

## JAMES WILSON AND THE SCOTTISH ENLIGHTENMENT

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I. INTRODUCTION: WILSON, SCOTLAND, AND THE AMERICAN CONSTITUTION	

In an earlier article in this *Journal*, I examined the contributions of James Wilson to the Philadelphia Constitutional Convention of 1787.<sup>1</sup> Wilson's importance at the Convention is widely acknowledged. Apart from Gouverneur Morris, he spoke more frequently than any other delegate, and with James Madison, he was one of the two leading advocates of the "large state" position in the debates leading up to the "Great Compromise" of July 16. Perhaps because Madison and Wilson were so closely allied in these debates, or perhaps because of the lingering disgrace of Wilson's death—he died shortly after being released from debtors' prison, while still a sitting Justice of the Supreme Court—Wilson has been remarkably neglected in the scholarly literature, where he is usually treated as a mere follower of Madison's. As I argued, this view of Wilson is unable to survive a careful reading of the Convention proceedings. His arguments are often strikingly different from Madison's; moreover, even when the two delegates voted the same way, they often did so for very different reasons. Wilson was Madison's senior in age and, in 1787, in accomplishments. He attended the Convention with fully developed views of his own, and was in no sense following the lead of anybody. It is thus an important task to attempt to reconstruct his constitutional thought—to attempt to understand him in his own terms, and to bring him out from under the shadow of his great colleague. Who was James Wilson? Where did he come from? What experiences shaped his thinking, and what ideas did he bring with him as he walked through the doors of the State House in May 1797? Those questions follow naturally from the conclusions of the earlier article.<sup>2</sup>

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<sup>1</sup> William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008).

<sup>2</sup> As I noted at the end of my previous article, ultimately the goal is to examine in detail Wilson's writings on theoretical questions of the philosophy of law. Only then can we claim to have an understanding of his constitutional thought. But that task, for reasons that will become clear, depends upon first securing a solid understanding of the bio-

We shall need to begin our story much further back than may at first glance seem necessary. James Wilson was born in Scotland in 1742, and he received a university education in Scotland before he emigrated to Pennsylvania in 1765. That is, in itself, a highly significant fact. Today it is commonplace to think of Scotland as simply the northern part of Britain, and indeed it is not unknown for the entire island, Scotland and Wales included, to be referred to as “England.”<sup>3</sup> But that such a confusion is even possible was an accomplishment of the eighteenth century, and the sense of a shared British identity did not take root in popular feeling until long after the Napoleonic wars.<sup>4</sup> In Wilson’s day an older and bloodier history was still alive in the minds of the populace on both sides of the border, and the last major Jacobite rebellion occurred during his lifetime. Wilson was the only delegate to the Constitutional Convention to have been born and educated in Scotland. As several of his Convention speeches on citizenship make clear, he was well aware of his own status as an immigrant; and indeed, during the Pennsylvania ratification debates, the opponents of the Constitution made an issue of Wilson’s foreign

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graphical background; so I turn to that task first, and postpone an examination of Wilson’s philosophical writings to another occasion.

The standard biography of James Wilson is CHARLES PAGE SMITH, *JAMES WILSON: FOUNDING FATHER, 1742–1798* (1956). This work antedates the historiographic revolution associated with Caroline Robbins, Bernard Bailyn, Gordon Wood and their followers, which has transformed our understanding of the intellectual landscape of the American Revolution. Smith’s treatment is generally reliable on the basic facts of Wilson’s life, but he has a disconcerting tendency to make up scenes and conversations beyond what the evidence would allow. Many of his assertions are not properly footnoted; for example, his list of the works of political theory studied by Wilson under the tutelage of John Dickinson has no basis in the archival sources that Smith cites. *Id.* at 26. More significantly, Smith does not treat either eighteenth-century law or eighteenth-century political philosophy in any detail: and these are the critical topics for understanding the background of Wilson’s constitutional thought. In this Article, I shall attempt to fill some of these gaps; but it should be emphasized that the treatment here falls short of the full, scholarly biography that is still badly needed.

- 3 In strict usage, “Great Britain” designates the union of England, Scotland, and Wales. “The United Kingdom” is the shortened form of “The United Kingdom of Great Britain and Northern Ireland.” There are legal complexities involving the Channel Islands that need not concern us here. In American usage, one often hears reference to “the Queen of England,” or to “the English Parliament.” Such usages are not unknown, even in Britain. Bonar Law, himself a Scot born in Canada, referred to himself as “the Prime Minister of England” when he held the post in the early 1920s. See A.J.P. TAYLOR, *ENGLISH HISTORY 1914–1945*, at v, 15 (1965). In more recent decades, with the spread of Scottish nationalism and the establishment of a separate Scottish parliament, the usages have become stricter. I note in passing that English usage employs the word “Scotch” (both as adjective and noun); north of the border the standard usage is “Scottish” and “Scots.”
- 4 The standard account of this building of a British national identity is LINDA COLLEY, *BRITONS: FORGING THE NATION 1707–1837* (1992).

background, referring to him as “James the Caledonian,” or even “*James de Caledonia*.”<sup>5</sup>

Three facts in particular should be noticed about Wilson’s Scottish background. First, it is important to observe that he attended university in the middle of the extraordinary intellectual efflorescence known as the “Scottish Enlightenment.” For many years, the standard account of the principal intellectual influences on the American Founders was, in the strict sense of the term, Anglo-centric. The most prominent American settlers (it was said) were of English stock, and they brought with them the English view of government, and the English common law.<sup>6</sup> But in an important essay published in 1957, Douglass Adair pointed out that Madison, in *Federalist No. 10*, had borrowed entire passages of his famous argument from the Scottish philosopher, David Hume. Furthermore:

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<sup>5</sup> SMITH, *supra* note 2, at 282.

<sup>6</sup> For examples from the first half of the twentieth century, one can consult, as typical specimens, the writings of such influential constitutional historians as McIlwain or Corwin, who appear to overlook the Scottish thinkers entirely. See EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1929); CHARLES HOWARD MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* (1923). The same is true even for Carl L. Becker, who was an authority on European thought of the Enlightenment and wrote the classic *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* (1932); but his *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1922) [hereinafter BECKER, *THE DECLARATION OF INDEPENDENCE*] contains a solitary reference to Hume, and none to the other thinkers of the Scottish Enlightenment. *Id.* at 236.

As far as I am aware, the first extended scholarly treatment of the question of Scottish intellectual influence on the American Founders came in a special symposium issue of the *William and Mary Quarterly* in 1954. Symposium, *Scotland and America*, 11 WM. & MARY Q. (1954). At the time, the *Quarterly* was being edited by Douglass Adair. That issue contained contributions from Caroline Robbins, and also a note by John Clive and Bernard Bailyn. John Clive & Bernard Bailyn, *England’s Cultural Provinces: Scotland and America*, 11 WM. & MARY Q. 200 (1954).

The pioneering scholarship of Caroline Robbins in the 1950s drew attention to the importance of the radical Whig tradition in *English* oppositional political thought, but her work also contained an insightful chapter on Scottish thinkers. CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN 177–220* (1959). The major study by Bernard Bailyn, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967), despite his earlier contribution to Adair’s symposium, did not develop this particular theme; “Scotland” does not appear at all in his index, whereas “England” has one of the longest entries, filling sixteen lines. *Id.* at 325, 332.

It is important to note that the concept of “The Scottish Enlightenment” appears to be relatively recent. One can find scattered references to the “Scottish Renaissance” or to the “Golden Age of Scotland” in earlier writers, but the term “Scottish Enlightenment” did not become standard until H.R. Trevor-Roper began to employ it in the 1960s. See Hugh Trevor-Roper, *The Scottish Enlightenment*, in 58 *STUDIES ON VOLTAIRE AND THE EIGHTEENTH CENTURY 1635* (Theodore Besterman ed., 1967).

[In Scotland,] especially in the Scottish universities, had been developed the chief centers of eighteenth-century social science research and publication in all the world. The names of Francis Hutcheson, David Hume, Adam Smith, Thomas Reid, Lord Kames, Adam Ferguson, the most prominent of the Scottish philosophers, were internationally famous. In America the treatises of these Scots, dealing with history, ethics, politics, economics, psychology, and jurisprudence in terms of “system upon which natural effects are explained,” had become the standard textbooks of the colleges of the late colonial period. At Princeton, at William and Mary, at Pennsylvania, at Yale, at King’s, and at Harvard, the young men who rode off to war in 1776 had been trained in the texts of Scottish social science.<sup>7</sup>

Twenty years later, Garry Wills extended Adair’s insight to Jefferson, arguing, that the key philosophical ideas in the Declaration of Independence were derived, not from John Locke (as had previously been supposed) but from the political thinkers of the Scottish Enlightenment.<sup>8</sup> It is now well understood that, in the middle decades of the

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<sup>7</sup> Douglass Adair, “*That Politics May Be Reduced to a Science*”: *David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343, 345 (1957). This essay has been often reprinted; the quotation appears near the beginning, in the sixth paragraph. The same observation about Hume and Madison had been made in 1954, independently of Adair, by the Oxford political philosopher, Geoffrey Marshall, in a brief and characteristically incisive note. Geoffrey Marshall, *David Hume and Political Scepticism*, 4 PHIL. Q. 247, 255–56 (1954). Adair’s insight appears to go back to his unpublished doctoral dissertation at Yale in the early 1940s: see the introductory note to this essay in the various reprintings of DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* 75, 93 (Trevor Colbourn ed., 1974).

The Adair arguments about *Federalist No. 10* have been further taken up by James Conniff, *The Enlightenment and American Political Thought: A Study of the Origins of Madison’s Federalist Number 10*, 8 POL. THEORY 381 (1980), and especially by Edmund S. Morgan, *Safety in Numbers: Madison, Hume, and the Tenth Federalist*, 49 HUNTINGTON LIBR. Q. 95 (1986).

<sup>8</sup> Wills pointed out that Jefferson was educated at William and Mary by William Small, a Scot trained at Aberdeen, who exposed him to the works of the principal thinkers of the early Scottish Enlightenment. GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 177–80* (1978). Wills concluded that Jefferson’s ideas were not derived, primarily, from Philadelphia or Paris, but from Aberdeen and Edinburgh and Glasgow. We have enough evidence of his reading, and of his conclusions from that reading, to establish that the real lost world of Thomas Jefferson was the world of William Small, the invigorating realm of the Scottish Enlightenment at its zenith.

*Id.* at 180.

Wills’s particular target in this book was the influential study by Carl L. Becker, *THE DECLARATION OF INDEPENDENCE*, *supra* note 6, which had dominated discussion of the intellectual origins of the Declaration for the previous fifty years. *Id.* at 168–69. Becker gives almost exclusive credit for the underlying philosophical ideas of the *Declaration* to John Locke. *Id.* at 27–29. Wills in his *Prologue* explicitly cited the work of Adair, concluding, “[i]f Adair is right, Becker is wrong. And if Becker is wrong, we have a lot of work ahead of us.” WILLS, *supra* note 8, at xxvi. Wills’s book was at points somewhat polemical, and certainly the book attracted a number of unfavorable reviews. See, e.g., Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills’s Inventing Amer-*

eighteenth century, large numbers of educated Scotsmen emigrated to British North America, where they served either as tutors to the young or as instructors in the universities.<sup>9</sup> The College of New Jersey (later Princeton University), King's College (later Columbia University), and the College of Philadelphia (later the University of

ica: Jefferson's Declaration of Independence, 36 WM. & MARY Q. 503 (1979). But his central point about the importance to Jefferson of the Scottish thinkers is undeniable.

Jefferson was educated at the College of William and Mary, which opened in 1693. Its first President was the Rev. James Blair, a Scottish minister who had been educated at Marischal College, Aberdeen; and he saw to it that William and Mary followed a Scottish curriculum, with a compulsory course in moral philosophy. Jefferson's remarks in his often-reprinted *Autobiography* are worth quoting:

It was my great good fortune, and what probably fixed the destinies of my life that Dr. Wm. Small of Scotland was then professor of Mathematics, a man profound in most of the useful branches of science, with a happy talent of communication correct and gentlemanly manners, & an enlarged & liberal mind. He, most happily for me, became soon attached to me & made me his daily companion when not engaged in the school; and from his conversation I got my first views of the expansion of science & of the system of things in which we are placed. Fortunately the Philosophical chair became vacant soon after my arrival at college, and he was appointed to fill it per interim: and he was the first who ever gave in that college regular lectures in Ethics, Rhetoric & Belles lettres. He returned to Europe in 1762, having previously filled up the measure of his goodness to me, by procuring for me, from his most intimate friend G. Wythe, a reception as a student of law, under his direction, and introduced me to the acquaintance and familiar table of Governor Fauquier, the ablest man who had ever filled that office. With him, and at his table, Dr. Small & Mr. Wythe, his amici omnium horarum, & myself, formed a partie quarree, & to the habitual conversations on these occasions I owed much instruction.

THOMAS JEFFERSON, *AUTOBIOGRAPHY OF THOMAS JEFFERSON 1743-1790*, at 5-6 (Knickerbocker Press 1914) (1821). Jefferson had already remarked in 1783 that,

[If] I was to enquire for a tutor. . . I concluded . . . we might . . . venture to bring a man from his own country, it would be best for me to interest some person in Scotland . . . From that country we are surest of having sober attentive men.

6 THE PAPERS OF THOMAS JEFFERSON 432-33 (Julian P. Boyd ed., Princeton Univ. Press 1952) (1783).

- 9 There have been numerous further studies of particular aspects of the relationship between Scotland and America in the eighteenth century. Some of the principal works (in chronological order) are: DOUGLAS SLOAN, *THE SCOTTISH ENLIGHTENMENT AND THE AMERICAN COLLEGE IDEAL* (1971); ANDREW HOOK, *SCOTLAND AND AMERICA: A STUDY OF CULTURAL RELATIONS, 1750-1835* (1975); SCOTLAND, EUROPE, AND THE AMERICAN REVOLUTION (Owen Dudley Edwards & George Shepperson eds., 1976); HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976); David Fate Norton, *Francis Hutcheson in America*, in 154 *STUDIES ON VOLTAIRE AND THE EIGHTEENTH CENTURY 1547* (Theodore Besterman ed., 1976); Daniel Walker Howe, *European Sources of Political Ideas in Jeffersonian America*, 10 *REVS. IN AM. HIST.* 28 (1982); D.M. Walker, *Lawyers of the Scottish Enlightenment and Their Influence on the American Constitution*, 1988 *JURID. REV.* 4; Daniel Walker Howe, *Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution*, 31 *COMP. STUD. OF SOC'Y & HIST.* 572 (1989); SCOTLAND AND AMERICA IN THE AGE OF THE ENLIGHTENMENT (Richard B. Sher & Jeffrey R. Smitten eds., 1990); 1-2 *HUME'S RECEPTION IN EARLY AMERICA* (Mark G. Spencer ed., 2002); Colleen A. Sheehan, *Madison v. Hamilton: The Battle Over Republicanism and the Role of Public Opinion*, 98 *AM. POL. SCI. REV.* 405 (2004); MARK G. SPENCER, *DAVID HUME AND EIGHTEENTH-CENTURY AMERICA* (2005).

Pennsylvania)<sup>10</sup> all followed a Scottish curriculum; and when Madison studied at Princeton, and Hamilton at Columbia, they were exposed to the ideas of Hume and Smith, Lord Kames, Hutcheson, Ferguson, Reid, and the other leading thinkers of Scotland. As Garry Wills puts the point, “The education of our revolutionary generation can be symbolized by this fact: at age sixteen Jefferson *and* Madison *and*

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10 The curriculum at Princeton was organized by John Witherspoon, a Presbyterian minister trained in Edinburgh, and who, according to Adrienne Koch, had studied with David Hume, Adam Smith, and Thomas Reid. ADRIENNE KOCH, MADISON’S “ADVICE TO MY COUNTRY” 9 (1966). The Princeton curriculum was organized around the works of Hutcheson, Hume, Smith, Ferguson, Reid, and Kames. Witherspoon was a powerful and famous instructor, and had a profound influence on his student James Madison. The relationship is discussed by Douglass Adair in his chapter *James Madison, in FAME AND THE FOUNDING FATHERS*, *supra* note 7, at 124. The chapter was originally published in *THE LIVES OF EIGHTEEN FROM PRINCETON* 137 (Willard Thorp ed., 1946). Garry Wills gives a brief summary of Witherspoon’s importance as an educator of the Revolutionary generation in GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 15–20 (1981). The standard biography is the two-volume work, VARNUM LANSING COLLINS, *PRESIDENT WITHERSPOON: A BIOGRAPHY* (1925). After his death, Witherspoon’s lecture notes were published and have appeared in a number of editions, including JOHN WITHERSPOON, *AN ANNOTATED EDITION OF LECTURES ON MORAL PHILOSOPHY* (Jack Scott ed., 1982). From these notes one obtains a detailed picture of what the undergraduates at Princeton were expected to master. Ironically, it is clear that these lectures on morality by Presbyterian minister Reverend Witherspoon were plagiarized from the works—also on morality—of Francis Hutcheson. Witherspoon disapproved of what he regarded as Hutcheson’s theological laxity and was critical of Hutcheson in public, while copying his ideas in private. The point is noted by Adair in *FAME AND THE FOUNDING FATHERS*, *supra* note 7, at 296, in the essay entitled *Clio Bemused*.

As for Columbia and the College of Philadelphia (later the University of Pennsylvania), the curriculum at both schools was shaped by the ideas of William Smith, who was born in Aberdeenshire in 1727, educated at King’s College, Aberdeen, and emigrated to New York in 1751. WILLIAM R. BROCK, *SCOTUS AMERICANUS* 111 (1982). In about 1752 he published a pamphlet on university education, urging that in their final year students should study Hutcheson’s ethics, astronomy, natural history, chemistry, jurisprudence, economics, and theories of government. He was instrumental in founding King’s College (apparently named for his alma mater), which came into existence in 1754. *Id.* at 111–12. In that same year he was recruited by Benjamin Franklin to teach ethics, rhetoric, logic, and natural philosophy at the College of Philadelphia; the following year he became Provost, and begun to organize the College along the lines of the Scottish universities. *Id.* at 112.

The curriculum at the College of Philadelphia was also influenced by Francis Alison, who had been a pupil of Francis Hutcheson’s at Glasgow, and who had emigrated to America in 1735. In America Alison first became a tutor in Maryland in the Dickinson household. His technique of teaching was to drill his students in Hutcheson’s texts. He later became, under Smith, Vice-Provost at the College of Philadelphia. Student transcripts show that there, too, he relied heavily on Hutcheson (Wilson was to interact extensively with Alison and Smith; we shall encounter them later). A good, brief summary of the Scottish influence on American higher education is Archie Turnbull, *Scotland and America, in A HOTBED OF GENIUS: THE SCOTTISH ENLIGHTENMENT 1730–1790*, at 137 (David Daiches et al. eds., 1986). A longer treatment is provided in the book by SLOAN, *supra* note 9.

Hamilton were all being schooled by Scots who had come to America as adults.”<sup>11</sup>

Of all the major Founders, however, Wilson was the only one who was himself born and educated in Scotland. He experienced the Scottish Enlightenment first hand; the others, only derivatively. This fact leads to some subtle differences. The Scottish Enlightenment unfolded with extraordinary rapidity. Because Jefferson, Madison and Hamilton received their education from instructors who had trained in Scotland some years before, their exposure was to an earlier phase of the movement than was Wilson's. Moreover, the very fact that Wilson was an immigrant gave him a different perspective on the new nation than that of many of the Founders. Thomas Jefferson may serve as an instructive contrast. Throughout his life, whenever he is away from Monticello, Jefferson's letters talk of his longing to return home, and speak of his love for “my country.” He wrote this way from Paris, but also from New York, Philadelphia, and the White House. For Jefferson, “my country” was not America. It was his native land of Virginia. And what was true of Jefferson was true of most of the Framers of the Constitution: their primary loyalties were local. Wilson, by contrast, came from overseas. This fact no doubt made it easier for him to think of America as “his country.” At the Constitutional Convention, the only other delegate who was as consistently nationally minded as Wilson—able to look beyond the borders of his own state and to identify with the interests of the nation as a whole—was Alexander Hamilton; and I note in passing that Hamilton, too, was an immigrant.<sup>12</sup>

The second fact to notice is this: the question of independence from England had long been at the center of Scottish political history, and the Treaty of Union was ratified only in 1707, a few decades before Wilson's birth. Before that time, a declaration of Scottish in-

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<sup>11</sup> WILLS, *supra* note 10, at 63. Madison, like Jefferson, paid warm tribute to his Scottish teachers, and in particular to Donald Robertson, a Scot who had been trained at Aberdeen and at Edinburgh: “All that I have been in life I owe largely to that one man.” IRVING BRANT, 1 JAMES MADISON 60 (1941). See generally Roy Branson, *James Madison and the Scottish Enlightenment*, 40 J. HIST. IDEAS 235 (1979), and, for a more popular account, ROBERT W. GALVIN, AMERICA'S FOUNDING SECRET: WHAT THE SCOTTISH ENLIGHTENMENT TAUGHT OUR FOUNDING FATHERS (2002).

<sup>12</sup> Hamilton was born in the Caribbean and immigrated to America from St. Croix in 1772. I note in passing that George Washington, also the descendent of an aristocratic Virginia family, shared the national outlook of Hamilton and Wilson, famously siding with Hamilton in his rancorous arguments with Jefferson during the 1790s. I shall not attempt to document the point here, but Washington's experience of being chosen to lead an *American* army against the British, and then of campaigning up and down the Atlantic seaboard, seems to have induced in him a national outlook. He was not born with it.

dependence had been a real possibility. Indeed, long before the American colonists ever dreamed of separating from the mother country—long, in fact, before the American colonies even existed—the Scots had been debating their legal relationship to the Westminster Parliament and the English Monarchy. It is important to remember that English colonial expansion did not begin in North America, but in the British Isles themselves. Wales had been conquered in the thirteenth century, and was formally absorbed in 1536; Ireland was subjugated and colonized in the sixteenth century, and native uprisings were suppressed with great ferocity in the seventeenth. These various expansions of English rule raised the constitutional question of how to conceive of the authority of Parliament within an emerging imperial political structure. The Scots answered this question in one way, and the Americans were to answer it in another; but a Scot like Wilson would have seen the constitutional crisis leading to the American Revolution as having a history stretching back hundreds of years.

The third point is the subtlest and the most significant. Wilson was by profession an attorney, and, at the time of the Constitutional Convention, the most distinguished practicing lawyer in Philadelphia.<sup>13</sup> Now, quite apart from the question of the *general* intellectual influence of the Scottish Enlightenment on the thought of the American revolutionary generation, there is a more specific and pertinent difference between England and Scotland. England is of course the home of the common law. However, Scotland, for a variety of complex historical reasons, in the eighteenth century belonged firmly within the civil law tradition of continental Europe. Indeed, the divergence in legal systems was one of the greatest obstacles to the union of the two kingdoms in the seventeenth century, and union could not take place until England recognized the authority of Scots law north of the Tweed. It is important to understand that this divergence was not merely a matter of which specific rules of contract or inheritance were to apply on which side of the border, but involved profound differences in the way in which the legal order was conceived. As I shall explain below, the tradition of Roman law lay at the very heart of the Scottish Enlightenment. So Wilson occupies a special niche. He was the only delegate to the Convention to have been trained in the Scottish universities; he was steeped in the ideas of a movement that was itself steeped in continental traditions of legal thought; and he was himself a prominent lawyer, helping to draft a

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<sup>13</sup> I describe Wilson's legal activities in Ewald, *supra* note 1, at 902–15.

document that founded the legal system of the United States. These facts naturally raise a tangled set of questions about Wilson's relationship to Scots law, and, more generally, of the relationship of the American founding to the legal traditions of the Continent.

#### WILSON IN SCOTLAND

Let us begin with the most basic facts about Wilson's early life. James Wilson was born in 1742 at Carskerdo in the Scottish lowlands.<sup>14</sup> Carskerdo, whose origins go back at least to the fourteenth century, still exists. It is little more than a farm, far too small to appear in most atlases. Its name (which is accented on the second syllable) has been variously spelled over the centuries: Carskerdo, Carskeirdo, Caskardy. Ceres, the nearest town, is also too small to appear in most atlases. It is in an isolated area in the middle of the shire of Fife, but it is not distant from two great university towns. St. Andrews, on the east coast of Scotland, is less than ten miles away, and is easily reached by foot. Edinburgh, as the crow flies, lies about thirty miles to the south, across the waters of the Firth of Forth. By land the journey is longer, but the distance is not great.

About Wilson's parents and family life in Carskerdo we know little. We can obtain glimpses in the letters written to him by his mother after he had emigrated to America. His father, William Wilson, a tenant farmer, was a deeply pious Calvinist and an Elder in the Church of Scotland. The father wished his oldest son to become a minister in the Kirk; it was for this reason that he sent him first to the local grammar school, and then to university.

Most of what we know of Wilson's life in Scotland comes from two principal sources. Neither is entirely reliable. Each contains gaps, and the two accounts are at points discrepant. Because of the importance of the issue, we will do well to consider the evidence closely.

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14 The date of Wilson's birth is given in many places as September 14, 1742. In particular, the September 14 date is carved on his grave marker in Philadelphia. But that grave marker was erected in the twentieth century, and I have not been able to find any contemporaneous record, either in Scotland or in America, that would confirm this date. I note that the date given on that marker for his death is almost certainly incorrect. The old parish records for Largo Parish (Parish 443, vol. 0020) are held in the New Register House, Edinburgh. They confirm a baptismal date of 14 June, 1743, but give no indication of the date of birth.

## THE ANNAN LETTER

The first source of information is a letter written in 1805 by Robert Annan.<sup>15</sup> Robert Annan was Wilson's first cousin, and had grown up with him in Scotland. He had emigrated to Pennsylvania some years before Wilson, and had established himself there as a Presbyterian minister.<sup>16</sup>

The 1805 letter was addressed to Wilson's son, Bird Wilson, who had asked for information about his father's early life. It is important to observe that Annan's letter was written seven years after Wilson's death, and fully half a century after the events he describes. At times he acknowledges ignorance or expresses some hesitancy about his recollection.

"I was boarded some years in his father's house," Annan recalled, "when we were both performing our classical studies at a Grammar School in that Neighbourhood and we travelled many a day to school in company." This was the Cupar Grammar School, where the two boys would have received intensive training in Latin and, to a lesser extent, Greek. Although lecturing styles in the eighteenth century were changing, many university instructors still delivered their lectures in Latin; so this early training was a prerequisite to higher education. The father, Annan recalled, "was distinguished for gravity, piety, and good sense; and was for many years and until his death a ruling Elder in the Church of Scotland." All the surviving family correspondence in the Wilson papers corroborates the impression of a pious and somewhat stern Calvinist upbringing. "The precise time of his birth," says Annan, "I do not certainly know. The place of his birth was named Carscerdie, an [illegible] and productive farm which his Father cultivated for many years."

According to Annan, young James Wilson was a talented student:

His parents intended your Father for public service in the Church, and kept him constantly at school from the time he was capable of receiving instruction. He early gave proofs of a fine genius, a prompt capacity for learning and a steady application. As soon as he finished his classical education as far as is common at Grammar schools, he was sent to the College of St. Andrews, where by his merit he obtained at his entrance, what is called a Bursary, that is an annual premium, nearly, if not altogether sufficient to defray the expenses of his education.

The records of St. Andrews show that Wilson's examination for his bursary occurred in the fall of 1757, and he matriculated St. Andrews

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15 Letter from Robert Annan to Bird Wilson (May 16, 1805) (on file with the Historical Society of Pennsylvania). This letter is quoted at length in the forthcoming text.

16 SMITH, *supra* 2, at 19.

in November of that year.<sup>17</sup> At the time, the entire University numbered somewhere around two hundred students.<sup>18</sup> Annan's letter continues:

After going regularly through the different stages, which then commonly occupied four years, he applied to the study of Divinity for some time. But to the best of my recollection, his Father died about that time, and the Widow having a numerous family to attend to, he became for some time a tutor in a Gentleman's family.

On this chronology, Wilson would have studied in the United College at St. Andrews for approximately the years 1757–1761, and then entered the University's school of divinity, St. Mary's College, where he began the study of theology. The death of Wilson's father would have occurred in approximately 1762. But it is important to observe that Annan says that he himself emigrated to Pennsylvania in 1761, and he had himself left St. Andrews some years before that. So his knowledge of Wilson's activities even when both young men were in Scotland was not always direct. As I shall explain below, the years 1761–1766 are something of a mystery, and it is important to remember that, during that time, Annan and Wilson were living on different continents altogether.

(I note in passing that, while he was a student at St. Andrews, Wilson may well have first encountered a man who was later to become a familiar acquaintance in Philadelphia. Benjamin Franklin was awarded an honorary degree from St. Andrews in 1759. Thirty years later, in his old age, he was to rely on Wilson to read aloud for him his speeches at the Constitutional Convention.)

It is entirely plausible that, as Annan says, on the death of his father Wilson left school to look after his siblings. He had three younger brothers and four sisters, and, in his later correspondence with the family, there are occasional references to the assistance he had provided them. Concerning the "Gentleman's family" in which Annan reports that he served as a tutor, we have no information whatsoever.

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17 The pamphlet, RANDOLPH G. ADAMS, *JAMES WILSON AND ST. ANDREWS* 16 (1931), says that Wilson's signature is visible on the College Roll for February, 1755. This is incorrect. It is clear from the matriculation records at St. Andrews that a second student named "James Wilson" was also enrolled there during part of the time that Wilson was a student, and that this other Wilson matriculated in 1755. In consulting the College records, it is at times difficult to avoid confusing the signatures of the two students.

18 RONALD GORDON CANT, *THE UNIVERSITY OF ST. ANDREWS: A SHORT HISTORY* 85 (2d ed. 1970) observes the difficulty of giving exact figures. For 1730, he estimates about 150 students in the three colleges. Enrollments were increasing, and by Wilson's day the number is likely to have grown; but it is not possible to be more precise.

Those are the facts of Wilson's early life as related by the only direct witness we possess. Annan's account is spare, but raises important questions. What is the significance of the fact that Wilson was a Scot? What can we infer from his upbringing, from his Calvinist background, from his university education, from the fact of his emigration? Is it important that he was a lowlander? What courses is he likely to have followed at St. Andrews?

One question is especially important. According to Annan, Wilson's university education was intended to train him as a clergyman. But his significance in American history is as a lawyer. It is known from many sources (including later portions of the Annan letter) that, soon after his emigration to America, Wilson studied law under John Dickinson. One might naturally surmise that Wilson's theological training in Scotland had little to do with his subsequent career in America. But the situation is complicated. In fact, in the Scotland of the eighteenth century the study of law and the study of theology were closely related, so that the two disciplines cannot be sharply separated. Moreover, there is also evidence that Annan's account is incomplete, and that Wilson, even before he left Scotland, had already turned his attention to questions of law and politics. In the context of the Scottish Enlightenment, none of this would have been surprising. —I mentioned the existence of a second biographical account of Wilson's early life, which in important ways diverges from the Annan letter. Before we can appreciate its significance, we must first consider some of the broader political and intellectual features of Scottish history, and in particular the legal background to the Scottish Enlightenment.

## II. SCOTLAND

### A. *Political and Legal History*

The political history of Scotland, from the time of Julius Caesar's invasion of Britain onward, can be viewed as a prolonged struggle to preserve Scottish independence from foreign rulers—especially those who came from the south, although at various times Norsemen and the French had to be resisted as well.<sup>19</sup> The Romans never con-

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<sup>19</sup> Much of the information summarized below is standard fare in histories of Scotland, and can be found in many places. For a general introduction, one can turn to any edition of the *Encyclopedia Britannica*—not surprisingly, since this reference work was itself one of the by-products of the Scottish Enlightenment. Much fuller accounts of Scottish history are to be found in the *Edinburgh History of Scotland* (four volumes, 1966–1975); *New History of Scotland* (eight volumes, 1981–1984); or, more compactly, in MICHAEL LYNCH,

quered the mountainous region that they called Caledonia. More exactly, they never bothered to conquer it. After a few half-hearted incursions, in the time of Hadrian they built a wall to protect Roman Britain, and abandoned Caledonia to its seemingly ungovernable inhabitants. Those inhabitants were of two sorts—Britons, and a people the Romans called “Picts” from their habit of painting their bodies.<sup>20</sup> Roman Britain collapsed late in the 300s, and in the following centuries Caledonia was colonized by successive waves of migrants. In the absence of written records, the exact details of these migrations are unclear; in Wilson’s day the entire subject was shrouded in myth.<sup>21</sup> Archaeologists have reconstructed the story as follows.<sup>22</sup> It seems that, in the fifth century, Gaelic-speaking migrants, sailing across the narrow sea from Dalriada in Northern Ireland, landed on the sparsely inhabited west coast of Scotland, and settled in the highland regions to the north and west. These migrants brought with them a Celtic form of Christianity, and preserved close links with Northern Ireland throughout the middle ages. The Latin name for Ireland was *Scotia*; in time, the migrants—the Scots, i.e., the Irish—were to give their name to the land the Romans had called Caledonia. (In 2009 a large piece of graffiti was scrawled prominently on a wall in the center of Edinburgh: “Scotland = Ireland.” No doubt the slogan refers to the problems of Northern Ireland, and to the Scottish Nationalist movement for independence; but the historical roots of this equation are ancient.)

On the opposite coast, from the fifth through the seventh centuries, the Angles, a Germanic people who came across the North Sea, settled in the lowland regions of the east and south of Scotland. (They also, of course, settled in “Angle-land” to the South.) It appears that, in the following centuries, the Scots and the Angles gradually intermarried and merged with the aboriginal Britons and

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SCOTLAND: A NEW HISTORY (1992), or T.M. DEVINE, *THE SCOTTISH NATION: A HISTORY 1700–2000* (1999). WILLIAM FERGUSON, *SCOTLAND: 1689 TO THE PRESENT* (1968), though slightly dated, is helpful on political and intellectual history. *THE OXFORD COMPANION TO SCOTTISH HISTORY* (Michael Lynch ed., 2001) contains a very full bibliography.

<sup>20</sup> The archeological history is summarized by HUGH TREVOR-ROPER, *THE INVENTION OF SCOTLAND: MYTH AND HISTORY 4* (2008). The nouns “pict” and “picture” have a common root in the latin verb *pingere*, “to paint.”

<sup>21</sup> Famously, Edward Gibbon for a time accepted as authentic the recently discovered poems of Ossian, which described the battles of Fingal against the Romans. Gibbon later questioned the accuracy of these mythic tales, and rightly so, since the poems of Ossian turned out to be one of the great hoaxes of English literature, the fabrication of an ingenious Scotsman, James Macpherson. The entire episode is thoroughly explored by Hugh Trevor-Roper. *Id.* at 75–188.

<sup>22</sup> *Id.* at 3–21.

Picts. All four peoples seem to have been driven together by their shared fear of Viking invasion. By 843 the Scottish kings had absorbed the kingdom of the Picts, and they gradually expanded their power over the whole of mainland Scotland. This process was substantially complete by the time of the Norman conquest of England in 1066.

*1. Law in England, 1066–1300*

To understand the distinctive elements of Scots law, it will be helpful if we begin by briefly sketching some familiar facts of English legal history and then draw a contrast with the less familiar case of Scotland.

a. Manorial Law

English law went through rapid and profound changes between 1066 and the reign of Edward I; but as a crude first approximation, it is useful to think of England during this period as possessing three overlapping systems of law. The first—*manorial law*—was intimately bound up with the feudal system. In feudal theory, all land in the kingdom belonged ultimately to the King; he would parcel out large tracts to his nobles, in return for a pledge that they would supply him with troops. The high nobility, in a practice known as *subinfeudation*, would then in turn parcel out their land to lesser knights, also in exchange for a pledge of loyalty and military service.<sup>23</sup> These feudal relationships were reciprocal: the vassal pledged fealty and military service to his overlord; the overlord, in turn, promised not just land, but security and justice to his vassals. The economic and social and political relationships of English society were mediated through the feudal bond; the complex hierarchy of oaths of fealty, of reciprocal duties and obligations owed between lords and vassals, served to organize a carefully stratified society, from peasants at the bottom, to local knights, to the higher feudal nobility, to the King himself. The

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<sup>23</sup> The literature on English feudalism and on the development of the common law is of course vast. The classic account, still accepted in its broad outlines, is SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 1 *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* (2d ed. 1899). For an introduction into the current scholarly debates, recent studies include PAUL BRAND, *THE MAKING OF THE COMMON LAW* (1992); JOHN HUDSON, *LAND, LAW, AND LORDSHIP IN ANGLO-NORMAN ENGLAND* (1994); S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* (1976); and the important study by SUSAN REYNOLDS, *FIEFS AND VASSALS: THE MEDIEVAL EVIDENCE REINTERPRETED* (1994), which challenges the very idea of “feudalism” as a social system altogether.

clergy, also hierarchically arranged, was organized into a parallel structure, answering ultimately to the Pope.

Much of the administration of law revolved around the feudal relationship. Lords had jurisdiction over the legal disputes of their vassals, and most everyday legal matters were left to be adjudicated by whoever happened to be the local lord of the manor. The system operated without lawyers or statutes or explicit rules of procedure. The laws themselves were unwritten—matters of untutored common sense.

#### b. Canon Law

Existing alongside this system of English manorial law was a second system—the far more sophisticated law of the Church. In the aftermath of the revolutionary papacy of Gregory VII at the end of the eleventh century, Rome had moved vigorously to impose its legal authority over religious life throughout Christian Europe. All local churches, all bishops, all monasteries, all abbeys and nunneries, all religious orders, were, as a matter of canon law, ultimately answerable to the Pope. The Church set up a remarkably complex administrative system, embracing the whole of Europe. It followed that, if legal uniformity were to be achieved, both laws and the proceedings of the courts would need to be in writing. The task of administering the system fell to the canon lawyers, i.e., clerics who had spent several years at university mastering the details of canon law. They often took a degree in Roman law as well.<sup>24</sup> The ecclesiastical courts were responsible, not only for cases involving the internal organization of the

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<sup>24</sup> The standard account in English of these developments is HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). Berman is especially strong in explaining the administrative complexities. To administer such a system effectively required an immense effort, and the training of large numbers of lawyers. Parish priests administered ordinary, minor matters of canon law for their parishioners; more significant matters were referred to the ecclesiastical courts of the local bishop; the bishops in turn were answerable to their archbishops or to papal judges-delegate sent from Rome; and the decisions of archbishops could ultimately be appealed to the central papal court, the Rota, in Rome.

As for the substance of canon law, an introductory account is provided by JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* (1995); more advanced is R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* (1996). For the relationship between canon law and Roman law, a helpful introduction is provided by MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE 1000–1800* (Lydia G. Cochrane trans., 1995). Canon law was grounded in the Bible, in the writings of the Church Fathers, and in the Decretals, i.e., the legal rulings of the Popes. Broadly speaking, those clerics who were to have pastoral duties, i.e., who were to have charge of their parishioners' souls—studied only the canon law; those intending to go into Church administration typically studied Roman law as well.

Church, but also for applying religious law, both criminal and civil, to laymen; thus it was through the clergy that most of Europe received its first encounter with a sophisticated system of written law.<sup>25</sup>

### c. Common Law

Besides the local, unwritten, manorial law and the canon law of the Church, England also possessed a third system, the system of royal law—or, as it is also known, the common law. On the whole, the kings of England were willing to permit local resolution of most disputes, and in any case lacked the administrative machinery to do the job themselves. But major infractions of the King's peace, and the regulation of the system of feudal tenures itself, were a different matter. Those things involved the stability of the kingdom, and, when a major crime was committed, or when disputes arose between lord and tenant over the law of feudal obligations—and in particular over the disposition of land—the Crown was quick to intervene and to attempt to impose a “common law” that would be uniform throughout the entire realm. Under Henry II (1154–1189) a permanent royal court was established, and the practice was settled of sending itinerant judges—“*justices in eyre*”—into the countryside to administer the King's law (which, at that time, was still largely customary and unwritten). The decisions of the judges declared the custom, and, in so doing, set precedents that were to be followed by subsequent judges. By the reign of Edward I (1272–1307) the common law had reached a mature state. The central courts—King's Bench, Common Pleas, and Exchequer—were firmly established; the unofficial Year Books were being kept to record legal proceedings; and a coherent, professional

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<sup>25</sup> The ecclesiastical courts were responsible, roughly speaking, for two sorts of cases. The first involved the internal structure and supervision of the Church. This category included disputes over the powers of church officials, the proper administration of the sacraments; the discipline of members of the clergy. The ecclesiastical courts claimed the exclusive authority both to try and to punish members of the clergy accused even of secular crimes (a serious source of friction in the dispute between Archbishop Thomas Becket and Henry II).

The second category involved the application of canon law to laymen. The ecclesiastical courts had jurisdiction over the sacrament of marriage and thus over much of family law (adoption, legitimacy, bastardy, large portions of the law of inheritance); religious crimes (blasphemy, various sexual offenses, heresy, sorcery); and the large category of contracts made under oath. The canon lawyers were responsible for importing essentially religious ideals of good faith into the law of contract, and analyses of intention and moral guilt into the criminal law; they also developed a sophisticated body of procedural rules in order to administer the complicated judicial system of the Church. These developments are extensively described in all the standard works on canon law mentioned in the preceding footnote.

body of advocates had emerged, soon to be organized around the Inns of Court. Thus by 1300 the Plantagenet kings had consolidated their hold over a powerful, centralized kingdom, and had laid the foundations for the English common law.

## 2. Scots Law, 1066–1300

These three elements—the local administration of manorial justice, the canon law of the church, and a national, “common” law concerned mostly with landed property—are familiar from numerous studies of medieval English legal history. They all underwent massive change in the twelfth and thirteenth centuries; but they provided the basic organizational structure for law in England. These three elements also existed in Scotland, and in fact there appears to have been a good deal of direct legal borrowing from England.<sup>26</sup> In substance, the rules of Scottish common law in 1300 do not appear to have diverged greatly from the rules of English common law. “[W]e may doubt,” wrote F.W. Maitland, “whether a man who crossed the river [Tweed] felt that he had passed from the land of one law to the land of another.”<sup>27</sup>

But there were also already significant legal differences between the two kingdoms. The most important concerns the Scottish Highlands. The Scottish kings had been able to introduce feudal law on the Anglo-Norman pattern into the lowlands. But those lowlands, settled by the Angles, were English-speaking regions, highly similar to England itself. The Gaelic Highlands were a different matter altogether. They possessed a social system much older than feudalism.<sup>28</sup>

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<sup>26</sup> In the account of the history of Scots law below, I have found two works especially valuable. The first is John W. Cairns, *Historical Introduction*, in 1 A HISTORY OF PRIVATE LAW IN SCOTLAND 14–184 (Kenneth Reid & Reinhard Zimmermann eds., 2000). Cairns is especially perceptive on the intellectual history, and I have followed his account closely. I have also used the multi-volume treatise by David M. Walker, *A Legal History of Scotland*, especially volume 4 (1996) and volume 5 (1998), which cover the seventeenth and eighteenth centuries respectively. In general, Walker concentrates more heavily on the institutional history than does Cairns.

<sup>27</sup> POLLOCK & MAITLAND, *supra* note 23, at 222. It has been argued that Maitland somewhat understated the differences; for references, see Cairns, *supra* note 26, at 32.

As for the canon law in this period, a papal bull was issued in 1176 declaring that the Scottish church would answer directly to Rome, rather than to the Archbishop of York. This papal decree, issued at the urging of the Scottish king, effectively established the independence of the Scottish church from England, and meant that England and Scotland were also similar in both being directly subordinate, in matters of ecclesiastical law, to the jurisdiction of Rome. *Id.* at 29.

<sup>28</sup> The Highlanders appear to have practiced a Celtic form of secular marriage, and to have employed the device of fostering out children to be raised by other families in the clan, a

In place of the intricate network of feudal obligations binding lord to vassal, the Highlands were organized around extended clans, each headed by a hereditary tribal chieftain. The Church and the Scottish Crown labored to change these ancient traditions; but the Highland chieftains retained an independent authority that derived from their headship of the clan, and was not dependent upon any grant of powers by the King. As a result, the Crown was forced to tread warily, to grant certain legal exemptions and privileges to the clans. Indeed, various Celtic legal practices survived into the early modern period, and a certain unruly sense of legal independence persisted into the Scotland of Wilson's youth. In consequence, in the early Middle Ages the grip of the Scottish kings on their subjects was less secure than in England, the law was more archaic, and the administration of justice was not so able.

### 3. *The Breach with England, 1300–1603*

The legal development of Scotland and England might nevertheless have continued along similar trajectories, with Scotland continuing to borrow legal ideas from the Anglo-Norman state to the south. But political events drove Scotland onto an entirely different course. In the 1290s a dispute arose between rival claimants to the Scottish throne; Edward I of England was asked to mediate. But Edward, who had recently subjugated Wales, saw an opportunity; in 1296 he invaded. It should be noted that at the time of his invasion Scotland was an entirely distinct kingdom from England, and had been independent since long before the Norman Conquest. It had its own royal family, its own direct relation to the papacy, its own parliament. Much of the population spoke Gaelic rather than English. Edward's invasion initiated a complicated and devastating series of wars between England and Scotland. In the end, the Scots, led by Robert the Bruce, defeated the English forces at Bannockburn in 1314; and in 1328 Edward II explicitly conceded Scottish independence.

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strategy designed to reinforce the ties of blood. Details of the archaic legal arrangements in the Highlands are difficult to reconstruct; for a discussion of the Celtic influences, see G.W.S. BARROW, *THE KINGDOM OF THE SCOTS: GOVERNMENT, CHURCH AND SOCIETY FROM THE ELEVENTH TO THE FOURTEENTH CENTURY 7–82* (2d ed. 2003), as well as the numerous shorter works cited by Cairns, *supra* note 26, at 17–18. A valuable study of medieval Scots law and the social system is HECTOR L. MACQUEEN, *COMMON LAW AND FEUDAL SOCIETY IN MEDIEVAL SCOTLAND* (1993). For broader accounts of the political and social background, see G.W.S. BARROW, *KINGSHIP AND UNITY: SCOTLAND 1000–1306* (1981) and G.W.S. BARROW, *THE ANGLO-NORMAN ERA IN SCOTTISH HISTORY* (1980); these are standard references which contain extensive discussion of the legal system.

The intensity of Scottish national feeling can be seen in the “Declaration of Arbroath,” a letter written by the Barons of Scotland to Pope John XXII in 1320. The Scottish Barons are here speaking of their King, Robert the Bruce, the great hero of the age, and generally considered the greatest King in Scottish history. That makes the Declaration all the more remarkable:

Him, too, divine providence, his right of succession according to our laws and customs which we shall maintain to the death, and the due consent and assent of us all, have made our Prince and King. To him . . . we are bound both by law and by his merits that our freedom may be still maintained . . . Yet if he should give up what he has begun, and agree to make us or our kingdom subject to the King of England . . . we should exert ourselves at once to drive him out as our enemy and a subverter of his own rights and ours, and make some other man who was well able to defend us our King; for, as long as but a hundred of us remain alive, never will we on any conditions be brought under English rule. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom—for that alone, which no honest man gives up but with life itself.<sup>29</sup>

This document is instructive on several levels; and one observes (as James Wilson was certainly aware) that the tradition of declaring independence from England—the entire question of the relationship of England to the other parts of what might anachronistically be called the Empire—has deep historical roots within the British Isles themselves. Notice that the letter of the Scottish Barons declares the authority of Robert the Bruce to rest, not (or not primarily) upon inheritance, nor upon some conception of the divine right of kings, but ultimately upon the customs and laws of Scotland, and in particular upon the “consent and assent” of the Barons—so much so that if Robert were to attempt to subject Scotland to foreign rule, the Barons would have the right to depose him. It is significant that the letter is addressed to the Pope; it certainly reflects the view of the medieval canon lawyers that unjust kings may lawfully be deposed for sufficiently grave violations of the law; indeed, like Magna Carta a century earlier, it is thought that the Declaration of Arbroath may well have been drafted by canon lawyers.<sup>30</sup>

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<sup>29</sup> THE DECLARATION OF ARBROATH 9 (Sir James Fergusson trans., Univ. Press 1970).

<sup>30</sup> The general historical background to the Declaration is given in Fergusson’s translation of the Declaration, *id.* The classic study of the relationship of Magna Carta to canon law is R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999).

## a. The “Auld Alliance” and Canon Law

This period of intense warfare at the beginning of the fourteenth century pushed Scotland into a policy of alliance with France, the only effective military counterweight to England. Over the next four centuries, the primary task of the Scottish rulers would be to preserve their hard-won independence; and the primary instrument would be what came to be called the “auld alliance” with France. This turn towards the Continent was of great significance for Scottish history, and left its mark on the law. The wars with England had severely disrupted the Scottish legal system, and when the royal courts sought to rebuild, they turned for assistance to the canon lawyers of the Church. Scotland in the fourteenth century had no universities; so legal education was supplied by the great centers of learning on the Continent, primarily in France.<sup>31</sup> This is an extremely important fact for understanding the intellectual world of James Wilson’s youth. Scotland for nearly four centuries looked intellectually to the Continent, and especially so in the field of law. At this time, law in France and Italy was based on the *ius commune*—that is, on a mixture of Roman law and canon law. These subjects were taught in the continental universities in the fourteenth century; and although law students were at this time almost always members of the clergy, their technical legal knowledge could be put to the service of the temporal rulers as well. It was thus largely through the influence of ecclesiastics that Scotland was first exposed to the ideas of Roman law. (I mentioned that in Wilson’s day training in theology and training in law were not entirely separate intellectual pursuits; that linkage goes back to the fourteenth century.)

The process of absorbing the *ius commune* accelerated under the Stuarts, who came to the throne around 1400. As they consolidated

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<sup>31</sup> The statistics are revealing. Between 1340 and 1410, some 400 Scots are known to have been graduated from the continental universities; only eleven from Oxford and Cambridge. Of the 400, the vast majority studied in France. In 230 cases the student’s field of study can be identified; fully 200 studied law, either as a first or a second degree. D.E.R. Watt, *Scotsmen at Universities Between 1340 and 1410: A Study of the Contribution of Graduates to the Public Life of Their Country* (1957) (Ph.D. thesis, Oxford University), summarized in PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 306–07 (1988).

Other studies documenting the continental influences on Scots law include: Annie I. Cameron, *Scottish Students at Paris University, 1466–1492*, 48 JURID. REV. 228 (1936); R.J. Mitchell, *Scottish Law Students in Italy in the Later Middle Ages*, 49 JURID. REV. 19 (1937); and F.P. Walton, *Relationship of the Law of France to the Law of Scotland*, 14 JURID. REV. 17 (1902). There is also a great deal of information in the various contributions to *SCOTLAND AND THE LOW COUNTRIES, 1124–1994* (Grant G. Simpson ed., 1996).

their power over the kingdom, they increasingly took control over the administration of justice, both civil and criminal. The primary intellectual influences in the fifteenth century continued to come from France. It remained common for Scots to study abroad; and by the end of the century secular students, as well as clerics, went to the Continent seeking an education in the *ius commune*.<sup>32</sup>

Unlike the kings of England, the Stuarts never established a sophisticated institutional structure for administering the Scottish kingdom. In part this was the result of accidental circumstances: the Stuarts had a remarkable tendency to die both young and violently. But it was also the result of local social conditions. Scotland was still divided between the lowlands and the Highlands; and the Stuart kings never fully brought the Highland chieftains under their sway.

A further impetus to the reception of the *ius commune* occurred in the sixteenth century. The existing system of courts had come to seem antiquated. In 1541 the Scottish Parliament ratified the creation of a new, central court, the College of Justice. This court was explicitly promoted by the Papacy; the judges, many of them ecclesiastics, had been trained in the *ius commune*. In its administration of justice it followed the "Romano-canonical" rules of procedure that had been developed by the ecclesiastical courts. In the substantive law, it applied Scottish statutes and other local written law; but these sources of law were heavily supplemented by the *ius commune*.

The result of these accumulated developments was to turn Scotland into a fully fledged civil-law jurisdiction. By the mid-1500s, Scotland could boast of a flourishing legal profession. Its judges and lawyers were trained in the universities of the Continent. They were expert both in Roman and canon law, and skilled in the procedural techniques developed by the ecclesiastical courts.<sup>33</sup> The influence of

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<sup>32</sup> Numerous studies of the presence of Scottish students in Louvain in the fifteenth century are cited by Cairns, *supra* note 26, at 69.

It should be noted that three universities were founded in Scotland in the fifteenth century—St. Andrews (1412), Glasgow (1451), and Aberdeen (1495). All three were founded by canon lawyers, and all three provided legal training in the *ius commune*. The practice of studying law on the Continent continued for the next two centuries, but could now be supplemented by study in Scotland itself.

I note in passing that the Stuarts remained in power for so long primarily because they were adept at cultivating the continental alliance; and they themselves frequently intermarried with the French aristocracy. The orthography of their name is itself a French spelling of "Stewart" or "Steward": the family originally served as stewards in the Scottish royal household.

<sup>33</sup> Cairns, *supra* note 26, at 68–74, gives a helpful account of these developments in the sixteenth century. It is interesting to note that Germany followed a somewhat similar pattern of development: first came what is called the "pre-reception"—the introduction of

English common law was scant; indeed, at this time, Scots law was both closer to the European mainstream and technically more sophisticated than was law in England.

#### b. The Reformation

The intellectual influences from the Continent were felt not just in the law, but also in religion: and indeed the two were deeply connected. Not only had the *ius commune* originally been introduced into Scotland by the clergy, not only had many of its fundamental legal concepts been developed at the hands of moral theologians, but the Protestant Reformation was itself intrinsically both a religious and a legal event. In essence the issue was this. Throughout the middle ages, much of the law—family law, inheritance law, parts of contract law, parts of criminal law—had been the province of the canon lawyers, and had been administered by the Roman Church. If the legal authority of the Church was now denied, who should take over the administration of these parts of law? The Protestant Churches? The temporal rulers? And, in either case, how were religion and law related, what was to be the role of law in upholding true religion, and on what ultimate basis did the authority of the legal order rest?<sup>34</sup>

The start of the Protestant Reformation is traditionally dated to 1517, when Luther nailed his theses to the door, denying the authority, spiritual and legal, of the Roman Church. England, under Henry VIII, broke with Rome in 1534. Scotland, too, was in those years convulsed by religious controversy, and absorbed from the Continent the ideas of Protestant religious reformers. Here the central figure was John Knox. Knox in 1554 fled to Geneva to escape persecution; while in Geneva he came under the influence of John Calvin. He then returned to Scotland and preached the Calvinist message with great success. He called for the establishment of a Presbyterian theocracy, and also for the suppression of “idolaters” (i.e., Catholics):

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Roman law concepts by the clergy; then, in the years around 1500, the establishment of a new Imperial Court, employing the sophisticated practices of Romano-canonical procedure, and applying the *ius commune* as a background source of law; the result was a wholesale reception of Roman law, which almost entirely displaced the native Germanic customs within a few decades. The story has been often told; the standard account is in FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY* (Tony Weir trans., 1995).

<sup>34</sup> The most thorough recent scholarly treatment of these questions in the context of the German and English Protestant Reformation is HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003).

his was not a tolerant outlook.<sup>35</sup> In 1560, the Scottish Parliament formally abolished the jurisdiction of the Pope, adopted Knox's new confession of faith, and gave him and his followers the task of organizing the reformed Scottish Kirk. But that hardly ended the matter. Scotland was torn between Catholics and Protestants; some of the nobility remained loyal to the old religion, while others became ardent Protestants.

c. "One King, Two Kingdoms"

During this time of political and religious turmoil, there occurred a dynastic event of great constitutional significance. In 1567, Mary, Queen of Scots was driven from Scotland. Mary was a Catholic, but that was not the reason for her expulsion. The Scots would have tolerated a Catholic Queen, so long as she did not interfere with the Presbyterian Kirk. But she was suspected of complicity in the assassination of her first husband, and forced to abdicate in favor of her eleven-year-old son.<sup>36</sup> She fled to England, where she sought shelter at the court of her cousin, Elizabeth I. Elizabeth happily welcomed her to England, and promptly imprisoned her in the Tower. Twenty years later, when the Spanish Armada was making ready to sail, Elizabeth had Mary beheaded, allegedly for treason. For Mary was highly dangerous to Elizabeth. She was descended from a younger daughter of Henry VII of England, who had married King James V of Scotland. That made her both a Tudor and a Stuart, and a potential Catholic claimant to the throne of England.

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<sup>35</sup> If the idolaters were sufficiently recalcitrant, they should, he thought, in accordance with Mosaic law, ideally be put to death. Knox was also the author of *THE FIRST BLAST OF THE TRUMPET AGAINST THE MONSTROUS REGIMENT OF WOMEN* (1558), reprinted in 1 *THE ENGLISH SCHOLAR'S LIBRARY OF OLD AND MODERN WORKS* (Edward Arber ed., William Caxton trans., AMS Press 1967) (1878), denouncing the rule of women over men as ungodly. He had in mind Catholic queens like Mary Tudor and Mary, Queen of Scots; he seems never to have understood why the Protestant Queen Elizabeth was cool towards this pamphlet. See C.S. LEWIS, *ENGLISH LITERATURE IN THE SIXTEENTH CENTURY: EXCLUDING DRAMA* 200 (1954).

Incidentally, during this period wars with England continued. The worst occurred in 1513, when Henry VIII sent an army to fight the Scots at Flodden. The Scottish King was killed, along with much of the leadership of Scotland: three bishops, eleven earls, fifteen lords, and some ten thousand soldiers. Henry's victory pacified the border for twenty years, but at the cost of strengthening the animosity between the two nations. See *THE OXFORD ILLUSTRATED HISTORY OF BRITAIN* 254 (Kenneth O. Morgan ed., 2d ed. 2009).

<sup>36</sup> Mary was herself half-French, the daughter of Marie de Guise. Historians are uncertain whether she was herself involved in the assassination of her husband, Darnley, who had himself earlier murdered one of her favorites. Whatever the truth of the allegations against her, she too hastily married her husband's assassin, and this conduct, even by the lax standards of the age, was regarded as unseemly.

Meanwhile, in Scotland, Mary's son had been raised a Protestant. On attaining his majority, he was crowned King James VI of Scotland. Despite Elizabeth's treatment of his mother, he pursued a policy of friendly relations with England. When Elizabeth died without issue in 1603, James inherited the English throne as well, and became King James I of England. It is striking to notice that he had already been King of Scotland for nearly three decades.

So Scotland and England now shared the same monarch. But formally they remained distinct kingdoms. James would have preferred that his realms be consolidated and that he be called "King of Great Britain." A proposal for union was studied by the Parliaments of both Scotland and England.<sup>37</sup> But in the end a formal merging of the kingdoms was impossible. In part this was because there was too much national feeling on both sides of the border: three centuries of bloody conflict had not been forgotten. But a more important obstacle came from the lawyers. The Scottish Parliament made clear its determination to safeguard "the fundamentall lawes, Ancient privilegis, offices and liberteis of this kingdome."<sup>38</sup> The Scots lawyers argued that, if the two legal systems were to be united, then the common law should be abandoned. Union should be on the basis of the *ius commune*, which was, after all, the law of civilized mankind. But this proposal met with opposition from the English lawyers. So, as a formal matter, in the seventeenth century, Scotland continued to be ruled by King James VI of Scotland and the Scottish Parliament; England was ruled by King James I of England and the English Parliament. The fact that James VI and James I shared the same human body was considered a technicality.<sup>39</sup> This uneasy formula of "one King, two Kingdoms" continued throughout the century.<sup>40</sup> There were some constitutional anomalies during the Civil War and the Interregnum, but after the Restoration the old formula was reinstated. Scotland throughout retained its own Parliament, and its formal legal independence.<sup>41</sup>

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<sup>37</sup> Plentiful references are given by Cairns, *supra* note 26, at 78.

<sup>38</sup> *Id.*

<sup>39</sup> On this general point, see the classic study, ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1957).

<sup>40</sup> See Jenny Wormald, *One King, Two Kingdoms*, in *UNITING THE KINGDOM? THE MAKING OF BRITISH HISTORY 123* (Alexander Grant & Keith J. Stringer eds., 1995).

<sup>41</sup> I note in passing that during the early 1770s, as the tensions between Britain and the American colonies worsened, Wilson sought to revive such a formula as a possible solution to the crisis. But a discussion of his argument lies beyond the scope of this paper. The literature on the proposed union is extensive. See J.H. BURNS, *THE TRUE LAW OF KINGSHIP: CONCEPTS OF MONARCHY IN EARLY-MODERN SCOTLAND* (1996); BRUCE

#### d. The Glorious Revolution

The Glorious Revolution of 1688 changed the constitutional equation in a fundamental way. James II of England (James VII of Scotland), a Catholic, had ascended to the two thrones in 1685. He had earlier, in Scotland, supervised the repression of rebellious Protestant Dissenters, making extensive use of judicial torture. As King, he proved to be politically inept. Almost as soon as he came to the throne, he made extraordinary claims of royal authority, and asked Parliament to remove the disabilities on Catholics. His subjects had reason to view this behavior with alarm. After all, in 1685 the Catholic Louis XIV had revoked the Edict of Nantes, and commenced to expel the Huguenots from France. The situation rapidly deteriorated, and in 1688 James faced a Protestant uprising. He was driven from power, and the English crown was awarded by the English Parliament to William of Orange, and his wife, Mary. (Mary was the daughter of James II; this was the basis of William's claim to the throne.)

The events of the Glorious Revolution had taken place largely in the south of England. The Scottish Convention of Estates subsequently ratified the outcome and proclaimed William and Mary the rulers of Scotland. But there was a fundamental difference between the constitutional settlement in Scotland and England. It was well enough for the English to depose their own monarch. That was their affair. But James II of England was also James VII of Scotland; and the Stuart dynasty had ruled Scotland for three centuries. William, moreover, was a Dutchman, and had no interest in Scottish affairs. Certainly he was no master of the complex clan politics of the Highlands. Many Scots therefore remained loyal to James and the Stuart line. (They were known as "Jacobites," *Jacobus* being the Latin version of "James.") Jacobite sentiment was particularly strong in the Highlands, where a number of chieftains still upheld the Catholic religion.

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GALLOWAY, *THE UNION OF ENGLAND AND SCOTLAND 1603-1608* (1986); BRIAN P. LEVACK, *THE FORMATION OF THE BRITISH STATE: ENGLAND, SCOTLAND, AND THE UNION 1603-1707* (1987); Edward J. Cowan, *The Union of the Crowns and the Crisis of the Constitution in 17th Century Scotland*, in *THE SATELLITE STATE IN THE 17TH AND 18TH CENTURIES* 121 (Ståle Dyrvik et al. eds., 1979); Brian P. Levack, *English Law, Scots Law and the Union, 1603-1707*, in *LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY* 105 (Alan Harding ed., 1980); Brian P. Levack, *The Proposed Union of English Law and Scots Law in the Seventeenth Century*, 20 *JURID. REV.* 97 (1975); John Morrill, *Three Kingdoms and One Commonwealth? The Enigma of Mid-Seventeenth-Century Britain and Ireland*, in *UNITING THE KINGDOM? THE MAKING OF BRITISH HISTORY*, *supra* note 40, at 170; Conrad Russell, *Composite Monarchies in Early Modern Europe: The British and Irish Example*, in *UNITING THE KINGDOM? THE MAKING OF BRITISH HISTORY*, *supra* note 40, at 133.

But James also had powerful support among the Presbyterians, who preferred even a Catholic Stuart to what they perceived as illegitimate foreign rule. In 1692, at Glencoe, the chief of the Macdonald clan and many of his followers were massacred by members of the rival Campbell clan, who accused the Macdonalds of having refused to swear an oath of allegiance to William. That Scots could be brought to murder Scots over a question of allegiance to a Dutch king was considered a scandal, and only reinforced the popularity of the Stuarts among the Highlanders. The question of the Scottish crown was therefore not settled by the Revolution of 1688, nor by William's victory over James at the Battle of the Boyne in Ireland in 1690. After that battle, James and many of the Scottish nobility fled to France, where their cause received the financial and military support of Louis XIV.

#### e. The Treaty of Union

As the century drew to a close, the situation was combustible: massacres in the Highlands; assassination plots against William in London; uncertainty about the succession to the Scottish throne; uncertainty about the constitutional relationship of Scotland to England; and a Stuart army organizing itself in France.

Scotland in 1700 had come to a fork in the road. The central issue was at bottom a question of constitutional law. The formula that had arisen almost by accident in 1603 when James inherited the English crown—"one King, two Kingdoms"—was no longer satisfactory. There were ultimately only two possibilities: "one King, one Kingdom," or else "two Kings, two Kingdoms." But in either case the number of Kings needed to be made equal to the number of Kingdoms. In other words, the choice was between a complete political union with England, or a complete declaration of Scottish independence.

There were strong arguments on both sides of the issue. On the one hand, the entire course of Scottish history could be viewed as a long, continuous struggle to maintain national independence. The mythology took the struggle back nearly eighteen centuries to mythical chieftains fighting the Romans; but the memories of the past 400 years—of Wallace and of Robert the Bruce, of Bannockburn and Flodden—were historical enough. And then, Scotland had its own traditions, very different from the English. It had the Gaelic-speaking clans of the Highlands. It had its own, long-standing links to the continent. It had the Presbyterian Kirk. Scots law was part of the Roman law tradition, and, in 1700, arguably more sophisticated than the

English common law. Were all these things simply to be given up? England was the stronger, wealthier, more populous power, and under any scheme of Union (it seemed) would simply absorb Scotland, just as she had absorbed Wales in 1536. Wales now had no independent legal system, no independent Church; all it had to set it apart was the Welsh language. Scotland in the same way would henceforth simply be the northern part of England. The “great cause” would be at an end.<sup>42</sup> Would it not be far better for the Scottish Parliament to re-assert the national independence? Let it choose a different monarch, and even reinvigorate the “auld alliance” with France, where the Jacobite forces now sat in exile. These were resonant arguments in the Scotland of 1700, and at first they seemed likely to prevail. The Scottish Parliament pointedly declined to follow the English Parliament, which had stipulated that, following the death of Queen Anne, the English throne would pass to the House of Hanover. For Scotland, the question of the succession remained open, as did the possibility of a Stuart restoration.

But there were also arguments on the other side. France was the great Catholic power of Europe; and Scotland, like England, was solidly Protestant. The Stuarts had shown themselves to be inveterate Catholics, and there was no sign that the younger claimants to the throne might depart from the family tradition. And then, what would happen if Scotland asserted her independence? The population was rapidly expanding, but only about 25% of the land was arable. The country was rocky and mountainous. The rivers, abounding in waterfalls, were unsuited to inland navigation. Scotland would be a small and impoverished northern land, surrounded by great powers, and with no influence in the wider world. But Union would bring new prospects. The border would open. Industrious Scots would be free to emigrate, either to England or to the English colonies. There, with intelligence and hard work, they would earn their fortunes.

England, too, pushed hard for Union. True, there was a fear that Scottish immigrants would flood the South and take jobs away from Englishmen. But France was the great enemy, and the prospect of an independent Scottish kingdom on England’s northern border, possibly allied to France, was a grave threat. So, in the early 1700s, some hard bargaining went forward. The result was the Treaty of Union of 1707. The essential terms were as follows. Formally both kingdoms

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<sup>42</sup> For a recent discussion of the complex arguments advanced in Scotland concerning the relationship between Scotland and England, see COLIN KIDD, *UNION AND UNIONISMS: POLITICAL THOUGHT IN SCOTLAND, 1500–2000* (2008).

would dissolve themselves, and merge into a new entity. The Scottish Parliament would disappear entirely. In exchange, Scotland would receive a certain number of seats in the Westminster Parliament. Scotland would accept the Hanoverian succession. The entire island would henceforth be a free trade area, with complete freedom of movement across the old border, and with Scots entitled to the same rights as Englishmen. The debts of the two kingdoms would be appropriately apportioned. The independence of the Scottish Kirk was guaranteed, and Scots law was to continue in force north of the border.<sup>43</sup> The Treaty of Union marked the creation of a new political entity, the United Kingdom of Great Britain. It flew a new flag, the “Union Jack,” superimposing the Scottish cross of St. Andrew upon the English cross of St. George.

#### 4. *The Scottish Enlightenment*

##### a. General Social Background

We now come to the eighteenth century, and to the Scotland of James Wilson. These dramatic political events set the stage for the Scottish Enlightenment. As a practical matter, the Treaty of Union ended the debate over Scottish independence. Although Jacobite sympathies persisted, especially in the Highlands, the political situation was now stable. With political stability came a diminution in religious tension. The last execution for blasphemy took place in 1697, when a young student at Edinburgh, Thomas Aikenhead, was hanged for having made disparaging remarks about Christian theology.<sup>44</sup> Intellectual energies that had long been focused on theological disputation could now be turned in new directions. Scots (many of whom now called themselves “North Britons”) found that a new world of commerce and overseas trade had been opened up to their energies. The eighteenth century was to see a remarkable flowering of intellectual life, quite unlike anything that had gone before. This age is now referred to as the “Scottish Renaissance” or the “Scottish Enlightenment”; certainly it was a golden age for Scotland. In previous centuries there had been educated Scots; but the country was poor, and

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<sup>43</sup> For the technical details of the treaty, see 5 DAVID M. WALKER, *A LEGAL HISTORY OF SCOTLAND* 84–97 (1998).

<sup>44</sup> Roger Emerson, *The Contexts of the Scottish Enlightenment*, in *THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT* 9, 14, 34 (Alexander Broadie ed., 2003). Further references are on page 55 n.8. A few scattered executions of witches occurred in the early eighteenth century, though not on the massive scale of the seventeenth. CHRISTINA LARNER, *ENEMIES OF GOD: THE WITCH-HUNT IN SCOTLAND* (1981).

barren, and in many ways backward. But in the eighteenth century all that changed. For a few decades, Scotland became the intellectual leader of Europe. In economic thought, it was supreme. In philosophy, it had no serious rivals until the time of Kant. In the study of history, and in the emergent social sciences, it could easily hold its own with France and surpassed England. Adam Smith in economics; Francis Hutcheson in ethics; David Hume, Thomas Reid, Dugald Stewart in metaphysics; Hugh Blair in literature and rhetoric; Colin MacLaurin in mathematics; Joseph Black in chemistry; Lord Monboddo in historical linguistics; Adam Ferguson in sociology; Lord Kames in law; David Hume, William Robertson, and John Millar in history; James Watt in engineering; James Hutton in geology—these were the great minds of the age. It is striking that these thinkers tended to work in several disciplines at once, and that many of these intellectual disciplines were either entirely new, or changed by the Scots in ways that were to have a profound impact on Western thinking about law, economics, history, and society.

How did it happen? Why did it happen in Scotland? What holds together the various themes? It is no doubt futile to try to identify a single cause for so complex and varied and prolonged a phenomenon as the Scottish Enlightenment. A great deal was due to the genius of individuals; and scholars do not agree on when the movement began, when it ended, whether it was primarily literary or political or scientific—or even whether it is appropriate to call it a “movement” at all. But we can at least point to some of the background circumstances.

In the first place, Scotland possessed a remarkably literate population. In large part this was a legacy of Presbyterianism. For the radical Protestants, it was important that every Christian be able to read the Bible directly, to encounter God’s Word without the mediation of priests or bishops. At the time of the establishment of the Scottish Kirk, Knox called on parliament to embrace a program of universal education, to place “a school in every parish.” And as a result, by the eighteenth century, Scotland, and especially lowland Scotland, possessed one of the most literate populations in Europe, with a literacy rate approaching 75%.<sup>45</sup>

Not only could most of the population read and write, but Scotland also possessed an advantage in higher education. Scotland had

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<sup>45</sup> Lawrence Stone, *Literacy and Education in England 1640–1900*, 42 PAST & PRESENT 69, 127 (1969). Statistics on the social background of Scotland in the eighteenth century are compiled in 5 WALKER, *supra* note 43, at 57–83. See also ANAND C. CHITNIS, *THE SCOTTISH ENLIGHTENMENT & EARLY VICTORIAN ENGLISH SOCIETY* (1986).

four universities—Edinburgh, Glasgow, St. Andrews, and Aberdeen. England, in contrast, despite its much larger population, had only Oxford and Cambridge. More importantly, in the early decades of the eighteenth century the English universities were intellectually torpid. Edward Gibbon and Jeremy Bentham, Adam Smith and Joseph Butler all in later years recalled that their Oxford education had been essentially worthless. The English universities at this time rarely produced scholarship, and had become little more than finishing schools for the aristocracy.<sup>46</sup> The situation was to improve later in the century; but it is important to observe that when James Wilson attended St. Andrews he received a far better education than anything that would have been available to him in England or in North America.

In addition, Scotland still preserved its links to the centers of learning on the Continent. At the end of the seventeenth century, during the reign of James II, the Scottish opposition was driven into exile in Holland or France; after the Glorious Revolution, it was the turn of James and his followers to take their place. Well into the eighteenth century it was common for Scots who could afford to do so to send their sons to be educated abroad. At this time, much of the instruction in the continental universities was conducted in Latin, a field in which Scots had long excelled.<sup>47</sup> As a consequence, many Scots regarded themselves as part of an international “republic of letters,” and were as well informed about intellectual developments in Amsterdam or Paris as they were about what was being thought in England.

The Treaty of Union brought about another change. In the years after 1707, many members of the landed aristocracy, in order to be close to the social and political center of the new nation, took up residence close to London. This exodus left Scottish society, especially in the cities, to be dominated by members of the educated professions—doctors, lawyers, and clergymen. Practically speaking, Scotland was already a bourgeois society, decades before the French Revolution. Much of the social life of a city like Edinburgh was conducted in the numerous learned societies and social clubs that grew up to discuss projects of social improvement. The Philosophical Society and the Select Society in Edinburgh; the Wise Club in Aberdeen; the

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<sup>46</sup> M.A. Stewart, *The Curriculum in Britain, Ireland, and the Colonies*, in 1 THE CAMBRIDGE HISTORY OF EIGHTEENTH-CENTURY PHILOSOPHY 97, 97–99 (Knud Haakonssen ed., 2006).

<sup>47</sup> Trevor-Roper devotes an entire chapter to the influence of George Buchanan, “by universal consent, the greatest Latin writer, whether in prose or verse, in sixteenth century Europe.” TREVOR-ROPER, *supra* note 20, at 33.

Literary Society in Glasgow—these were among the most prominent gathering places for the “literati,” but they were surrounded by a host of lesser dining clubs where men could gather to drink and dine and debate the questions of the day.<sup>48</sup> Such clubs would bring together, say, a university professor like Adam Smith with prominent merchants engaged in international trade, or an historian and religious sceptic like David Hume with members of the Presbyterian clergy. At the end of his *Treatise of Human Nature*, Hume explained his remedy for the melancholy caused by his philosophical scepticism.

I dine, I play a game of back-gammon, I converse, and am merry with my friends; and when after three or four hours' amusement, I wou'd return to these speculations, they appear so cold, and strain'd, and ridiculous, that I cannot find in my heart to enter into them any farther.<sup>49</sup>

Much of the conviviality of the Scottish Enlightenment is reflected in this sentence.

What did they talk about? One set of issues was severely practical. Scots were well aware that their mountainous and rocky countryside was not well suited to the needs of modern agriculture and manufacturing and trade. These points had all loomed large in the debates over Union with England. What was to be done? One possible response was emigration. After the Union, Scots chose in large numbers to try their fortunes elsewhere, migrating either to England itself, or to British North America. Indeed, in proportion to its population, Scotland at this time probably had the highest rate of emigration in Europe.<sup>50</sup> A second response was education. Scots grasped the importance of human capital, of acquiring skills or useful knowledge that could be carried to foreign lands. It is striking that

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<sup>48</sup> I say “men” intentionally. Scotland was still a Calvinist society. Women did not attend university, and were excluded from these intellectual gatherings, which frequently took place in local taverns. The point is noted by Roger Emerson, *supra* note 44, at 24. For a general history, see ROSALIND K. MARSHALL, *WOMEN IN SCOTLAND, 1660–1780* (1979). I note in passing that many of the most prominent figures in the Scottish Enlightenment—notably Hume and Adam Smith—were lifelong bachelors.

For concise discussions of the literary and other societies, see A HOTBED OF GENIUS: THE SCOTTISH ENLIGHTENMENT 1730–1790, *supra* note 10, at 35–38; Emerson, *supra* note 44, at 9. A more lengthy account is provided by DAVIS D. MCELROY, *SCOTLAND'S AGE OF IMPROVEMENT: A SURVEY OF EIGHTEENTH-CENTURY LITERARY CLUBS AND SOCIETIES* (1969). See also the essays collected in *SOCIABILITY AND SOCIETY IN THE EIGHTEENTH-CENTURY SCOTLAND* (John Dwyer & Richard B. Sher eds., 1991).

<sup>49</sup> DAVID HUME, *A TREATISE OF HUMAN NATURE* 269 (L.A. Selby-Bigge ed., New York, MacMillan 1896).

<sup>50</sup> The gathering of emigration statistics from the seventeenth and eighteenth centuries is a complex scholarly enterprise, and has spawned a small literature. For recent general discussion, with references to the literature, see CHRISTOPHER HARVIE, *SCOTLAND AND NATIONALISM: SCOTTISH SOCIETY AND POLITICS, 1707 TO THE PRESENT* (4th ed. 2004).

between 1750 and 1850, the universities of Oxford and Cambridge, together, trained about 500 medical doctors. Scotland in the same period trained 10,000.<sup>51</sup> It has been estimated that, during the eighteenth century, somewhere between 3,500 and 6,000 trained physicians left Scotland for other lands.<sup>52</sup>

Yet a third response was to think intensively about what could be done within Scotland itself—to study the principles of trade and commerce; to promote scientific farming, and the building of roads and canals; to apply the findings of science to industry, and to attempt to discern the underlying scientific and economic principles that would permit Scotland, in spite of its natural disadvantages, to flourish. As a result, we find in the thinkers of the Scottish Renaissance—even the most abstract and theoretical—a keen appreciation of practical knowledge. Societies with names such as the *Honorable Society of Improvers in the Knowledge of Agriculture in Scotland* sprang up on every side. Henry Home (later Lord Kames), the great lawyer and antiquary, theorist of religion and student of agriculture, was a prime mover in the *Edinburgh Philosophical Society for Improving Arts and Sciences and Particularly Natural Knowledge*. “Facts and experiments are useless lumber,” he declared in one of his essays, “if we are not to reason about them, nor draw any consequences from them.”<sup>53</sup>

But the questions that concerned the thinkers of the Scottish Enlightenment were not merely a matter of devising schemes for national betterment. The truly remarkable thing is that the circumstances of Scottish history had brought to the surface a vast range of practical problems that called out for philosophical analysis. It is essential to grasp this fact if we are to understand why the Scottish Enlightenment had such an impact on the American Founders. Many of its central themes began life as questions about the distinctive institutions of Scottish society—the Highland clans, the Kirk, Scots law, the relationship with England—but then turn into something considerably more general and abstract; and it is precisely for this reason that the thinkers of the period are so difficult to classify into neat intellectual compartments. The underlying themes are deeply interlinked; and the characteristic intellects of the age—thinkers like Hume, or Smith, or Kames—have a tendency to range over the entire landscape, to concern themselves with religion, and law, and meta-

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51 COLLEY, *supra* note 4, at 123.

52 Emerson, *supra* note 44, at 11.

53 Henry Home, *Of the Laws of Motion*, in 1 ESSAYS AND OBSERVATIONS: PHYSICAL AND LITERARY 2–3 (Edinburgh 1754).

physics, and history, rather than to confine themselves to any one particular spot.

What were the various issues and how were they linked? One obvious question concerned the relationship with England. Granted, the two kingdoms were now one. But what did that mean? Where did it leave the Scots? Were they now to think of themselves as Englishmen, or as Scotsmen, or perhaps as “North Britons”?<sup>54</sup> More generally, how were they to make sense of the entire course of Scottish history, and of the long struggle for independence? How had the distinctively Scottish social institutions grown up, and what set them apart from England? Questions like these prompted a historical turn in Scottish thought. “[T]his is the historical Age,” wrote David Hume, “and this the historical Nation.”<sup>55</sup> (Indeed, in his own time Hume was better known as an historian and essayist than as a philosopher. What made his name was the *History of England*, in which he attempted to provide a historical account of the growth of British political liberties.)<sup>56</sup> Hume approached history in a philosophical spirit—not as a chronicle of kings and queens, nor as a narrative of great events, but in an attempt to fathom the deeper causes of the rise and progress of nations; and the works of his successors, such as Adam Ferguson’s *Essay on the History of Civil Society* (1767) or John Millar’s *The Origin of the Distinction of Ranks* (1771), carried this tendency even farther than Hume had done.<sup>57</sup>

#### b. The Highlands and the Jacobites

There was a further issue. Scotland after the Union no longer needed to fear England militarily; but social and cultural condescension was another matter. Englishmen could point to their literary

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<sup>54</sup> A HOTBED OF GENIUS: THE SCOTTISH ENLIGHTENMENT 1730–1790, *supra* note 10, at 8, observes that this term was in common usage in the decades after the Act of Union.

<sup>55</sup> Letter from David Hume to William Strahan (Aug. 1770), in 2 DAVID HUME, THE LETTERS OF DAVID HUME 230 (J.Y.T. Greig ed., Clarendon Press 1932).

<sup>56</sup> DUNCAN FORBES, HUME’S PHILOSOPHICAL POLITICS (1975) gives a detailed analysis of the relationships between Hume’s *History*, his Tory politics, and his philosophical views. Significantly, Hume wavered between calling his work a history of England, and a history of Great Britain: he tended to treat the two concepts as equivalent. As for Hume’s reputation among his contemporaries, he famously wrote in his short autobiography that he was driven to write by a desire for literary fame, and that the *Treatise of Human Nature*, now considered his philosophical masterpiece, had fallen “dead-born from the press”; he therefore turned to the writing of history instead.

<sup>57</sup> For a general discussion of the changes that the Scottish Enlightenment introduced in the writing of history, see Murray G.H. Pittock, *Historiography*, in THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT, *supra* note 44, at 258, 258–79.

tradition—to Chaucer and Spenser, Milton and Dryden, and, above all, to Shakespeare. In philosophy, the English had Bacon and Locke. In science, they had Newton. In architecture, they had Wren. In music, they had Handel. Scotland had—what? Dr. Johnson’s famous *Dictionary* was published in 1755. “Oats,” read one entry. “A grain, which in England is generally given to horses, but in Scotland supports the people.”<sup>58</sup> How were Scots to answer such ridicule? How were they to explain the cultural backwardness of their nation, and—more importantly—what was to be done to correct it?

These questions had their focal point in the problem of the Highlands. Outside the cities, in the small farms of the lowlands, the condition of the people was rustic; but in the Scottish mountains, on the outer islands, one seemed to encounter a different form of life altogether—more ancient, more primitive, than what was to be found in the civilized portions of Europe. Despite centuries of effort, the Stuart kings had never fully established control over the tribal chieftains. They remained a law to themselves. Blood feuds were common among the clans, and it was not unknown for captives to be sold into slavery. From the point of view of the elegant, classically-educated *literati* of Edinburgh, these barbarous mountain men, with their Gaelic language, with their kilts and their bagpipes, were a national embarrassment, and an easy target for the ridicule of the English.<sup>59</sup> How to civilize them, how (in the vocabulary of the age) “to improve their taste and manners,” was the question.

But the problem went beyond mere backwardness. Jacobite feeling in Britain was strongest and most disruptive among the Highland clans. In the first half of the eighteenth century there were repeated insurgencies. The major Catholic powers—Spain and especially France—lent military support. There were armed landings in 1708 and 1715, and numerous invasion scares. The last occurred in 1759, at a time when Wilson was a student at university.<sup>60</sup> The most important uprising, however, occurred in 1745. “Bonnie Prince Charlie,” the grandson of King James, landed in Scotland, rallied several thousand Highlanders to his cause, and marched on Edinburgh, which he captured. (Wilson was at the time three years old, and the family

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58 *Oats*, in 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755).

59 An etching shows a Highlander, recently arrived in London, seated on a privy. His kilt is hoisted up around his waist, and he has a puzzled expression on his face, evidently because he has just placed his feet in two adjacent privy holes. See THE OXFORD ILLUSTRATED HISTORY OF BRITAIN, *supra* note 35, at 413.

60 See COLLEY, *supra* note 4, at 24. Invasion scares occurred in 1717, 1719, and 1720–1721.

farm was not far from Edinburgh; so the insurrection swept close.) The rebel army then invaded England, and marched to within 150 miles of London. The uprising was not finally put down until the battle of Culloden, nine months after it began.<sup>61</sup> From the point of view of the lowlanders of Edinburgh, Scots in kilts—what Hume referred to as “bare-arsed Highlanders”—were anything but picturesque.<sup>62</sup> They were a sign of national backwardness, and moreover a threat to public order.<sup>63</sup>

After “the ‘Forty-Five,” the British government determined, once and for all, to crush the Highland chieftains. The leaders of the revolt were hunted down and executed. The last vestiges of feudalism were abolished. The populace was disarmed. For a generation, until 1782, the tartan and bagpipes were proscribed as symbols of sedition. Military roads were driven deep into the Highlands.<sup>64</sup> The government consciously attempted to break up the social system, to encourage emigration, to recruit young Scotsmen into the British army. In this they were highly successful. The enterprise of foreign conquest gave Scots an outlet in which they could equal the English; and they

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61 Linda Colley discusses the uprising and the subsequent problem of integrating the Scots into British life. *Id.* at 44–46, 77–85, 140–41. General histories are BRUCE LENMAN, *THE JACOBITE RISINGS IN BRITAIN, 1689–1746* (1980) and DANIEL SZECHI, *THE JACOBITES: BRITAIN AND EUROPE 1688–1788* (1994).

It should be noted that Jacobitism was not exclusively a Scottish phenomenon. The English Tories long remained sympathetic to the Jacobite cause: it was the Whigs who had supported the Glorious Revolution and the Hanoverian succession. Not until the reign of George III, the victories of the Seven Years’ War, and the dwindling of the exiled Stuart line, did the Jacobite movement wither away; at that point, the King was glad to welcome the Tories back into political power.

62 TREVOR-ROPER, *supra* note 20, at 118.

63 The symbolism of kilts and bagpipes as emblems of Scottish national identity was a creation of the nineteenth century, and in particular of the historical novels of Walter Scott. As Trevor-Roper explains in detail, it was only after the Highland clans had been thoroughly crushed in the eighteenth century that it became possible, in the nineteenth, for kilts and tartans and bagpipes to be depicted by a remarkable cast of romantics and charlatans and clothing manufacturers as symbols of Scottish identity. *Id. passim*. But, as Macaulay observed about the novels of Walter Scott, in the eighteenth century “a Macdonald or Macgregor in his Tartan was to a citizen of Edinburgh or Glasgow what an Indian hunter in his war paint is to an inhabitant of Philadelphia or Boston.” The quotation appears in Chapter XIII of 3 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II* (Philadelphia, Porter & Coates 1865), which was written in the 1850s; it is cited by TREVOR-ROPER, *supra* note 20, at 217. Macaulay was himself of Highland origins, and, as this passage shows, contemptuous of Walter Scott’s romantic portrayal of old Highland life.

64 DAVID M. WALKER, *THE SCOTTISH LEGAL SYSTEM: AN INTRODUCTION TO THE STUDY OF SCOTS LAW* 160 (8th ed. 2001). A general account is provided by JOHN PREBBLE, *CULLODEN* (1961). See also Francis Watt, *The Treason Trials at Carlisle After the ‘45*, 25 *JURID. REV.* 124 (1913) and John Bartholomew, *The Highland Clans in the Law of Scotland*, 13 *JURID. REV.* 205, 307 (1901).

became zealous in the cause of the Empire.<sup>65</sup> In the years 1760–1775—roughly the time of James Wilson’s emigration—some 40,000 Scots emigrated to the American colonies. Most of them were impoverished Highlanders; and, in sharp contrast to the Irish immigrants, most of them were loyalists, fiercely opposed to American independence.<sup>66</sup> The lowlander James Wilson was to take the other side.

It is thus not surprising that, with the problem of the Highlands so conspicuously in front of their eyes, the thinkers of the Scottish Enlightenment should have been preoccupied with questions of anthropology as well as history. How did civilization arise? How was it to be promoted? Why did some nations succeed and others fail? What causes led to the growth of arts and letters? Were there stages through which mankind inevitably progressed? How could a barbarous people be civilized, and how was human history, in the broadest terms, to be conceived?

### c. The Kirk

Such questions about the Highlands inevitably raised questions about another central institution of Scottish life, the Kirk. The religious wars of the past two centuries had fractured Scotland. It was evident that they were bound up with questions that lay on the frontier between theology and philosophy. What was the true basis of religious belief? How, in principle, was one to resolve the disputes of the various Christian sects? To what extent should dissentients be tolerated, and what should be the role of the law in enforcing religious orthodoxy? These questions were by no means new, nor were they exclusively Scottish; but they began to receive different answers than in the past. For John Knox, the most important thing to be learned from the study of the Bible was that irreclaimable “idolaters” (by which he meant Catholics) must not be allowed to live.<sup>67</sup> But by the

<sup>65</sup> This important point is discussed in COLLEY, *supra* note 4, at 130–32. As she points out, for all the linguistic confusion surrounding the terms “Britain” and “England,” nobody ever refers to the “English Empire.”

<sup>66</sup> See BERNARD BAILYN & BARBARA DEWOLFE, *VOYAGERS TO THE WEST: A PASSAGE IN THE PEOPLING OF AMERICA ON THE EVE OF THE REVOLUTION* 26–27 (1986); see also COLLEY, *supra* note 4, at 140; G. MURRAY LOGAN, *SCOTTISH HIGHLANDERS AND THE AMERICAN REVOLUTION* (1976).

<sup>67</sup> One example will convey the flavor. Knox came to his Protestantism as a consequence of a brutal incident. He had been the companion of George Wishart, who had urged reforms in the Catholic Church; for this, the Catholic prelate, Cardinal Beaton, had had him burned to death for heresy. The execution took place at St. Andrews in 1546. Two months later, Cardinal Beaton was himself murdered by the followers of Wishart. In a

eighteenth century, this sort of ferocity was out of fashion. The religious thinkers of the Scottish Enlightenment sought, consciously and deliberately, to turn down the temperature. William Wishart, Principal of the University of Edinburgh, was in the habit of praying, “Lord rebuke and bear down a spirit of imposition and persecution, not only in Papists, but in Christians of whatever denomination.”<sup>68</sup> Many intellectual leaders of the Scottish Enlightenment—Hugh Blair, Adam Ferguson, William Robertson—had significant careers in the Church of Scotland before they turned to academic and philosophical pursuits.<sup>69</sup> The sermons of Hugh Blair play down the Calvinist doctrines of sin and predestination, damnation and the Elect, and instead present Christianity as essentially a system of benevolent ethics—highly similar, in fact, to the philosophical system outlined in Francis Hutcheson’s *Inquiry into the Original of our Ideas of Beauty and Virtue*, one of the fundamental texts of Scottish Enlightenment thought.

I noted earlier the historical turn in Scottish Enlightenment thought, and its connection to anthropological questions about social development. This entire line of social thought was bound up with parallel questions about the historical origins of religion. How had religious belief (and not just Christianity) come into existence? What were the various forms of monotheism and polytheism, and how had religious belief evolved in human history? Did religion serve a social function, and how were the claims of various religious sects to be reconciled? In the changed religious climate, it now became possible for thinkers like David Hume to inquire into the natural origins of human religion, to reject miracles, to express polite scepticism about the literal truth of the Bible. Only a few decades earlier, Thomas Aikenhead had been executed for expressing similar views. But Hume was received in polite society, and even on cordial terms with at least the more moderate members of the Presbyterian clergy.<sup>70</sup>

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memorable passage, Knox recounts, in grisly detail, the killing of Beaton, adding the observation, “These things we wreat mearelie”: we did these things merrily. LEWIS, *supra* note 35, at 201. These two murders took place only a few yards from the College of St. Andrews, where James Wilson lived as a student; he certainly was aware of the history.

68 A HOTBED OF GENIUS: THE SCOTTISH ENLIGHTENMENT 1730–1790, *supra* note 10, at 13.

69 *Id.* Hugh Blair became Professor of Rhetoric at Edinburgh; William Robertson a distinguished historian; Adam Ferguson, a historian and sociologist.

70 The change is an important one; but we must not exaggerate the point. Hume repeatedly tried to find employment in the Scottish universities, but his religious views were considered disqualifying. Only at the outermost fringes of the Scottish Enlightenment did a few of the *litterati* incline towards deism or religious skepticism. The mainstream was closer to the “rational Christianity” of a Hugh Blair.

However, the important line of demarcation was not the one separating believers from the small number of sceptics, but the one separating religious “moderates” from the traditional Calvinists. In the early 1730s one of the Moderates, the Glasgow Professor of Divinity, John Simson, caused a scandal when he taught that God was not merely just, but also loving, and furthermore encouraged his students to think for themselves. A serious attempt was made to discipline him for these teachings. But the traditionalists were defeated; after that, at least in the universities, the Moderates were in control of the teaching of theology.<sup>71</sup> However, it is important to remember that the literary clubs, the universities, the gatherings of the *illuminati*, were almost entirely an affair of the cities. Outside the cities, in the smaller towns, in the countryside, on farms like Carskerdo, an older and more flinty Calvinism continued to flourish. The Kirk itself was to split in the eighteenth century between the Moderate and the traditionalist factions. Wilson and his clergyman cousin, Robert Annan, with their St. Andrews education, ended on one side of the divide, with most of the other members of the Wilson family on the other.

#### d. Scots Law

Let us briefly take stock. I have outlined the way in which the idiosyncrasies of Scottish history—the problem of the Union, the problem of the Kirk, the problem of the Highland clans—generated a set of practical questions that in turn prompted deep philosophical reflection on the foundations of civil society. The practical problems and the philosophical reflection were intimately related; and the various strands of the Scottish Enlightenment—history, anthropology, economics and sociology; theology, metaphysics, literature, ethics—overlap and intersect in remarkable ways.

The important point I wish now to emphasize is that law—and in particular the intellectual tradition of Roman law—lies at the very center of these intellectual developments. I mentioned earlier that the Scottish Enlightenment was largely an affair of the educated professions. In eighteenth-century Scotland, that meant the clergy, the lawyers, and the doctors. The doctors we can set to one side. But the lawyers and, to a lesser extent, the clergy were at the heart of things. The point is crucial to an understanding of James Wilson. As we saw,

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<sup>71</sup> Emerson, *supra* note 44, at 14. In 1755, John Home, a Presbyterian minister, wrote a patriotic tragedy in imitation of Shakespeare. The play was successfully performed at Covent Garden; but members of the clergy were not supposed to write for the stage, and he was forced to leave his ministry. See TREVOR-ROPER, *supra* note 20, at 76–77.

he was sent to St. Andrews to prepare for the ministry, and in time he emerged as one of the foremost lawyers in America. Today it is natural to think of theology and law as entirely separate fields of study; but that was far from how they appeared in the Scotland of the eighteenth century. What is the role of law in a godly polity? What is the relation between God's law and human law? What are the ultimate foundations of the legal order? How far should the state guard against heresy and blasphemy? These questions had been at the center of Scottish religious and political life at least since the time of John Knox; and as the religious answers changed, the legal answers were forced to change as well.<sup>72</sup> But there is a subtler point. Roman law was not merely a body of rules to be applied to the resolution of disputes. It was also a sophisticated tradition of political and social thought, possessing intellectual resources that set it apart in fundamental ways from English common law. It is this aspect of the Roman legal tradition that places it near the heart of the Scottish Enlightenment, and that we now need to attempt to understand.

#### i. The Roman Law Background

As is well known, the divergence between English common law and the civil law of the Continent can be traced back to the twelfth century.<sup>73</sup> The story is complicated, but, broadly speaking, the divergence had its root in the fact that the continental legal systems organized themselves around the texts of ancient Roman law—the *Corpus Juris Civilis*—that were rediscovered in Italy sometime around the year 1100; English law, by contrast, organized itself around the decisions of the King's courts. From this primary difference flowed several further consequences. Because the continental systems were organized around a canonical document, legal instruction took place primarily in the universities, at the hands of scholars, whereas in England it took place primarily at the hands of practitioners. Where legal education in England was a severely practical discipline, an initiation into a trade, legal education on the Continent was more

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<sup>72</sup> For a history of the relationship between law and religion in the seventeenth century, see generally BERMAN, *supra* note 34.

<sup>73</sup> The literature on Roman law is massive, and important works are to be found in most of the European languages. An account of the classical law that is both reliable and not overly technical is provided by BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* (1962), which contains a helpful bibliography. For the history of Roman law in the medieval and modern periods, WIEACKER, *supra* note 33, is the standard reference. Most of the facts in this paragraph about the intellectual tradition of Roman law are thoroughly discussed in ALAN WATSON, *THE MAKING OF THE CIVIL LAW* (1981).

academic, more concerned with broad questions of legal philosophy. In part this was because of the influence of the scholastic method, which the medieval jurists applied diligently to attempt to provide a logical analysis of the somewhat disorderly Roman texts; in part it was a reflection of the fact that many of the medieval scholars were ecclesiastics, and concerned to analyze the ethical foundations of legal order; and in part it was a reflection of the fact that Roman law, because it was more highly organized and more accessible than the common law, attracted the attention of philosophers who were not themselves lawyers. As a result of all these tendencies, the civil law has long been associated with a tendency towards logic, conceptual organization, and philosophical reflection. In addition to these broadly philosophical tendencies, the study of law on the Continent also had a second intellectual strand, linking it to the study of ancient history; and again, this marks a contrast with the common law. The Roman laws had been written in ancient times, and in the Latin language; and as the study of ancient literature and the knowledge of Roman history progressed, it was natural to apply the new learning to the study of Roman law.<sup>74</sup> As a result, by the seventeenth century the study of civil law on the Continent was associated both with philosophy and with the study of history and classical literature. It was a highly sophisticated intellectual enterprise, touching not just on the particular rules to be applied to the interpretation of contracts, but on philosophy and theology, classical languages, archaeology, and the study of ancient literature and history.

The situation in England was very different, and the difference is one of fundamental intellectual orientation. A young student of the common law in the eighteenth century was not sent to university. Instead he went to the Inns of Court, to be trained by practicing attorneys. Nor was he encouraged to study either philosophy or classical Roman history. Rather, he was expected to spend several years mastering the judicial writs and the rules of common law pleading. Legal study was not a theoretical enterprise, not one of the liberal arts, but rather an initiation into a trade, an instruction in legal technique. Where the civilians had gone to great pains to organize and classify the basic principles of Roman law, in the eighteenth century the organization of the common law remained haphazard. This was not to

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<sup>74</sup> To see this point, one need only consult the voluminous footnotes to Edward Gibbon's famous chapter forty-four on the history of Roman law in *The History of the Decline and Fall of the Roman Empire* (1781 & 1788). He was able to draw on dozens of works of historical scholarship in Latin and French; at the time, nothing remotely comparable existed for the history of the common law.

change until Blackstone published his lectures on the common law in the 1760s; and the task of reform was to last well into the nineteenth century. The entire system was so forbidding, so complicated, as to discourage philosophical inquiry—either by philosophers, who lacked the necessary legal mastery, or by the lawyers, whose attention was fixed on the practical aspects of their craft.

## ii. Roman Law and the Scottish Enlightenment

Let us now consider the impact of the Roman legal tradition upon the thinkers of Scotland. Recall that for generations Scots had been going to the universities of the Continent to receive their higher education, and that the education they received was overwhelmingly in law.

The first point to observe is that both strands in the civil law tradition—the philosophical strand and the historical strand—were powerfully exemplified in Scottish legal thought. The most influential writer on Scots law in the seventeenth century was James Dalrymple, who in 1690 became the first Viscount of Stair.<sup>75</sup> Although Stair is generally considered the greatest jurist in Scottish history, he was not formally trained in law. As a young man, he had been an instructor in philosophy at the University of Glasgow; he undertook on his own the study of Roman law and classics.<sup>76</sup> His most important work of scholarship appeared in 1681. The full title is informative: *The Institutions of the Law of Scotland Deduced from Its Originals, and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighboring Nations*.<sup>77</sup> He found Scots law a heterogeneous mixture of rules from different sources; his task was to reduce them to an orderly system. In pursuing this goal Stair was explicitly writing in the logical and classificatory tradition of Justinian's *Institutes*. But he had other, more recent models. He was deeply familiar with the work of the

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<sup>75</sup> The works of Scottish legal history by Cairns, *supra* note 26, and 5 WALKER, *supra* note 43, contain extensive references to the biographical literature on Stair (whose dates are 1619–1695).

<sup>76</sup> WALKER, *supra* note 64, at 150.

<sup>77</sup> JAMES VISCOUNT OF STAIR, *THE INSTITUTIONS OF THE LAW OF SCOTLAND* (David M. Walker ed., Univ. Presses of Edinburgh and Yale 1981) (1693). The history of the various editions of Stair's treatise is complex; for details, see John W. Cairns, *The Civil Law Tradition in Scottish Legal Thought*, in *THE CIVILIAN TRADITION AND SCOTS LAW: ABERDEEN QUINCENTENARY ESSAYS* 191–223 (David L. Carey Miller & Reinhard Zimmermann eds., 1997). Stair's treatise belongs to a class of juridical writing known as "institutional literature," from its emulation of the *Institutes*. The topic is influentially discussed in Klaus Luig, *The Institutes of National Law in the Seventeenth and Eighteenth Centuries*, 17 JURID. REV. 193 (1972).

French and Dutch jurists—notably Hugo Grotius and Samuel Pufendorf, whose writings on natural law belong as much to political philosophy as to law. (Indeed, when he was driven into exile during the years 1682–1688, he spent his exile in Leiden, one of the great centers for the study of natural law.)<sup>78</sup>

Stair used the ideas of the natural lawyers to perform two interrelated tasks. The first was organizational. He aimed to display Scots law as a coherent, rational, and unified structure. So he attempted not only to arrange and classify the legal rules, but to place them into a logical and hierarchical order, with the more specific rules being systematically deduced from higher principles. (This conception of the logical structure of the law—of law as “legal science”—has had a lasting impact on Scottish legal thought. Even today the leading introductory textbook in Scots law begins with an extended discussion, explicitly traced to Stair, of “[t]he Science of Law”;<sup>79</sup> such a concept is of course foreign to the intellectual tradition of the common law.)

The second task was that of criticism, of appraisal. The law of nature gave Stair a platform from which not only to *organize* but to *evaluate* the various traditional rules of Scottish law, and to pick and choose among them. For our purposes, the most significant thing is the argument Stair gave to justify this procedure. He needed to explain why Roman law—the law of an ancient and pagan people—should have any authority in modern Scotland. This question he addressed by tracing it to a higher question: What is the relationship between human law and divine law? To this question he gave a traditional answer. God is necessarily a rational being; and human beings, through the use of the faculty of reason implanted in them by God, have an innate capacity to discern the basic principles of natural law, the law of reason. This natural law, he explains, must prevail over any merely human law, whether it is established by legislation, or custom, or immemorial usage. “Law,” he said in the opening of the *Institutions*, “is the dictate of reason, determining every rational being to

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<sup>78</sup> I note that not only Stair, but the other great Scots jurists of the seventeenth century, Thomas Craig and George Mackenzie, also studied on the Continent. 4 WALKER, *supra* note 43, at 360–63; WALKER, *supra* note 64, at 163 & n.9.

<sup>79</sup> WALKER, *supra* note 64, at 1–2. This influential textbook was written by David M. Walker, the Regius Professor of Law at Glasgow. The first two chapters, filling some eighty pages, are entitled “The Science of Law” and “The Divisions of Legal Science.” *Id.* at 1–82. Walker undertakes to explain that law “is truly a science, that is, a systematic body of coherent and ordered knowledge about the institutions, principles and rules regulating human conduct in society,” *id.* at 2; the general conception of “legal science” is explicitly traced to Stair. *Id.* at 3.

that which is congruous and convenient for the nature and condition thereof.”<sup>80</sup>

This conception of law was of course not original to Stair. Substantially the same argument was to be found in the writings of Grotius and the school of natural law; and these writings Stair knew well. Grotius in turn took it from the school of scholastic legal-theologians who flourished in Spain at the end of the sixteenth century: Francisco de Vitoria, Domingo de Soto, Luis de Molina, Francisco Suarez. The Spanish late scholastics in turn were explicitly drawing on the writings of Thomas Aquinas from the thirteenth century.<sup>81</sup> There are some subtle differences between the Spanish Catholics and the Scottish Presbyterians; but they are overshadowed by the similarities.<sup>82</sup> Why, then, according to Stair, is Roman law binding in Scotland? Not because it is directly authoritative. Rather, because of all human laws, the civil law of the Roman commonwealth is

the most excellent. And because of that affinity that the law of Scotland hath with it . . . and its own worth, even after the ruin of the Roman Empire which hath so commended it,[] that though it be not acknowledged as a law, binding for its authority, yet being, as a rule, followed for its equity, it shall not be amiss here to say something of it.<sup>83</sup>

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<sup>80</sup> STAIR, *supra* note 77, bk. I, tit. I, § 1, at 73.

<sup>81</sup> 4 WALKER, *supra* note 43, at 365–66. The central article calling attention to the importance of the Spanish Scholastics for the school of natural law is Hans Thieme, *Natürliches Privatrecht und Spätscholastik*, 70 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 230ff (1953), reprinted in HANS THIEME, IDEENGESCHICHTE UND RECHTSGESCHICHTE: GESAMMELTE SCHRIFTEN 870 (1986).

<sup>82</sup> For general discussion of the relationship of Stair to the Scholastic tradition, see William M. Gordon, *Stair's Use of Roman Law*, in LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY, *supra* note 41, at 120; Peter Stein, *Legal Thought in Eighteenth Century Scotland*, 1957 JURID. REV. 1, 3–5. There are further references to works on this topic in Cairns, *supra* note 77, at 206.

The literature on Stair and natural law is considerable. Among the principal general contributions are R.H. Campbell, *Stair's Scotland: The Social and Economic Background*, 1981 JURID. REV. 110; T.M. Cooper, *Stair the Scientist*, 67 JURID. REV. 23 (1955); Gordon Donaldson, *Stair's Scotland: The Intellectual Inheritance*, 1981 JURID. REV. 128; John Underwood Lewis, *The Moral Character of Positive Law in Viscount Stair's Institutions of the Law of Scotland (1681): A Source for Rethinking the Nature of Legal Obligation*, 1976 JURID. REV. 127; D.M. Walker, *The Importance of Stair's Work for the Modern Lawyer*, 1981 JURID. REV. 161.

For scholarly discussion of Stair on natural law, see, for example, A.H. CAMPBELL, THE STRUCTURE OF STAIR'S INSTITUTIONS (1954); John D. Ford, *Stair's Title "Of Liberty and Servitude"*, in THE ROMAN LAW TRADITION 135 (A.D.E. Lewis & D.J. Ibbetson eds., 1994); D.N. MacCormick, *Law, Obligation and Consent: Reflections on Stair and Locke*, 65 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 387 (1979); D.N. MacCormick, *Stair as Analytical Jurist*, in STAIR TRICENTENARY STUDIES 187 (David M. Walker ed., 1981); Neil MacCormick, *The Rational Discipline of Law*, 1981 JURID. REV. 146; P.G. Stein, *Stair's General Concepts: The Theory of Law*, in STAIR TRICENTENARY STUDIES, *supra*, at 181.

<sup>83</sup> STAIR, *supra* note 77, at 80.

Here, “equity” is just a synonym for the law of nature. In other words, the ultimate foundation of Scots law—the reason for the authority of Roman law—was not tradition, or custom, but rather the divine law of reason; and it follows that the rules of Roman law were binding only to the extent that they were conformable to rationality. In drawing this conclusion, Stair was following in the footsteps of another great Scots jurist of the seventeenth century, Thomas Craig, who had given essentially the same analysis at the very beginning of the seventeenth century; and Craig’s analysis directly influenced Stair. In Scotland, wrote Craig, “we are bound by the Roman laws only in so far as they are congruent with the laws of nature and right reason.”<sup>84</sup> I said that the intellectual tradition of the civil law has two strands, a logical and a historical. The logical strand in Stair’s treatise is clear enough. But what of the historical strand? That is present, too, in the detailed discussion he provides of the rules of the *Digest* and of their historical origins. But there is a subtler point here, and to grasp it we need to understand something of the legal profession in Scotland at the end of the seventeenth century. Notice first that, because Scotland was a civil law jurisdiction, advocates were not (as in England) expected to argue their clients’ case by citing precedents to the court. Judicial decisions were not viewed as a source of law, either by the judges or by the lawyers, and in any case were not reported.<sup>85</sup> What then did judges want to hear? What they expected—what made a successful advocate—was somebody who could argue from the law of reason, who was familiar with the treatises of natural law, who could build an argument from first principles, and illuminate it with a deep understanding of the history of Roman law. As a later Scottish judge observed:

From their sojourn in Holland the aspirants to practice in the Parliament House brought back with them not only the principles which they had imbibed from the masters of the Roman-Dutch law but also the treatises

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84 Craig’s argument from his *Ius Feudale* is quoted in Cairns, *supra* note 26, at 100. Craig’s natural law argument is too early to have been influenced by Grotius and Pufendorf; it would be interesting to know more about his antecedents. Cairns, *supra* note 77, at 200–12, summarizes the contributions of Craig, Stair, and Mackenzie.

85 Kenneth Reid, *A Note on Law Reporting*, in 1 *A HISTORY OF PRIVATE LAW IN SCOTLAND*, *supra* note 26, at liv (outlining the history of case reporting in the Court of Session). No systematic law reporting occurred until the eighteenth century, when the development of a more sophisticated theory of precedent took place. *Id.* at lvi. For further information, see G. Maher, *Judicial Precedent*, in 22 *THE LAWS OF SCOTLAND: STAIR MEMORAL ENCYCLOPAEDIA* 92 (Sir Thomas Smith ed., 1987). (I note in passing that Stair at the end of the seventeenth century published a collection of reports of Scottish case law, but of course did not regard the decisions of the Scottish courts as establishing binding precedent.)

of which the law schools of the Dutch Universities were so prolific. No Scots lawyer's library was complete in those days which did not contain the works of Grotius, Vinnius, the Voets, Heineccius and other learned civilians. Collections of decisions of the Scottish judges were few and inaccessible, and the Court of Session, with its predilection for principle rather than precedent, heard many arguments, adorned with citations of the Roman law and its Dutch commentators.<sup>86</sup>

(I note in passing that this general attitude is a striking feature of James Wilson's constitutional opinions when he was a Justice of the United States Supreme Court: even though he had studied the common law, in his judicial opinions he tends to recur to first principles, rather than to parse the case law.)

At this time, at the end of the seventeenth century, before the Act of Union, most members of the Scottish legal profession received their formal education in the Netherlands, usually at Leiden or Utrecht. Domestic Scottish education in law at this time was weak. In part this was because Scotland still had the system of "regenting," in which a student would be taught by a single tutor (or "regent") who would supervise his reading in all subjects of the curriculum throughout his university career. In addition, there were few university instructors in law, and none were of any distinction. The Dutch universities, in contrast, had organized themselves into a professorial system. Individual scholars were appointed to chairs in their field of specialization. Education took the form of university lectures; and students could choose which lectures they wished to follow. The language of instruction was, of course, Latin. Scottish law students typically began by attending lectures on the *Institutes* and on natural law; they then proceeded to the *Digest*. These studies in Roman law were often supplemented by the study of feudal law and canon law; but also history, classical languages, Greek and Roman antiquities, and rhetoric. All of this was highly dissimilar to the training of lawyers in England. Sometimes the Scottish students took a degree, but that was not the common practice; and in any case, a degree was not needed for admission to legal practice in Scotland.<sup>87</sup> During the last decades of the seventeenth century—roughly speaking, from the Restoration in 1660 to the Treaty of Union in 1707—the organization of

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<sup>86</sup> *Stewart v. London, Midland and Scottish Ry. Co.*, [1943] S.C. (H.L.) 19, 38–39, *quoted in* WALKER, *supra* note 64, at 164.

<sup>87</sup> Cairns, *supra* note 26, at 128–29 (giving numerous citations to the literature on interactions between Scotland and the Netherlands in legal education in the eighteenth century); *see also* John W. Cairns, *Importing our Lawyers from Holland: Netherlands Influences on Scots Law and Lawyers in the Eighteenth Century*, in SCOTLAND AND THE LOW COUNTRIES, *supra* note 31, at 136–53.

the Scottish legal profession and its understanding of itself underwent a profound change. Early in the seventeenth century, the lawyers who practiced before the Court of Session had come to be recognized as a corporate body, the Faculty of Advocates.<sup>88</sup> After the Civil War and the Restoration, the Faculty came to see itself as a bastion for protecting Scottish liberties and private property against royal encroachment. The Lords of Session (i.e., the judges of the supreme Scottish court) were appointed by the Crown, which retained the power to dismiss them at its pleasure: between the Restoration and the Revolution, nine judges were removed from office for opposing the policies of the King. The Lords in addition had a poor reputation for legal learning, and some were not trained at all. From about 1670, the Advocates attempted to organize themselves into an elite profession, and in particular to gain control over the standards of admission to legal practice. It had long been established that the preferred path of admission to practice before the Court of Session required an examination in Roman law administered by the Faculty of Advocates; but the Lords were in the habit of admitting practitioners (often their close relatives) who had not met this requirement. A struggle followed between the Advocates and the Lords. By the end of the century, it was settled that aspirants to legal practice would have to pass a rigorous series of public and private examinations administered by the Faculty of Advocates; and the examinations were to be not in Scots law *stricto sensu*, but in Roman law.<sup>89</sup> The skilled attorney in this system was expected not merely to be a master of the technical details. Sir George Mackenzie, in a work published in 1681, summed up the new ideal, which was derived from the writings of Cicero. The applicant was of course to master the *Corpus Juris*—“the pure fountain of true eloquence and justice”—but also the Latin classics, from which he would learn rhetoric and history and the customs of ancient Rome.<sup>90</sup> This erudition would set apart the Advocates as a learned and honorable body, an elite group distinguished by their education and social status. At about this time, at the instigation of

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88 Cairns, *supra* note 26, at 86–87. The official recognition of this body emerged gradually over many years. As early as 1582 a prominent lawyer was recognized as the “dean of the advocates,” and by 1619 it was required that aspiring lawyers first pass an examination to be administered by the “dean of faculty.”

89 The story is told by Cairns, *supra* note 26, at 125–27, and by 5 WALKER, *supra* note 43, at 379–83. Incidentally, in 1714 Scotland had approximately 200 advocates, of whom roughly 170 were practicing; this number appears to have remained relatively constant throughout the eighteenth century. Cairns, *supra* note 26, at 155.

90 GEORGE MACKENZIE, *IDEA ELOQUENTIAE FORENSIS HODIERNAE* (1681), *discussed in* Cairns, *supra* note 26, at 126.

Mackenzie, the Faculty began to collect an important library. The Advocates Library contained not only a vast collection of continental treatises on the *ius commune*, but was also rich in what Mackenzie referred to as “the servants of jurisprudence”: history, rhetoric, classical studies, and theology. After the Treaty of Union, it became a copyright library, and in the eighteenth century was one of the greatest libraries of Europe.<sup>91</sup> Thus, at the time of the Treaty of Union in 1707, Scotland possessed a highly sophisticated legal profession, steeped not just in the tradition of the *ius commune*, but in classical literature and history and philosophy. Well into the eighteenth century it remained fashionable for Scots who could afford to do so to study in Holland; but the cost of a foreign education was high, and the Faculty of Advocates actively encouraged the Scottish universities to introduce legal instruction on the Dutch model. In 1707 Edinburgh established a new chair (devoted, significantly, to Public Law and the Law of Nature and Nations); in 1710 it added a chair in Civil Law. Glasgow established a chair in Civil Law in 1713; and in 1719 Edinburgh appointed a Professor of Universal History to teach Roman antiquities, an important course for legal education.<sup>92</sup> The system of “regenting” was gradually abandoned throughout the Scottish universities and replaced by a system of professorial lecture courses. Professors were now expected to have a field of expertise, and to engage in scholarly writing. These changes revolutionized higher education in Scotland, and helped to usher in the Scottish Enlightenment.<sup>93</sup>

What curriculum would a university student have followed in James Wilson’s day? The normal progression looked something like this.<sup>94</sup> The first two years were generally devoted to the classical languages and to Greek and Roman history—subjects considered the

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91 Mackenzie’s oration is discussed in Cairns, *supra* note 26, at 128. The oration itself (which may never have been formally delivered) is translated in 2 TRANSACTIONS OF THE EDINBURGH BIOGRAPHICAL SOCIETY 273 (1946).

The history and composition of the Advocates’ Library is discussed in 4 WALKER, *supra* note 43, at 401–03; 5 WALKER, *supra* note 43, at 410–18. Further information is contained in William K. Dickson, *The Advocates’ Library*, 14 JURID. REV. 1, 113, 214 (1902); William K. Dickson, *The National Library of Scotland*, 40 JURID. REV. 172 (1928). In the twentieth century, the Advocates’ Library became the National Library of Scotland.

92 Cairns, *supra* note 26, at 129–30; John W. Cairns, *The Origins of the Glasgow Law School: The Professors of Civil Law, 1714–61*, in THE LIFE OF THE LAW: PROCEEDINGS OF THE TENTH BRITISH LEGAL HISTORY CONFERENCE 151, 157–58 (Peter Birks ed., 1993).

93 For a general treatment of one of the major universities, see ROGER L. EMERSON, PROFESSORS, PATRONAGE AND POLITICS: THE ABERDEEN UNIVERSITIES IN THE EIGHTEENTH CENTURY (1992).

94 I have drawn the facts in this paragraph from M.A. Stewart, *supra* note 46, at 97.

distinguishing mark of an educated mind. (It should be noted that, as in Holland, university lectures were often delivered in Latin; so a mastery of that language was essential.) After this initial training in the classics, the sequence of the curriculum followed the traditional order: logic, metaphysics, moral philosophy, and natural philosophy. It should be noticed that most students following this curriculum would have been preparing for a career either in the church or in the law. The arts curriculum was originally designed to educate students of theology; but it also served admirably for the lawyers. This should not be surprising, since, as we have seen, in the tradition of the *ius commune* law and theology were closely linked. The classics and ancient history were of course essential to the study of Roman law. And recall that the central argument of Stair's *Institutions of the Law of Scotland*—that Scots law rested on the divine law of reason—aligned the study of law with three central disciplines in the university curriculum: logic, natural theology, and moral philosophy. Logic (which at the time also encompassed epistemology) was of course a principal tool in the hands of the natural lawyers. Metaphysics was understood to include natural theology; and moral philosophy was frequently taught from textbooks of natural law. In other words, even a student training for the ministry like James Wilson would have received, in his basic arts education, essentially the same instruction as the students of law. Only after these basic subjects had been mastered would the students begin to specialize; the lawyers would attend the technical lectures on Roman law, and future members of the clergy would undertake the advanced study of theology.

### iii. Scottish Legal Education in the Eighteenth Century

A few words should now be said specifically about the development of Scottish legal education during the eighteenth century. At the beginning of the century, the teaching of law followed traditional lines. On the one hand, students were expected to master the abstract theories of the natural lawyers; on the other, they were to master the rules of Roman law. The two enterprises were held together (as in Stair) by the assumption that Roman law, because of its intrinsic excellence, its conformity with the law of Reason, was presumptively valid in Scotland. But as the Scottish Enlightenment progressed, this traditional understanding of law came under pressure from two directions. First, the moral philosophers, starting with Francis Hutcheson's *Inquiry into the Original of our Ideas of Beauty and Virtue* (1725), abandoned the older, rationalist approach to ethics, and instead developed the theory that morality is grounded, not in

reason, but in the moral sense. Although the implications of this new view for law were not immediately apparent, Hume in 1740 famously turned the theory of moral sense into a profound attack upon the idea of natural law altogether.<sup>95</sup>

Secondly, in 1748 there appeared Montesquieu's *Esprit des Lois*, a work which had a profound effect in Scotland. It shifted attention away from natural law, and towards the historical—even anthropological—question of how laws arise, and of how legal rules are related to the background conditions of civil society. Montesquieu's questions had an obvious bearing on the problems of modern Scotland, and in particular the problem of the Highlands. After all, the insurrection of "Bonnie Prince Charlie" had been put down only two years before his treatise appeared, and Edinburgh had been an occupied city. Montesquieu's work unleashed in Scotland a flood of speculation about the "stages" of human society—from hunting, to pasturage, to agriculture, to commerce. It was taken for granted that the progress from one stage of civilization to the next was bound up with changes in the law, and in particular the law of property.<sup>96</sup> Already in his *Historical Law Tracts* of 1758, Lord Kames had begun to ask, not just about the anthropological question in the abstract, but about what regime of property rules was most suited to the needs of a commercial society. This new, relativistic and theoretical attitude tended to encourage a more relaxed approach to the rules of Roman law. By 1761, John Millar, who held the chair in Roman law at Glasgow, was explaining to students that a knowledge of "what was the Roman System . . . would be of little consequence of itself"; instead, Roman law was useful as furnishing historical material to illustrate the way in which laws grow and change in response to changes in civil society.<sup>97</sup>

There is much more to be said about the role of Roman law in eighteenth-century Scottish thought: the foregoing remarks barely

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95 Hume's attack on the foundations of natural law is a central theme of PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION* (1966). It should be borne in mind, however, that Hume's *Treatise*, as he said in his autobiography, "fell dead-born from the press"; his attack on natural law only became influential much later, and does not appear to have had significant influence on the Scottish legal thinkers of Wilson's day.

96 An insightful discussion of the development of the "stadial" theory of social evolution, and of its relationship to Scottish legal thought, is provided by PETER STEIN, *The Four Stage Theory of the Development of Societies*, in *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 395–409 (1988).

97 Millar's views are discussed by Cairns, *supra* note 26, at 165–66. See also John W. Cairns, "Famous as a School for Law, as Edinburgh . . . for Medicine": *Legal Education in Glasgow, 1761–1801*, in *THE GLASGOW ENLIGHTENMENT* (Andrew Hook & Richard B. Sher eds., 1995).

scratch the surface. It is difficult to convey in a short space just how densely interwoven with law were the central themes of the Scottish Enlightenment; but two examples may help to illustrate the point. The first is a quotation from Sir Walter Scott. Scott as a young man had studied law at Edinburgh under Baron David Hume, the nephew of the philosopher. Baron Hume was a professor of Scottish law, and it was his lectures that awakened Scott's historical sense:

I copied over his lectures twice with my own hand, from notes taken in the class, and when I have had occasion to consult them, I can never sufficiently admire the penetration and clearness of conception which were necessary to the arrangement of the fabric of law, formed originally under the strictest influence of feudal principles, and innovated, altered, and broken in upon by the changes of times, of habits, and of manners, until it resembles some ancient castle, partly entire, partly ruinous, partly dilapidated, patched and altered . . . by a thousand additions and combinations, yet still exhibiting, with the marks of its antiquity, symptoms of the skill and wisdom of its founders, and capable of being analyzed and made the subject of a methodical plan by an architect who can understand the various styles of the different ages in which it was subjected to alteration. Such an architect has Mr Hume been to the law of Scotland . . . combining the past state of our legal enactments with the present, and tracing clearly and judiciously the changes which took place, and the causes which led to them.<sup>98</sup>

The second example is even more revealing. It comes from a highly detailed set of student notes for a course given during the year 1762–1763, roughly the time James Wilson was in university. The lecturer was an associate of the legal scholar, Lord Kames, and also a colleague of the distinguished historian of Roman law, John Millar, but he was not himself a lawyer. He had recently been appointed to a chair in moral philosophy. What is of interest is the way in which this lecturer, not directly concerned with legal education, nevertheless makes use of legal materials—the way in which the various materials are interwoven. His lectures are divided into a cycle of four courses. In the first course, he treats of Natural Theology as the foundation of all law and ethics. Here he discusses the various proofs of the existence of God, and the epistemological foundations of natural religion. He then passes in the second course to ethics *stricto sensu*, lecturing on moral psychology, the theory of the emotions, the nature of right and wrong; in the course of this analysis he discusses the various current theories of moral sense. He next turns from ethics to juris-

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<sup>98</sup> 1 JOHN GIBSON LOCKHART, MEMOIRS OF THE LIFE OF SIR WALTER SCOTT, BART 58–59 (Edinburgh, Robert Cadell 1837), quoted in A HOTBED OF GENIUS: THE SCOTTISH ENLIGHTENMENT 1730–1790, *supra* note 10, at 7; see also DAVID MARSHALL, SIR WALTER SCOTT AND SCOTS LAW (1975).

prudence. In this third course he discusses the development of law and of society; the social contract and the emergence of political society; the development of the institutions of marriage, property, contract, and personal wrongs. All of these topics are illustrated with plentiful examples from Roman law and ancient history. Finally, in the fourth course of lectures, having discussed legal evolution and the principles of justice, he turns his attention to Lord Kames's question of the *expediency* of the laws. How can society be improved? What is the basis of wealth, and how can the law be used to promote human cooperation? What are the underlying principles that relate trade, and finance, and the prosperity of the State? —What is striking about these lectures is the way the various themes are linked: the steady progression from theology, to ethics, to law, to legal history, to modern speculative economics. But this blending of themes is entirely characteristic of the Scottish Enlightenment, as is the tendency to move rapidly from field to field. (Indeed, this particular lecturer also wrote about rhetoric, and literature; he published essays on philosophical topics; before his current appointment in moral philosophy he had served for a time as a professor of logic.) Of his own lecture notes, those on theology have disappeared. The ethics lectures he eventually turned into a treatise on the theory of moral sentiments. The law lectures we possess in the form of an extensive set of student notes, which give a detailed record of the topics he covered. The professor of moral philosophy at Glasgow was of course Adam Smith, and his fourth set of lectures eventually grew into *The Wealth of Nations*.<sup>99</sup>

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99 For further information on Adam Smith and Scots law, see John W. Cairns, *The Influence of Smith's Jurisprudence on Legal Education in Scotland*, in ADAM SMITH REVIEWED 168 (Peter Jones & Andrew S. Skinner eds., 1992), and John W. Cairns, *Rhetoric, Language, and Roman Law: Legal Education and Improvement in Eighteenth-Century Scotland*, 9 L. & HIST. REV. 31 (1991); see also Cairns, *supra* note 97. More general studies include: CHARLES L. GRISWOLD, JR., ADAM SMITH AND THE VIRTUES OF ENLIGHTENMENT (1999); KNUD HAAKONSSON, NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT (1996); KNUD HAAKONSSON, THE SCIENCE OF A LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME AND ADAM SMITH (1981); THE GLASGOW ENLIGHTENMENT, *supra* note 97; DONALD WINCH, ADAM SMITH'S POLITICS: AN ESSAY IN HISTORIOGRAPHIC REVISION (1978); Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897, 897–924 (2002); Ronald L. Meek & Andrew S. Skinner, *The Development of Adam Smith's Ideas on the Division of Labour*, 83 ECON. J. 1094 (1973).

## e. Summary

This has been a long digression on Scotland and the Enlightenment. But the importance of the topic to the understanding of James Wilson should now be clear. Scotland at the beginning of the eighteenth century, long before the French Revolution, was already in practice a bourgeois society; and Scotland moreover confronted a complicated and densely interwoven web of social and political problems, made urgent by the prospect of Union with England. From one point of view, these problems were distinctively problems of Scottish history, and revolved around the central institutions of Scottish society: the Kirk, the Highland clans, and Scots law. But, from another point of view, Scotland was the first European nation to think through, in a systematic manner, the fundamental features—social and political and economic—of the new, more democratic, more egalitarian world that was coming into being throughout Europe and North America. The Scottish thinkers, working with great thoroughness, carried their analysis to an unprecedented depth, exploring the philosophical foundations of law, and morality, and society; in the process, they developed new ways of writing history, and they effectively invented the disciplines of anthropology, sociology, and economics. “We look to Scotland,” wrote Voltaire, “for all our ideas on civilisation.”<sup>100</sup>

Central to the entire Scottish Enlightenment was the tradition of Roman law. To say this is not to assert that all, or even most, of the Scottish thinkers were trained as lawyers: they were not. But the tradition of Roman law was at the intellectual heart of the movement. It was Roman law that furnished the link to the leading universities of Europe, and provided the inspiration for the reform of the Scottish curriculum. The civilian legal tradition was intellectually profoundly committed to the study of history, of classical languages and literature, of philology, and of antiquities; and out of these connections were to grow, in time, the studies of anthropology and civil society and economics. Philosophically, the *ius commune* had long been linked to moral theology; and the work of the natural lawyers subjected the foundations of the entire legal order to a sophisticated philosophical examination. We shall have missed the point entirely if we

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100 Quoted in José Manuel Barroso, President, European Comm'n, Address at the Enlightenment Lecture Series at Edinburgh University: The Scottish Enlightenment and the Challenges for Europe in the 21st Century; Climate Change and Energy (Nov. 28, 2006) (audio recording available at <http://www.podcastdirectory.com/podshows/3375303>; transcript available at [http://www.europa-eu-un.org/articles/fr/article\\_6525\\_fr.htm](http://www.europa-eu-un.org/articles/fr/article_6525_fr.htm)).

think of Scots law as a mere *practicum*, a technique for representing clients and earning a living. It was a highly refined style of thought, a discipline that brought together history and classics; rhetoric and moral philosophy; theology, politics, logic, metaphysics, and the study of society: a set of techniques not so much for litigating disputes, but for analyzing the deepest questions of human social life. The English common law, by comparison, at this somewhat bleak time in its history, possessed no comparable intellectual resources. I mentioned earlier the Advocates' Library, founded in the 1680s, which in the course of the eighteenth century grew into one of the foremost libraries of Europe. It is fitting that, in the middle years of the century, the Keeper of the Advocates' Library was not a lawyer at all, but a thinker whose interests ran to history and ethics, the origins of religion, metaphysics, epistemology, and the science of government, David Hume.<sup>101</sup>

#### f. The Impact on America

The writings of the Scottish Enlightenment had particular relevance to the circumstances of British North America, and would have been influential even if the American universities in the middle years of the eighteenth century had not been dominated by immigrants from Scotland. America, too, was in practical terms a bourgeois and even (by the standards of the eighteenth century) democratic society; and the questions raised by the Scots had an obvious interest. What was the nature of the British Empire? What was the basis of the authority of the Westminster Parliament? Should the nation declare its independence? What was the nature of human progress, and how could a relatively backward people acquire the civilizing polish of arts and letters? Should the national economy be founded on agriculture or on commerce? What were the implications for the social order of such a choice, and how should one design the appropriate laws for a commercial polity? What should be the role of banks, of finance, of international trade? How should the government be constituted, and what were the prospects for a republican political order? Were political parties to be welcomed or feared? —These questions, and others like them, loomed large in the thought of the American Founders, even after the ratification of the Constitution; but they had

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101 William K. Dickson, *David Hume and the Advocates' Library*, 44 JURID. REV. 1 (1932). Hume was the Keeper during the years 1752–1757; there is a discussion in 5 WALKER, *supra* note 43, at 415.

already been the subject of intensive discussion in Scotland fifty years before.

The revolutionary generation in America accordingly turned to the Scottish thinkers and studied closely their social and political thought. Perhaps the most influential was Francis Hutcheson. A standard text at American universities—the text from which the founding generation learned the social sciences—was Hutcheson’s *A Short Introduction to Moral Philosophy* (1747), which was an assigned text at Columbia, the College of Philadelphia, Yale, Harvard, and William and Mary; and which was followed closely in the lectures of Dr. Witherspoon at Princeton.<sup>102</sup> Hutcheson’s other works—his *Inquiry into the Original of Our Ideas of Beauty and Virtue* (1725), the *Essay on the Nature and Conduct of the Passions* (1728), and *A System of Moral Philosophy* (1755)—were also widely read in the American colonies. In his writings, the Americans encountered such passages as the following from the *Short Introduction*:

If the mother-country attempts any thing oppressive toward a colony, and the colony be able to subsist as a sovereign state by itself . . . the colony is not bound to remain subject any longer: ’tis enough that it remain a friendly state.<sup>103</sup>

Or, from *A System of Moral Philosophy*:

Large numbers of men cannot be bound to sacrifice their own and their posterity’s liberty and happiness, to the ambitious views of their mother-country . . . . There is something so unnatural in supposing a large society, sufficient for all the good purposes of an independent political union, remaining subject to the direction . . . of a distant body of men who know not sufficiently the circumstances and exigencies of this society . . . .<sup>104</sup>

Hutcheson flourished in the 1720s and 30s, and died in 1746. At the time, the question of American independence was not an issue, either in America or in Britain. Hutcheson’s passages were not written

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102 Douglass Adair, in the chapter entitled *Clio Bemused* in his book *FAME AND THE FOUNDING FATHERS*, *supra* note 7, at 299, notes that

In the last half of the eighteenth century . . . the standard text that summarized all the social sciences, used at Columbia, Harvard, William and Mary, and Yale, was Francis Hutcheson’s *Short Introduction to Moral Philosophy*. Oddly enough it was not the assigned text at Princeton, for President Witherspoon was a public critic of Hutcheson’s religious ideas. But I was amused and horrified to discover he had plagiarized the moral philosophy text for his course syllabus but did not admit that it was Hutcheson’s book that he had used. It was only after Witherspoon’s death that people dug up his carefully copied notes and published them . . . . So it is possible today to see that they reveal this very curious form of academic theft.

103 FRANCIS HUTCHESON, *A SHORT INTRODUCTION TO MORAL PHILOSOPHY*, at bk. III, ch. 7, at 303 (Glasgow, Univ. of Glasgow 2d ed. 1753).

104 2 FRANCIS HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY*, at bk. III, ch. 8, at 309 (Glasgow, Univ. of Glasgow 1755).

with the American colonies in mind, but with reference to the history of Scotland, and its long and complex relationship to England.

Hutcheson, like the other political and social thinkers of the Scottish Enlightenment, was deeply immersed in the writings of the natural lawyers; and, not surprisingly, the works of Grotius and Pufendorf were required texts at American colleges; they were also studied closely by the leading Founders.<sup>105</sup> As for Roman law—or, more broadly, the tradition of the *ius commune*—the leading Founders knew the writings, not only of the natural lawyers, but also the primary works of Cicero and the Roman historians, as well as the *Essays* of Lord Kames, and in particular his *Historical Law-Tracts*.<sup>106</sup> This is an extremely important point. The principal architects of the American system of constitutional government—Adams, Jefferson, Hamilton, Wilson, Dickinson, and many others—were for the most part lawyers, and trained to practice the common law. (Madison, who was not a lawyer, is the conspicuous exception.) It has often been assumed that American constitutionalism, at least in its origins, belongs, somehow, to the tradition of the English common law. That is a point it would be futile to dispute; the influences are ubiquitous. The intellectual history here is complicated, and varies depending on which Founder is being considered. But, as a general matter, although the common law supplied the colonies with most of the concrete rules of daily life, at the level of abstract legal and constitutional thought, the continental tradition of the civil law was at least as important; and much of the work of conveying those ideas to the colonies was performed by thinkers of the Scottish Enlightenment. From this point of view, the American legal system is as much an inheritor of the tradition of Roman law as it is of the common law.

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105 In one of his early pamphlets, *The Farmer Refuted* of 1775, Hamilton urges his pseudonymous opponent: "Apply yourself, without delay, to the study of the law of nature. I would recommend to your perusal, Grotius[,] Puffendorf, Locke, Montesquieu, and Bulemaqui. I might mention other excellent writers on this subject; but if you attend, diligently, to these, you will not require any others." 1 THE PAPERS OF ALEXANDER HAMILTON 86 (Harold C. Syrett ed., 1961).

106 Turnbull, *supra* note 10, at 143, notes that Kames presented John Adams with a copy of the *Historical Law-Tracts*, that Jefferson possessed a copy, and that Madison attended lectures on the legal philosophy of Kames at Princeton. *See generally* LORD HENRY HOME KAMES, *ESSAYS ON THE PRINCIPLES OF MORALITY AND NATURAL RELIGION* (Edinburgh, A. Kincaid & A. Donaldson 1751); LORD HENRY HOME KAMES, *ESSAYS UPON SEVERAL SUBJECTS CONCERNING BRITISH ANTIQUITIES* (Edinburgh, A. Kincaid 1747); LORD HENRY HOME KAMES, *HISTORICAL LAW-TRACTS* (Edinburgh, Bell & Bradfute 4th ed. 1817).

### III. WILSON REVISITED

#### THE WALN ACCOUNT

Let us now return to James Wilson. I mentioned that, in addition to the 1805 letter written by his cousin, Robert Annan, there is a second account of Wilson's early life. This is a biographical sketch of about fifty pages, first published in 1824, as a contribution to a nine-volume series, *Biography of the Signers to the Declaration of Independence*.<sup>107</sup> The sketch of Wilson was written by Robert Waln, Jr.

Waln's account of Wilson's early life tells a story significantly different from Annan's. Like Annan, he notes that Wilson's father was a reputable lowland Scots farmer, and that he provided James Wilson with an excellent classical education. But here the accounts diverge. "After leaving the grammar school," Waln says,

he studied at Glasgow and Edinburgh, and previously, for a short period, at St. Andrews. It was under the tuition of the famous Dr. Blair, in rhetoric, and of the not less celebrated Dr. Watts, in rhetoric and logic, that he laid the foundation of the celebrity which he subsequently acquired, as a powerful orator, and almost irresistible logician. His youthful character was correct and praise-worthy.

Waln also remarks that, when Wilson arrived in America, he brought "with him an excellent classical and scientific education, and attainments especially conspicuous in history and natural law."<sup>108</sup>

Waln says nothing about Wilson's study for the ministry. He instead lays the emphasis on rhetoric and classics, on history and natural law; and he adds the information that Wilson also studied at Edinburgh and Glasgow. Hugh Blair ("the famous Dr. Blair") was appointed to the chair of Rhetoric and Belles Letters at Edinburgh in 1762, at a time when Wilson was still in Scotland. Also at Edinburgh

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107 The first edition of *Biography of the Signers to the Declaration of Independence* was published in Philadelphia in nine volumes, which appeared between 1820 and 1827. It is not entirely clear who wrote which biographies. The first volumes appear to have been written by John Sanderson (1783–1844), whose name appears on the title page of the first volume, along with the printer (J. Maxwell, Philadelphia). By the time of publication of Volume VI (the volume which contains the biography of Wilson), Sanderson's name has vanished, and Volume VI is presented as "By Robert Waln, Jr." The publisher is R.W. Pomeroy, and the printer J. Maxwell. Library catalogues sometimes list the series under the name of Sanderson or even of Pomeroy. In 1828, a second edition ("Revised, Improved and Enlarged") was published in five volumes by Brown and Peters, Philadelphia; in this edition, no authors are identified at all, and Waln's sketch of Wilson appears in Volume III. The second edition omits the important appendix of letters between Waln and Bird Wilson which appear at the end of Volume VI of the first edition.

108 3 BIOGRAPHY OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 259–60 (Robert Waln, Jr. ed., 2d ed. 1828).

was Adam Ferguson, who was appointed to the chair in Moral Philosophy in 1764, a post he held until 1785. As for Glasgow, Adam Smith had been teaching there since 1751 until his resignation in the middle of the session of 1764. John Millar joined him as Regius Professor of Civil Law in 1761, and Thomas Reid as Professor of Moral Philosophy in 1764.<sup>109</sup> These are all figures of central importance—not just to the Scottish Enlightenment, but to the constitutional thought of the American Revolution in general, and to the thought of James Wilson in particular. We know from his later writings that Wilson was deeply familiar with their works (including works that were published after he had emigrated to America in 1765). So one would like to know whether the Waln account is correct.

This raises the question: Who was Robert Waln, Jr., and how much credibility should we give to his account?<sup>110</sup> Waln was a member of a prominent Philadelphia mercantile family. He was a prolific writer, producing several books and some fourteen of the *Biographies of the Signers*. He died in 1825, the year after the Wilson biography was published; Waln was thirty. From the sheer quantity of his writing, it is clear that he worked with remarkable speed; so it would not be surprising if his account contains some errors. And, unlike Annan, he did not know Wilson directly. But Waln's historical work involved serious research. His biography of Wilson shows that he had gathered accurate information about Wilson's role at the 1787 Convention, at a time when that information was not yet publicly known. (Madison's *Notes of the Convention* were not published until 1840, and until that time the proceedings were a well-guarded secret.) Moreover, Waln had the cooperation of James Wilson's son, Bird Wilson. It is clear that Bird supplied him with a copy of the Annan letter, for he reproduces Annan's account of Wilson's arrival at Philadelphia. It is also clear that Bird went to considerable trouble to clear up the allegation that, during the Revolution, Wilson had fa-

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109 Basic biographical information about these thinkers, and the dates of the university appointments, can be found in the relevant entries in any large encyclopedia; for instance, JOHN KEAY & JULIA KEAY, COLLINS ENCYCLOPAEDIA OF SCOTLAND (1994). Of all these luminaries, Hugh Blair today seems far the least significant, but at the time he was considered a major figure. His writings on rhetoric and literature—especially his *Lectures on Rhetoric and Belles Lettres* (1783) and his *Sermons* (1777–1801)—were to be highly influential in America well into the nineteenth century.

110 The facts in this paragraph are taken from the entries, *s.v.* "Waln," in 19 DICTIONARY OF AMERICAN BIOGRAPHY (Dumas Malone ed. 1936); 22 AMERICAN NATIONAL BIOGRAPHY (John G. Garraty & Mark C. Carnes eds., Oxford University Press 1999); and from the entry on Waln in HENRY SIMPSON, THE LIVES OF EMINENT PHILADELPHIANS 928 (Philadelphia, William Brotherhead 1859).

vored removing Washington from command of the American army. The allegation was easily shown to be false; and Bird supplied Waln with documentation that Waln then published as an appendix to his *Life*. It is also likely that Waln had access to documents that have subsequently disappeared.

In other words, Waln was a serious scholar, a member of a prominent Philadelphia family, writing a biography of perhaps the most prominent Philadelphian (Franklin excepted) of the Revolutionary era, writing at a time when many who had known Wilson were still alive, and writing under the vigilant eye of Bird Wilson, who would have corrected any statement about his father that he recognized as an obvious error. So it is likely that Waln proceeded carefully, and his version of events must be taken seriously.

For some reason, he chose to deviate from the details of the Annan account; but evidently he had some basis for thinking that Wilson had studied at Glasgow and Edinburgh under “the famous Dr. Blair.” Subsequent biographers have tended to dismiss his account, which was somewhat uncritically accepted by biographers in the nineteenth century. The 1956 biography by Page Smith makes no reference at all to Waln. (Smith relies entirely upon the Annan letter, which he embellishes with speculations about how much “Jamie” appreciated his mother’s cooking.)<sup>111</sup> The 1978 biography by Geoffrey Seed (who himself taught at St. Andrews) says (without mentioning Waln) that “[i]t has often been asserted that [Wilson] studied in turn at the universities of Edinburgh and Glasgow, but there is no clear evidence of this, and the records of those universities reveal no trace of him.”<sup>112</sup> Mark David Hall, writing in 1997, notes that the class rolls for the University of Edinburgh contain a signature for a “James Wilson” in Hugh Blair’s 1763 logic class; but he does not explicitly connect this fact to the Waln account; and he, like Seed, declares that there is no surviving evidence to show that Wilson studied at Glasgow.<sup>113</sup>

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111 Smith, *supra* note 2, at 10–11, 14–15. While the speculations about Wilson’s delight in his mother’s oatmeal occur on those pages, they appear to be an invention.

112 GEOFFREY SEED, *JAMES WILSON* 10–11 (1978). Seed, like Smith, does not explicitly refer to the Waln account.

113 MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742–1798* (1997). Hall’s discussion of the evidence occurs on pages 7–9. His footnotes indicate that his information is based on correspondence with the archivists at Glasgow and Edinburgh. He correctly notes that the name “James Wilson” was common in eighteenth-century Scotland, and suggests that the signatures of “James Wilson” for two classes at Edinburgh in 1765 probably do not belong to the American Founder.

At this point, the accounts of Waln and of Annan again converge. We know that in June of 1765 Wilson began to study accounting in Edinburgh with Thomas Young, but that he emigrated to America not long thereafter.<sup>114</sup> Annan says that, after his stint as a tutor in “a nobleman’s” family, Wilson, like so many young Scots, decided to emigrate:

His genius being too sublime for such low drudgery he formed the resolution to try his fortune in America. He arrived in Philadelphia in about the year 1766 an entire stranger in a strange land.

The account given by Waln is consistent with this evidence. He says that:

Soon after the completion of his education, and without selecting or embracing any profession, he resolved to emigrate to America, and endeavour, by the exercise of the talents, industry, and integrity, which he amply possessed, to realize, in a new country, that independence which his own could not afford. He arrived at New York in about the twenty-first year of his age, bringing with him an excellent classical and scientific education, and attainments especially conspicuous in history and natural law. In the beginning of the year 1766 he reached Philadelphia, with highly recommendatory letters to gentlemen of that city, one of whom was Dr. Richard Peters, rector of Christ and St. Peter’s churches, by whom he was particularly patronised, and introduced as an usher into the Philadelphia college and academy. Dr. Peters had been the secretary of the province, and, during forty years, the confidential friend and agent of the proprietaries. He was an original trustee of the college and academy, and being a man of learning, and zealous in its cause, was a competent judge of the capacity of any person presenting himself as a tutor, or professor. Mr. Wilson was considered by the trustee, before whom he was examined, as the best classical scholar who had offered as a tutor in the Latin department of the college.<sup>115</sup>

The records of the University of Pennsylvania confirm these accounts, and show that Wilson served as a tutor in Latin in the College of Philadelphia in early 1766. Waln is certainly correct that he impressed the trustees of the College; for later that spring he was awarded an honorary master’s degree “in Consideration of his Merit, and his having had a regular Education in the Universities [sic] of Scotland.”<sup>116</sup>

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114 Letter from Thomas Young to James Wilson (Jan. 24 1785). The original is in the Historical Society of Pennsylvania, James Montgomery Collection (#940), Box 3 of the James Wilson Correspondence.

115 3 BIOGRAPHY OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE, *supra* note 108, at 260.

116 Volume 1 of the Minute Books of the Trustees of the University of Pennsylvania 1749-68 (College, Academy, and Charitable School) contains two entries mentioning Wilson’s honorary degree. The first entry occurs on page 309, is dated 19th May 1766, and reads, “Mr. Wilson, one of the Ushers, having petitioned for the honorary Degree of Master of Arts, the Trustees agreed to grant him the same, in Consideration of his Merit, & his hav-

This was a highly unusual event: on average the College in the 1760s awarded less than one honorary degree a year.<sup>117</sup> Wilson was to preserve his connection to the College of Philadelphia throughout his life.

The details of Wilson's early life and education are scanty; but it is clear that, in the spring of 1766, a highly talented young Scotsman had arrived in Philadelphia, armed with the most recent learning of the Scottish Enlightenment, and keenly ambitious. He arrived, moreover, in the middle of the great crisis of the British Empire, the Stamp Act crisis of 1765–1766. Constitutional questions loomed large; and the young man remained only a few months as a tutor of Latin. He next turned his energies to the study of law, and placed himself under the apprenticeship of John Dickinson. To that episode in Wilson's intellectual development it will be necessary to turn next.

#### IV. CODA: RECENT DISCOVERIES

After this Article was substantially finished, I conducted some supplementary archival research on Wilson at the University of St. Andrews. The records are not extensive, but the University archive possesses the library lending lists covering at least part of Wilson's time at St. Andrews. The extant volume shows his library borrowings between November, 1757 and February, 1759. (The subsequent volume covering his later years has apparently been lost.) The surviving lending list shows that Wilson withdrew and returned a dozen volumes. They are: the *Guardian*, vol. 2 (checked out twice); Clarke's *Justine* (Latin-English); Gibbs's *Short Writing*; Clarke's *Suetonius* (Latin-English); the *Life of the Earl of Crawford*; Swift's *Works*, vol. 5; Walton's *Horace* (Latin-English); Hooke's *Roman History*; Clarke's *Iliad*; Rol-

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ing had a regular Education in the Universities of Scotland." The Trustees on that day turned down two other petitions for honorary degrees, noting "that the Intention of honorary Degrees, was only a Mark of Distinction to strangers of Merit, and approved Literature." The second entry occurs on page 311, is dated May 20th 1766, and describes that day's public Commencement. The Minutes record that "The honorary Degree of Master of Arts was at the same time conferred on Joseph Reed, Esqr.; of Trenton, & Mr. James Wilson, one of the Tutors in this College, in Regard to their particular Learning & Merit." I TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA MINUTE BOOKS 1749–1768 at 309 (available at <http://dewey.library.upenn.edu/sceti/codex/public/PageLevel/index.cfm?WorkID=787&Page=333>).

117 UNIV. OF PA., BIOGRAPHICAL CATALOGUE OF THE MATRICULATES OF THE COLLEGE, 1749–1893, at 518 (Philadelphia, Avil Printing Co. 1894) lists Joseph Reed and Wilson as the two recipients for 1766. David Rittenhouse, the important Philadelphia scientist, received a degree the following year. There were no recipients in 1764 and 1765, and no recipients in 1768–1770.

lins's *Roman History*; and Tillotson's *Sermons*. These books plainly cannot represent the entirety of Wilson's reading during the fourteen month period, but it is striking that this list from early in his college career is heavy on classical history and literature and contains only one work of religion.

Far more surprising than the lending lists at St. Andrews, however, was a discovery communicated to me by Mr. Martin Clagett, who had independently been investigating Wilson's Scottish background. To appreciate Clagett's discovery, it should be remembered that the principal biographers of Wilson have taken the view that Wilson studied only at St. Andrews. Clagett's work will be published separately, and will give full documentation of his discoveries. But the two principal points are these. First, Wilson, from 1762 to 1764, apprenticed himself to a lawyer and town clerk, William Robertson; this was in the town of Cupar, close to St. Andrews, where he had attended grammar school. This fact indicates that he had already begun the study of law before he left Scotland; and this early training was doubtless why he was able to complete his legal education in Philadelphia after scarcely a year of apprenticeship with John Dickinson. Secondly, Clagett has found Wilson's signature on the borrowing records at the University of Glasgow during the years 1764–1765. As was the case at St. Andrews, the books at Glasgow are overwhelmingly books of classics and ancient history. It should be remembered that Adam Smith resigned from his chair at Glasgow in the middle of the session of 1764, to be replaced by Thomas Reid; whether Wilson met or studied under either of these two men is unknown.

On the basis of Clagett's important new information, I am now inclined to believe that Waln's account is correct, and that Waln had access to documents that have subsequently disappeared. It seems, at any rate, that Wilson studied at more than one of the Scottish universities, and that at some point while he was still in Scotland his ambitions shifted decisively from theology to law. For reasons given above, the significance of this latter shift should not be exaggerated, since at the time the two disciplines were more closely related than they are today, and shared an overlapping curriculum. But when Wilson arrived in Philadelphia he already had received a thorough exposure to the most advanced philosophical and legal thought of the age.