in the decolonisation of India, Pakistan and Ceylon' (2013) 23 Transactions of the Royal Historical Society 223.

into the republican constitutions of India and Ireland a dimension of the civic republican tradition which was wholly distinctive to the periphery, and which both underpinned and gave a wholly different significance to the seeming institutional continuity between their pre- and post-independence governmental structures.[161]

2 Liberty, coercion and kindness: the constitutional roots of colonial policy

This article began with the objective of putting the world of metropole and periphery in a single analytical frame. The one piece of that picture that remains to be discussed is the British position. Why did the claims of the colonies have so little traction in Britain, and what were the constitutional ideas that underpinned the position Britain eventually adopted? As this section discusses, the answer to these questions is both interesting and potentially troubling, not least because it sits uneasily with the republican tradition to which theorists of the British constitution continue to lay claim.[162]

By the late nineteenth century, a consensus had emerged in Britain about the appropriate way to respond to demands for Irish Home Rule, juxtaposing conciliation (or 'kindness') and coercion.[163] This policy was most formally articulated in relation to Ireland – in particular, in Arthur Balfour's policy of 'killing Home Rule through kindness' – but it also underpinned the approach to India.[164] In the course of an essay on the Irish question, Dicey explained the constitutional logic behind this approach. The functioning of the English constitution meant that, in practice, it was the sentiments of English voters, rather than the Irish Parliamentary Party, that was the primary restraint on government action in Ireland:

> Humanity and a sense of justice would, one may hope, make it impossible for the English democracy to tolerate courses of action which would be repudiated by the very advisers who now recommend them, the moment when the actual results of such courses became visible to all observers.[165]

If, however, Ireland failed to respond to conciliation, then there would be a 'growth of a general conviction that justice had been tried with Irishmen in vain, and that there was nothing left for England but to show her power', against which no amount of parliamentary strength for Home-Rulers would avail.[166] Dicey also argued that English public opinion had shifted in favour of imperialism because of the view that an empire was necessary to 'maintain the power and the authority and the greatness of England' – in effect, a shift towards seeing imperial governance in the light of the contribution the Empire made to serving Britain's political needs.[167] The campaigns against Home Rule in England were, therefore, underpinned by an emphasis on the negative consequences for England.

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161 Cf. the point made by Malagodi et al (n 145) at 1284 that 'New Dominion Constitutionalism represents a crucial but understudied instrument of decolonization by constitutional means.'

162 For example, A Tomkins, *Our Republican Constitution* (Hart 2005).

163 For a detailed discussion of the policy, see L P Curtis, *Coercion and Conciliation in Ireland, 1880–1892* (Princeton University Press 1963) and A Gailey, *Ireland and the Death of Kindness: The Experience of Constructive Unionism, 1890–1905* (Cork University Press 1987).

164 Thus, for example, the passage of the Government of India Act 1919 – which conceded a measure of responsible executive government to India – was accompanied by the Rowlatt Acts, which incorporated what were at the time the most extensive measures of coercion that had yet been implemented in empire, and were directly implicated in the Amritsar Massacre.

165 A V Dicey, 'Notes on the relation between Home Rule and English politics' (1883) 37 The Nation 72, 73.

166 A V Dicey, 'What is the state of English opinion about Ireland?' (1882) 36 The Nation 95, 97.

167 See A V Dicey, 'The causes of imperialism in England' (1901) 55 The Nation 203.

These points, however, do not entirely answer the puzzle which this section set out to address, not least because Grattan expressly considered them. To Grattan, the idea that coercion was a price worth paying for mildness was unsupportable:

> … their logic appears to be little more, than that in consideration of a mild government, you should suspend civil liberty, and in consideration of the blessings of our constitution, you ought to deprive three-fourths of the inhabitants of its franchises; in other words, that in gratitude for the blessings of the constitution, you are going to surrender it to the crown. The sophism … mistakes the constitutional checks on government, for the natural mildness of its character, and infers that we should give up those checks to fortify the government; it proposes to put down the constitution to strengthen the government.[168]

In response to the contention that coercion was necessary to save Ireland from the United Irishmen's Jacobinism, Grattan responded angrily that it was the government's coercion that was Jacobin, not the actions of the United Irishmen:

> Away with the system of coercion; the Jacobinal system. What is the Jacobinal system? It is a contempt for human rights, and a violent encroachment on the laws. What has been our system of coercion, but a violent contempt of the rights and franchises of our fellow-subjects, and a violent outrage on the laws; it has been law-making in the spirit of law-breaking.[169]

Far from avoiding tyranny, the effect of enabling coercion would be to *create* tyranny, because it would create:

> … a minister perfectly uncontrollable and irresponsible … Such a minister would be a monster, the spring of every action, and with the executive power of both … Such a minister is a tyrant.[170]

Equally, Grattan (and Roy) went to lengths to try and demonstrate that Ireland and India would show more, not less, solidarity with Britain were they to be granted a greater measure of participation in their own rule.

Why, then, did British constitutional thinkers place so much emphasis on English public opinion, and so little on Irish or Indian? The answer, we suggest, lies in the manner in which political and constitutional thought in Britain had begun to view the question of authority in an imperial world, moving away from a principles-based constitutionalism legitimised by liberty and consent towards an interests-based constitutionalism legitimised by efficient and effective governance. Mill drew a sharp distinction between countries whose inhabitants had a national character marked by 'savage life', with little law, commerce, manufacture and agriculture, and more civilised nations such as Britain.[171] Savage countries were ill-served by letting them rule themselves.[172] India was explicitly placed in this category by Mill,[173] and, despite the general impression that he was sympathetic to Ireland, he appears to have believed that Ireland, too, belonged there. To Mill, the best way to rule a people unfit for self-rule was through what he termed

168 Grattan, 'Speech in Parliament of 17 October 1797' in *Speeches* (n 85) vol III, 265.

169 Grattan, 'Speech in Parliament of 20 March 1797' in ibid vol III, 304.

170 Grattan, 'Speech in Parliament of 3 May 1797' in ibid vol III, 331.

171 For a fuller analysis of Mill's views on colonialism, see Pitts, *Turn to Empire* (n 91) chapter 4.

172 Ibid 135.

173 Ibid 139.

'progressive colonial despotism', and, in his critique of Britain's history in Ireland, he faults it for failing to have imposed a progressive colonial despotism there.[174]

What did Mill mean by national character? It is clear that he did not see it as being racial: national character was mutable and evolved over time.[175] What he appears to have meant, in the terminology of modern social science, was that the capacity for self-rule requires informal institutions that facilitate and provide an environment for self-rule and have a propensity to produce agreement around principles of the sort that had come to be accepted as sound in England. These institutions could be acquired by acculturation. The Scots and Welsh, Mill held, had benefited through the Anglicisation that accompanied their union with England, and the same could happen with the Irish.[176] Absent such acculturation, however, colonised people are unfit to rule themselves because they lack the moral and political sentiments which such institutions engender. The best that can be done for them is progressive despotism.

Mill's views are not easy to account for. It is striking that his views on Ireland and India do not engage with the arguments of Grattan and Roy, even though both were well-known in England. After Union, Grattan sat for many years as an MP in the UK Parliament, and his views and thought were well-known in Liberal circles. Roy, too, was a minor celebrity in England, and was described by Bentham as his 'intensely admired and dearly beloved collaborator in the service of mankind'.[177] That Mill pays so little heed to their views on the Irish and Indian capacity for self-government is not easy to explain.

Nevertheless, Salisbury's notorious comment that one could no more justify giving free representative institutions to the Irish than to the Hottentots[178] arguably reflects a position close to Mill's views on national character, as does the juxtaposition of coercion and conciliation in Dicey's thought and British policy. Coercion, to the extent it saves the masses from misrule by the unfit, is in this view itself an act of kindness.

From the perspective of patriot political thought, it is self-evident that this was bound to fail to appeal to the people of India or Ireland. Benevolent tyranny is still tyranny; and if what should be a matter of right is no more than a matter of grace, then the subject is still a slave. Dicey's position may well have been that the rejection of kindness would leave no option but coercion, but the response from the colonies could equally be that if every demonstration of civic virtue was rejected, then there was no option but direct action. Against this background, it easy to see why the problem was so intractable and would, ultimately, lead both India[179] and Ireland[180] to reject constitutional nationalism altogether in favour of a more complete severance of the imperial link.

Conclusion

In his Isiah Berlin lecture, Quentin Skinner pointed to the parallels between anticolonial movements and the republican concept of liberty as non-domination.[181] Despite that

174 Ibid 146.

175 Ibid 136.

176 J S Mill, *Considerations on Representative Government* (Parker, Son & Bourn 1861) 293, 295–296.

177 B Majumdar, *History of Political Thought from Rammohun to Dayanand* (University of Calcutta Press 1934) 18.

178 Curtis (n 163) 103.

179 R De, 'Between midnight and republic: theory and practice of India's dominion status' (2019) 17 International Journal of Constitutional Law 1213.

180 L McDonagh, 'Losing Ireland, losing the empire: dominion status and the Irish Constitutions of 1922 and 1937' (2019) 17 International Journal of Constitutional Law 1192.

181 Skinner, 'A third concept of liberty' (n 29) 256.

provocative point, the relationship between moderate self-rule movements and republican and patriot political thought has largely remained unexplored, and little has been done to bring the two into a single analytical frame. The history not just of the constitution, but of political thought in the UK more generally, is almost invariably told without reference to the Empire. It is telling, for example, that Dicey's views on empire were not discussed in legal scholarship until very recently, and that Greenleaf's magisterial history of the British political tradition lacks the final volume on the influence of empire which it was projected to include.

Against that background, this article has sought to recover an important but neglected dimension of how people thought in the past about the constitution of empire: the attitudes, understandings and value commitments that underpinned their actions, and the legacy it has left in our present day thought, principles and institutional arrangements. The era when we could tell the story of the UK's constitution as an unbroken progression centred on England, from the Glorious Revolution, via *Entick v Carrington*, to Dicey and the present day, is long past. The Empire intervened in that story, and as we have sought to show, it is time it also intervened in the way in which we seek to study and understand the UK's constitutional development. Equally, the experience of empire left its legacies on constitutions and constitutional thought around the common law world. Putting the focus back on the legacies of empire is useful because it helps us understand what was gained and what was lost in the process.