

THE SPORTING LIFE: DEMOCRATIC CULTURE AND THE HISTORICAL ORIGINS OF THE SCOTTISH RIGHT TO ROAM

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In 2003, the Scottish Parliament enacted the Land Reform (Scotland) Act, which, among other reforms, grants to “everyone” a right to access virtually all land in Scotland for a wide variety of purposes, including recreation, educational activities, and even some commercial or for-profit activities. Legal recognition of this broad-ranging “right to roam” comes after more than a century of debate over the public’s right to access privately-owned land in the Scottish Highlands.¹ This Article is the first historical account of the origins of the remarkable Scottish right to roam. It sets the debate over the right to roam with a clash between two different visions of the sporting life. One, older, rooted in the Victorian and Edwardian periods, viewed the sporting life as one of hunting, aided by the use of modern technology—rifles and such—and much older technology in the form of dogs and horses. The other vision is of more recent vintage. It is a vision of contact with nature through walking, hiking, and similar forms of unmediated interaction with nature. Curiously, both visions of the sporting life claimed the mantle of preservation and conservation. This Article argues that the culture of unmediated contact with nature ultimately prevailed as a democratic culture became more entrenched in both politics and society.

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1. The debates were about access rights mainly in the Highlands but not exclusively so.

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Democracy sometimes develops in unexpected ways. This is as true of democratic social practices as it is its political institutions. Scotland's modern right to roam,² as it is called, is a democratic social practice. It may be exercised by anyone,³ rich or poor, old or young, landowner or tenant, man or woman. Indeed, there is no requirement even to be a Scot. What could be more democratic?

2. See Land Reform (Scotland) Act, 2003, (A.S.P. 2).

3. *Id.* § 1(1) (“Everyone has the statutory rights established by this Part of this Act.” (emphasis added)).

Democracy is not simply a set of political institutions and practices. It is also a culture. Democratic culture, like all cultures, is not a binary matter. That is, it does not switch off or on, but rather develops, usually slowly, over time. As democratic culture develops, it thickens and deepens, extending to increasingly further reaches of society. The thickness of democratic culture also means that its practices broaden, encompassing a greater range of social activities.

All of this is true regarding the development of the Scottish right to roam as a practice of democratic culture. Roaming, hiking, mountaineering—all of these activities are forms of recreation, and recreation is a cultural practice whose social character may be democratic in a broad sense of the term or profoundly elitist. Access to any particular form of recreation reveals a great deal about that practice's social character. It also reveals the character of the society generally: specifically, how broadly inclusive or exclusionary it tends to be. By looking at the historical development of particular recreational practices, we can gain understanding about not only the development of legal norms but also, more fundamentally, the society's conception of democracy at a particular time.

This Article uses the public's right to access mountains, moorlands, and other open areas—the right to roam—as the lens through which to examine the development of the democratic character of recreation and of society itself in Scotland. As I will later discuss, I use the terms democratic and democratization not in a thick sense but to suggest a gradual movement away from rigid class-based social hierarchy and exclusion. This somewhat thin conception of democracy is appropriate for analyzing sport in Scotland, indeed all of Britain, throughout the nineteenth and well into the twentieth centuries. Britain, including Scotland, was a profoundly hierarchical society during this period, and access to many places and activities, including many forms of recreation, was practically if not legally denied to the vast majority of the population.

The narrow aim of this Article is relatively straightforward: It is to show how the 2003 Scottish Land Reform Act represents part of a gradual evolution toward a more democratized—less exclusionary—vision of sport and leisure in the specific sense of providing more public access to recreational spaces. The broader aim of the Article is more tentative and more speculative: It is to suggest the possibility that increased public access to recreational spaces facilitates, though it does not ensure, democratizing interactions. That is, sharing a space may be a necessary, though surely not a sufficient, condition for extending socially democratic culture. As the Article later discusses, however, the point must not be pushed too far, for under some circumstances shared public spaces can be sites of social divisions.

Parts I through IV sketch the story of social hierarchy and exclusion in the context of land during eighteenth and nineteenth century Britain and Scotland. This story sets the background for the evolution toward a

more democratic, i.e., non-exclusionary, vision of the recreational use of land in the second half of the nineteenth century and the twentieth century through efforts to provide more public access to recreational areas. Part I discusses that part of the specifically legal part of the story that concerns land ownership. Although land ownership was hierarchical throughout Britain in the eighteenth and nineteenth centuries, the pattern was especially acute in Scotland, where legal ownership forms remained feudal, both technically and practically. Part II adds further detail to the picture of social exclusion in land ownership in late eighteenth and early nineteenth century Scotland by describing how the “Clearances” of tenant farmers paved the way for the creation of large Highland deer forests, a development described in Part III. The rise of the great Highland deer forests was an important factor in the exclusion of non-elites from recreational use of Highland land. Part IV provides the final piece of the requisite background for the story of the struggle for a right to roam by describing the role of railroads in providing access to the Highlands for elites who wished to use the great deer forests for their own preferred sport—hunting. The elites’ vision of the sporting life conflicted with the vision held by nonelites who viewed the Highlands as the ideal domain for walking and hiking. The clash between these two visions of the sporting life was one of the factors that contributed to repeated failures to achieve legal recognition of a right to roam in Scotland and, indeed, Britain in general, from the second half of the nineteenth century until 2003. The story of that struggle begins in Part V, where the Article chronicles the first stage of the struggle for legal recognition of a Scottish right to roam. While aspects of previous parts of the story have applied to Britain generally, this part is specifically Scottish. Part VI completes the narrative of the road to legal recognition of a right to roam to the modern chapter. Finally, Part VII extends the analysis of the democratization of recreation by relating the story of Scotland’s right to roam to recent developments regarding public access to recreation sites in American property law.

I. LAND AND SOCIETY IN THE SCOTTISH HIGHLANDS BEFORE THE RAILROAD

The Scottish Highlands of the early eighteenth century was an area of scanty population; limited, scattered cultivation; and little mineral wealth.⁴ The whole area has been described as “a tangled mass of contorted rocks.”⁵ What little farming was done there was rudimentary and at a subsistence level. Farms were scattered among the bases of the mountains and hills that dominated the terrain, and their location was dictated less by the quality of soil—never very good—than by the topography of the area north of the geological line that separates the highlands

4. See MALCOLM GRAY, *THE HIGHLAND ECONOMY 1750–1850*, at 3 (1957).

5. *Id.* at 4.

from the more benign Lowlands. Settlements were clustered primarily along the eastern and western margins of mainland hills. The vast interior was penetrated only by thin strands of settlements. By one estimate in 1800, the total percentage of Highland land surface that had been put under the plough stood between nine and fifteen percent.⁶ Farms were small, typically no more than a few acres, often consisting of scattered patches.⁷ Only some of the patches, those located on low ground, consisted of arable soil; the rest was rough pasture, hill, or muir. Meadow was scarce and did not always occur naturally, such that its distribution could be based on the distribution of arable land.⁸ The quality of farming of the arable portions was low, as soil conditions were poor.⁹ Many Highland soils were, and remain, coarse and stony. They are also typically wet and highly acidic.¹⁰

During this earlier period pasture land was used primarily for grazing cattle. Sheep farming came later.¹¹ Cattle-rearing, which came naturally to the Highlands, was largely undertaken for the market, the market being located mainly in the Lowlands.¹² Indeed for many years cattle formed the backbone of the Highland economy.¹³ It was virtually the only cash product for most farms and the most important source of cash for most peasant families. A factor would evaluate a peasant's fitness to continue as a tenant by the state of his stocks rather than his fields.¹⁴

A. *Land Tenures in the Highlands*

Until the late eighteenth century, farms were not arranged on the basis of what English and American lawyers call individual fee ownership, or even individual holdings, but in composite social units.¹⁵ Small groups of tenants arranged their holdings on the basis of the principles of the runrig system, which was a form of common holding of land then prevalent throughout Scotland. Rigs were narrow strips of cultivated land ("runs" were the actual furrows; "rigs" the ridges).¹⁶ Under the traditional runrig system, different individual farmers periodically cultivated

6. ENG. BD. OF AGRIC. AND INTERNAL IMPROVEMENT, 1 GENERAL REPORT OF THE AGRICULTURAL STATE AND POLITICAL CIRCUMSTANCES OF SCOTLAND app. at 49, 54 (John Sinclair ed., 1814) (charts); see also GRAY, *supra* note 4, at 6.

7. See GRAY, *supra* note 4, at 7.

8. *Id.* at 8.

9. *Id.* at 5.

10. See Scottish National Heritage, *The Soil Landscapes of Scotland*, <http://www.snh.org.uk/publications/on-line/livinglandscapes/soils/soillandscapes.asp> (last visited on Oct. 19, 2015).

11. There were sheep but no sheep farms in the Highlands before 1760. GRAY, *supra* note 4, at 38.

12. See *id.* at 15.

13. See *id.* at 36; see also T.M. DEVINE, *THE SCOTTISH NATION: A HISTORY 1700–2000*, at 171 (1999).

14. GRAY, *supra* note 4, at 37.

15. See *id.* at 6.

16. See JOHN RANKINE, *THE LAW OF LAND-OWNERSHIP IN SCOTLAND: A TREATISE ON THE RIGHTS AND BURDENS INCIDENT TO THE OWNERSHIP OF LANDS* 505 (2d ed., London, Bell & Bradfute 1884).

different adjacent rigs. Each farmer owned a number of rigs, which were interspersed with the rigs of the other small farmers, and each owner had an undivided share of the ownership of the common hill.¹⁷

The land tenure that prevailed throughout the Highlands during this period was feudal, and the social structure that it supported was equally hierarchical. “This is truly the patriarchal life,” Dr. Samuel Johnson observed on his 1773 tour of the Highlands.¹⁸ Feudalism coexisted uneasily with many elements of Gaelic and clan culture, causing feudalism to spread less rapidly in the Highlands than elsewhere in Scotland, but by the beginning of the seventeenth century, all of Scotland was covered by feudal tenures.¹⁹

A shift in the number of landowners accompanied feudalism’s entrenchment. At the end of the sixteenth century a consistent pattern of ownership, in which the same families owned estates for centuries, had become apparent.²⁰ During the first half of the seventeenth century, however, this pattern began to change as the total number of landowners started to decline, a trend that accelerated in the second half of the seventeenth century.²¹ The result was a reconcentration of land ownership into fewer and fewer hands, and this pattern of reconcentration of ownership continued throughout the eighteenth and into the nineteenth centuries.²² Moreover, kinship declined in importance as the economic role of land through rents assumed greater and greater prominence.²³

One important consequence of this change was that landowners became a more unified social and economic class. The old hierarchical gap between tenants-in-chief and landowners holding by a feu charter²⁴ had diminished. Tenants-in-chief and their nominal superiors came to hold much more in common as landowners. More important was the growing gap between landowners and nonlandowners or truly subordinate tenants,²⁵ about which we shall have more to say shortly.

The landownership system in Scotland was mainly feudal, but there were vestiges of the traditional pre-feudal regime. One of these was the commonty. Commonties were lesser estates, similar to but different from

17. Robin Callander, *The History of Common Land in Scotland* § 3.6 (Caledonia Ctr. Soc. Dev., Working Paper, 2003) (on file with author); see also GRAY, *supra* note 4, at 19.

18. JAMES BOSWELL, *BOSWELL’S JOURNAL OF A TOUR TO THE HEBRIDES WITH SAMUEL JOHNSON*, LL.D. 135 (Frederick A. Pottle & Charles H. Bennett eds., 1936).

19. See ROBIN FRASER CALLANDER, *A PATTERN OF LAND OWNERSHIP IN SCOTLAND* 31 (1987).

20. See *id.* at 32.

21. *Id.* at 32–33.

22. See *id.* at 33.

23. See *id.*

24. Under Scottish feudal land law, feus (fiefs or fees) were holdings of land (*dominium utile*) by vassals in perpetuity, granted by superiors, under which the vassal has the full use of the property, limited only by the conditions imposed in the grant by the superior. Feu charters were one form of grant of feus (the other two were feu dispositions and feu contracts). The Abolition of Feudal Tenure (Scotland) Act 2000 abolished this system, effective 2004. See generally KENNETH REID, *THE LAW OF PROPERTY IN SCOTLAND* 57–76 (1996).

25. See CALLANDER, *supra* note 19, at 34.

commons in important respects. A leading nineteenth century treatise gives the following explanation:

Commonty may be described as a species of common property, differing, however, from th[at] right . . . in three ways—in the mode or origin of its constitution, in the manner of its enjoyment, and in the rules for its division. It is distinguished from the Roman usufruct, as being not personal but an accessory of the private estate of the commoners; from the Scotch liferent, as being perpetual and without any reversionary right of fee in another; from servitude—and especially from the servitude of pasturage—as being a right of common property, which cannot be prescribed for beyond the express boundaries of a grant, and which gives a right of demand and an obligation to suffer the statutory division.²⁶

Commonties were exercised over uninhabited areas, varying in size from a few acres to thousands of acres. The traditions of common use predated the arrival of feudalism, but seventeenth-century legislation altered them in ways that made them not genuine commons as traditionally understood.²⁷ Rather than being open to use by anyone, commonties were now linked with neighboring (though not necessarily adjacent) landownership. Use rights in commonties were dependent upon ownership of neighboring land rather than being freestanding estates or interests such as servitudes. A 1695 statute provided that a commonty could be divided at the instance “of any having interest” by an adjudicatory proceeding in the county where the commonty existed.²⁸ Both the intent and the effect of such legislation was conversion of commonties into a form of individual ownership. The long-term effect was to strengthen the power of the large landowners.

B. The Great Landowners and the Rise of Concentrated Landownership

With regard to land ownership, the most marked characteristic of the seventeenth century, especially during the second half, was the rise of the Great Landowners. True landowners, men with the right to inherit land and to sell the land that they held, were not numerous. One estimate places the total number of such owners at less than 5,000.²⁹ The result of such small numbers was a high degree of concentration of landownership. Valuation rolls in Aberdeenshire for 1667, for example, indicate that 8.1 percent of the landowners (the fifty-one largest) owned forty-four percent of the county’s valued rent among them.³⁰ Of that eight percent, the larger landowners held a disproportionately large share, indicating still greater concentration of landownership.

26. RANKINE, *supra* note 16, at 498–99 (footnotes omitted).

27. *See id.* at 103.

28. *See id.* at 501.

29. T.C. SMOUT, A HISTORY OF THE SCOTTISH PEOPLE, 1560–1830, at 126 (1969). The exception is the Southwest, where very small estates were common.

30. CALLANDER, *supra* note 19, at 38.

Land owners were not homogenous. They generally fell into three groups. At the top of the feudal pyramid were the Great Landlords, who were mainly nobles and titled aristocrats. They held their land directly from the Crown. Of these there were fewer than a hundred.³¹ The second category were the lairds, comprising a more diverse group, both in their backgrounds and their sources of wealth (Great Landlords derived their wealth primarily from their large estates).³² The final group was that of the smaller landowners, who were more comparable to modern owner-occupants. Some of these held titles, but most were the beneficiaries of feuing of small parcels of land by the Crown or the Church.³³

For both the titled owners and lairds, there were two forms of tenure by which they held land. These were wardholding and feufarm. Significant differences existed between them. Wardholding originated as a military tenure, obligating the holder to provide his lord knight service.³⁴ Military tenures were very meaningful to Highland owners, who often were chiefs of their clans.³⁵ In such a society, the ability to have several hundred men answer his call to arms mattered far more than whatever few luxuries he might allow himself.³⁶ The importance of military tenure declined greatly after the disastrous Jacobite Rebellion of 1745 (“the ‘45”) and the ensuing attack on the entire clan culture.³⁷ Wardholding itself was abolished in 1746.³⁸ What replaced military obligation was money rent, and with the rise of the cash economy came many more changes, including growing interdependency between the Highlands and Lowlands.

Feufarm, the more recent of the two tenures, was also less personal, involving as it did only the payment of money rather than some personal type of obligation, like wardholding. The tenant paid his superior a rent known as a feu-duty, which was fixed in perpetuity.³⁹ As the advantage of having a regular source of cash income over personal military duties became increasingly apparent to nobles, feufferme replaced wardholding in large parts of the country by the end of the seventeenth century.⁴⁰

Continuing down the pyramid, just below the landowners was a subordinate class of gentry, not true landowners but still distinguished in wealth and social status from the peasantry. These were the tacksmen (so called because in Scotland leases were called “tacks,”⁴¹) who frequently

31. See T.C. SMOUT, *A HISTORY OF THE SCOTTISH PEOPLE 1560–1830*, at 126 (2d ed. 1970).

32. SMOUT, *supra* note 29, at 136.

33. See CALLANDER, *supra* note 19, at 38–39.

34. SMOUT, *supra* note 29, at 136.

35. See JOHN PREBBLE, *THE HIGHLAND CLEARANCES* 20 (1963).

36. *Id.* at 19.

37. *Id.*

38. Tenures Abolition Act, 1746, 20 Geo. 2, c. 50, § 1 (Scot.) (“The tenure of lands or heretages in Scotland by ward holding . . . are hereby taken away and discharged . . .”).

39. On feudal tenures in Scotland, see SMOUT, *supra* note 29, at 136.

40. See *id.* at 136–37.

41. On the historical origins of the tack, see Martin Hogg, *Leases: Four Historical Portraits*, in *A HISTORY OF PRIVATE LAW IN SCOTLAND* 363 (Kenneth Reid & Reinhard Zimmermann eds. 2000).

belonged to branches of the owner-chieftain's family. They in turn sublet to small tenants.⁴²

At the bottom of the feudal hierarchy were the peasants, who constituted the vast majority of the population.⁴³ They, too, were organized hierarchically according to their tenure and their position in the farming community. At the top were those peasants who held directly of the landowner. These were tacksmen. Some of these were joint tenants, whose interests might be quite small, especially in the Highlands.⁴⁴ Below the tacksmen were the crofters and the cottars. These lived in huts and had a small amount of fertile land as well as a right to graze a few animals on the moor.⁴⁵

The legal status of subtenants, especially crofters and cottars, commonly was precarious. Generally, they had no written leases and held as tenants-at-will or perhaps under short terms.⁴⁶ Crofters and cottars invariably were tenants-at-will. This contrasted with the terms of tacksmen, especially in the Highlands in the eighteenth century. It was common for major landowners there to let large tracts of land to tacksmen for periods ranging from nine to ninety-nine years.⁴⁷ Tacksmen holding large tracts under long-term leases would commonly sublet smaller portions to occupiers, who were at the bottom of the feudal heap.⁴⁸ But in time, during the Clearances, the tacksmen would experience the jolt of removal at the hands of large owners, along with the cottars.⁴⁹

C. *Land and Wealth in the Highlands in the Seventeenth and Eighteenth Centuries*

Throughout Scotland, but particularly in the Highlands, land was wealth, and it was power.⁵⁰ This was true throughout the seventeenth century, and the Great Landowners were the main source of capital.⁵¹ They dominated the country's land market, often purchasing land directly by taking advantage of the debts of small landowners. As one commentator observes, "The importance of these powerful landowners in the affairs of Scotland during the 17th century is hard to overestimate."⁵²

42. See DAVID M. WALKER, *A LEGAL HISTORY OF SCOTLAND, VOL. V: THE EIGHTEENTH CENTURY* 58–59 (1998).

43. One estimate places the peasant population as constituting three-fourths of the entire Scottish population. See SMOUT, *supra* note 29, at 144.

44. See *id.*

45. See *id.* at 145. Crofters were generally a little better off than cottars, who sometimes had no more than a single cow and a thin strip to farm. *Id.*

46. See PREBBLE, *supra* note 35, at 21.

47. See WALKER, *supra* note 42, at 750.

48. See *id.*

49. See PREBBLE, *supra* note 35, at 64, 69–70.

50. See Loretta Timperley, *The Pattern of Landholding in Eighteenth-Century Scotland*, in *THE MAKING OF THE SCOTTISH COUNTRYSIDE 137* (M.L. Parry & T.R. Slater eds., 1980).

51. See CALLANDER, *supra* note 19, at 42.

52. *Id.* at 44.

The picture remained much the same throughout the eighteenth century. Concentration dominated the pattern of landownership, and the Great Landowners continued their rule at the top of the hierarchical pattern.⁵³ In Aberdeenshire, for example, the number of landowners in 1770 had declined to one-third of the number from a century earlier, and this number was not atypical of the rest of Scotland.⁵⁴ There were legislative reforms abolishing some of the old feudal institutions such as wardholding, but these did not change the pattern of concentrated landownership.⁵⁵ Large estates grew larger, and titled families continued to dominate.⁵⁶ At the very end of the eighteenth and during the first half of the nineteenth centuries, the power that came with concentrated land ownership allowed the Great Landowners in effect to eliminate the feudal hierarchy by clearing their lands of both tenants-at-will and middlemen during the tragic emptying of the Highlands euphemistically known as the Clearances.⁵⁷

II. THE CLEARANCES

The standard version of the story of the Highland Clearances is straightforward enough.⁵⁸ The story, so told, proceeds as follows.

The Highland Clearances occurred primarily during the period between 1780 and 1855 when landlord-owners systematically cleared the common people, small farmers, off their traditional lands, replacing them with sheep-farmers from the south, whose business was far more profitable than that of cottars and other such tenants. These landlords were mainly from old social elites who had become Anglicized following the debacle of the '45 and spurned the old traditional Celtic worldview in favor of the new capitalist creed of Adam Smith. The sheep-farmers who replaced the ousted traditional small farmers were motivated by one thing—profits. To that end, they introduced new so-called “improvements” and introduced new practices, such as large sheep walks, that required fundamental changes in Highland agrarian economy and society. Entire communities and families were disrupted and displaced, triggering waves of emigration to North America that would result in a vast Highland diaspora. The result was the demolition of an entire way of life, a communal society bond by close ties of kinship. *Gesellschaft* replaced *gemeinschaft* in the Highlands, as an individualistic, profit-maximizing mentality took hold.⁵⁹

53. See *id.* at 45–59. According to one estimate, in 1770, the Great Landowners controlled just over 50 percent of the agrarian wealth in Scotland, with county figures varying from between 0 to 73.6 percent. Timperley, *supra* note 50, at 151. The lairds controlled 41.6 percent nationally that year. *Id.*

54. See CALLANDER, *supra* note 19, at 45, 48.

55. See *id.* at 46.

56. Two-third of the owners with land valued over £4,000 (Scots) were titled. *Id.* at 51.

57. See I ERIC RICHARDS, A HISTORY OF THE HIGHLAND CLEARANCES: AGRARIAN TRANSFORMATION AND THE EVICTIONS 1746–1886, at 32 (1982).

58. See *id.* at 3–5.

59. See *id.* at 3–4.

Thus told, the story is slightly embellished, obviously. Nevertheless, its core holds true. The complete story, of course, is more complex.⁶⁰ Although the main period of the clearances occurred between 1790 and 1855,⁶¹ clearances actually were spread out over a much wider span of time.⁶² They began well before 1780 and continued well beyond 1855. The Highlands were under strain before the clearances, as both emigration and agrarian changes took their toll on the traditional society. Emigration already occurred on a significant scale prior to the first major clearances.⁶³ Emigration to Ulster already had occurred before the union. Between 1650 and 1700, some 60,000–100,000 Scots had settled in Ireland, and Ulster had virtually become a Scottish colony.⁶⁴ Following the union an even more entrenched pattern of emigration to North America developed.⁶⁵

Agrarian changes, too, well preceded the Highland Clearances. The wide-ranging changes in the agrarian that came under the code word “Improvements,” a kind of creed that was promoted by propagandists like James Loch⁶⁶ and John Sinclair,⁶⁷ began in the last decades of the eighteenth century. Improvement practices varied depending upon local conditions, but there were certain common features. Enclosure was everywhere, as were the use of modern ploughs and summer fallowing.⁶⁸ Runrig and the tacksman came under attack after 1770.⁶⁹ The trend was all toward consolidation, individuation, and new methods of production.

Improvements were largely responsible for the development of crofting. Landlords gave special incentives to people to take small plots of uncultivated land, especially moor land, and convert them into arable farms. Such farms were quite small and usually devoted to potato cultivation. The crofter would have a rude hut and keep a few livestock.⁷⁰

60. For example, Eric Richards points out that the word “clearances” itself is a relatively late addition to the narrative. *See id.* at 5. Earlier accounts had referred to removals. *Id.* Moreover, the term “clearances” elides a distinction between evictions and removals, a distinction that was deemed material to the Napier Commission in 1883. *See id.* at 6.

61. *See id.* at 162, 199, 237.

62. *See id.* at 6.

63. *See id.* at 141.

64. *See* T.M. DEVINE, *THE SCOTTISH NATION: A HISTORY, 1700–2000*, at 52 (1999).

65. *See id.* at 26.

66. James Loch was a Lowlander who became the Commissioner of all the estates, particularly the vast Sutherland estate, of the George Leveson-Gower, the Marquess of Stafford and himself a great believer in improvements. *See* PREBBLE, *supra* note 35, at 76–77. Loch spent forty years working to clear the interior of the Highlands, build harbors, bridge rivers, and turn the emptied lands into great sheep-farms. *See id.* at 77. His work on the Sutherland estate became known as “the Loch Policy.” *See id.*

67. Sir John Sinclair of Ulbster was the great propagandist of the Cheviot sheep, the importation of which from the south was so vital a chapter in the story of the Highland Clearances. *See id.* at 33–35. But Sinclair practiced what he preached, introducing the new breed of sheep onto his own land in the Highland in a highly successful experiment. *See id.* at 34. The success brought him attention, and eventually he became the Chairman of the British Wool Society. *See id.* at 33–34; *see also* RICHARDS, *supra* note 57, at 189–90 (1982).

68. *See* GRAY, *supra* note 4, at 76.

69. *See* RICHARDS, *supra* note 57, at 122.

70. *See id.* at 129.

The emergence of crofting in the Highlands was important for multiple reasons, not the least of which is that it helped cope with both the dislocation that resulted from the clearances and an increase in the population.⁷¹ Despite emigration, the population in the Highlands continued to grow until 1851, although there were regional variations.⁷² The causes of this population increase are not clear,⁷³ but the impact on Highland economy and society is. Added population meant added pressure on the land, and, as Gray observes, “land pressure was the basic problem.”⁷⁴

Perhaps the greatest change was the emergence of the sheep economy. Market incentives, mainly demand from southern markets, led to the sheep clearances.⁷⁵ A large measure of the success of sheep farming in the Highlands can be attributed to the introduction of the Cheviot breed. Unlike the native Highland sheep, which were scrawny and which yielded inadequate amounts of wool for the Yorkshire mills, Cheviot sheep yielded far more both in terms of wool and meat.⁷⁶ The introduction of Cheviot sheep to the Highlands did not go smoothly initially. Resistance to the new breed came from common people—peasant farmers—who feared, with cause, dislocation and eviction.⁷⁷

The high point of resistance came in 1792, the so-called “Year of the Sheep,” when the “Ross-Shire Insurrection” climaxed.⁷⁸ As that riot was crushed, so too was any serious resistance to the sheep-farming transformation. The sheep economy replaced the cattle economy as beef prices declined and profits on the products derived from the foreign sheep increased.⁷⁹ The great sheep-walks required land, and landowners took advantage of the extraordinary legal control they enjoyed over their land to clear it of unwanted tenants.⁸⁰ In time, tacksmen as well as tenants-at-will would be cleared.⁸¹

Clearances continued apace throughout the first half of the nineteenth century. By 1855 they had by and large ended. After that date there were no more large scale clearances in the Highlands.⁸² Indeed, the tide would soon be reversed. The great enthusiasm for sheep farming was exhausted. Public opinion turned against the landlords, and the cause of crofters was to gain recognition in Parliament. After 1873, prices of sheep and wool dropped.⁸³ There was to be a replacement use of the

71. *See id.* at 129–30.

72. *See id.* at 123.

73. For excellent discussions of the causes, *see id.* at 96–99.

74. GRAY, *supra* note 4, at 60.

75. *See* RICHARDS, *supra* note 57, at 161.

76. *See id.* at 174–76.

77. *See id.* at 254.

78. On the Ross-Shire Insurrection, *see id.* at 255–72; *accord* PREBBLE, *supra* note 35, at 31–47.

79. *See* RICHARDS, *supra* note 57, at 173, 175.

80. *See id.* at 177.

81. *See* PREBBLE, *supra* note 35, at 64.

82. *See* RICHARDS, *supra* note 57, at 237.

83. *See id.* at 239.

land, a new enthusiasm whose rise is closely linked with the development the right to roam—deer forests.

III. THE (RE-)CREATION OF THE HIGHLAND DEER FORESTS

The first great deer forests in the Scottish Highlands were medieval. In the thirteenth century the deer forests were economically important, and their disappearance was due to the demands created by a growing population for arable land livestock. By the Napoleonic Wars they were virtually gone.⁸⁴

A. *Supply and Demand Conditions*

The return, or re-creation, of the deer forests in the second half of the nineteenth century was the result of two forces: changing market conditions and changing recreational tastes among the wealthy Lowlanders and English. Market changes occurred in several respects. One concerns the decline of sheep farming. James Hunter has argued that the rise of the deer forest was so directly and strongly linked with the decline of Highland sheep industry that one led almost inevitably to the other.⁸⁵ The industry generally enjoyed flushed times throughout the 1850s and 60s, as the demand for wool drove prices up. The profitable times ended in the early 1870s, however, when prices began to decline under the effects of foreign competition.⁸⁶ By the early 1880s, wool prices had dropped to a level that was untenable for Scottish sheep farmers. Supply from overseas producers, notably North America and the Antipodes, flooded the Scottish wool market, driving prices down.⁸⁷ The former chamberlain of a large estate told the Commission of Inquiry into the Condition of Crofters and Cottars of the Highlands (the Napier Commission) in 1883, “The price of Highland wool is now very low, and it is almost unsaleable, which makes a great difference to the sheep farmer who formerly looked to the wool for paying his rent.”⁸⁸

The dilemma facing sheep farmers was best expressed by George Malcolm, factor of a large Highland farm and an authority on Highland agriculture, in testimony to the Napier Commission. Malcolm stated:

If by reason of the unremunerative price of wool, the extravagant costs of winterings, the deteriorated capabilities of the grazings, and

84. See WILLIE ORR, *DEER FORESTS, LANDLORDS AND CROFTERS: THE WESTERN HIGHLANDS IN VICTORIAN AND EDWARDIAN TIMES* 2–3 (1982).

85. James Hunter, *Sheep and Deer: Highland Sheep Farming, 1855-1900*, 1 *NORTHERN SCOTLAND* 199, 199–222 (1973).

86. See ORR, *supra* note 84, at 15–16, 20–22.

87. HER MAJESTY’S COMMISSIONERS OF INQUIRY, *EVIDENCE TAKEN BY HER MAJESTY’S COMMISSIONERS OF INQUIRY INTO THE CONDITIONS OF THE CROFTERS AND COTTARS IN THE HIGHLANDS AND ISLANDS OF SCOTLAND, 1884*, H.C., H.L. vol. iv., at 3308 (U.K.) (testimony of John Munro MacKenzie) [hereinafter *NAPIER COMMISSION*], available at <http://www.whc.uhi.ac.uk/napier-commission/highlands-and-islands-commission-volume-4> (last visited Oct. 19, 2015).

88. *Id.*

the extravagantly high valuations of the stocks, the old tenants are forsaking their holdings and no new tenants can be found for them is there any other use to which these lands can be put . . . which will be more profitable to either tenants or landlords?⁸⁹

Malcolm's answer was to shift land use from sheep farming to deer farming, and that is precisely what a great many landowners did.

Paradoxically, expansion of the deer forests began during the periods of prosperity. The very factor behind the prosperity, high wool prices, led tenants not to renew leases and dissuaded prospective tenants from signing leases. Both existing and prospective tenants were deterred by the high rents that owners charged and by the fear of being locked into unfavorable leases in period of falling prices. Many tenants simply vacated their holdings and sold off their livestock, making land available for afforestation.⁹⁰

It is no coincidence that the rate of afforestation quickened as the price of wool declined precipitously.⁹¹ Wool prices began to drop substantially in 1872.⁹² In the ten years that followed, thirty new deer forests were created, as a majority of sheep farmers departed from large parts of the Highlands.⁹³ Between 1838 and 1883, the number of deer forests increased from thirty-nine to at least ninety-nine, and they covered nearly two million acres.⁹⁴ By the mid-1880s whole counties that had been heavily dependent upon sheep-farming were virtually emptied of sheep farmers.⁹⁵

The growing gap between what tenants of sheep farms were willing to pay and what tenants of deer forests were able and willing to pay made the transition virtually inevitable. On one estate in Ross-shire, for example, the leases for three sheep farms ended, and the owner was unable to find new tenants for them. The total rental for the sheep-farms had been £1,180.⁹⁶ The owner cleared the land of sheep, threw the farms together as a deer forest, and leased it at an annual rent of £2,000.⁹⁷ In the succeeding years the difference in revenues between the two uses contin-

89. *Id.* at Q. 42269, 2832; *see also id.* at Vol. III, Q. 26905, 1710 (testimony of Evander M'Iver) ("What will you do with the big sheep farmers?—They are going away in spite of us. We cannot get the farms let. We will have all the sheep farms in the country on our own hands in a short time. I may tell you that the Duke advertised two farms this year, and there never was a single candidate for either."), available at <http://www.whc.uhi.ac.uk/napier-commission/highlands-and-islands-commission-volume-3>.

90. *See* ORR, *supra* note 84, at 15; Hunter, *supra* note 85, at 211–14.

91. *See* George Malcolm, *Deer Forests: Past, Present, and Future*, 21 THE NINETEENTH CENTURY 683, 692 (1887). After discussing the inability of owners of sheep farms to find substitute tenants, Malcolm rhetorically asks, "[i]f that were so, what could be more natural, or shall we say justifiable, than that the landlords so situated should, when they could, have converted these unsought sheep-farms into profitable deer forests?" *Id.*

92. *See* Hunter, *supra* note 85, at 217.

93. *See id.*

94. *See id.* The Napier Commission reported that by 1885, 110 deer forests existed. *See* ORR, *supra* note 84, at 35.

95. *See* Hunter, *supra* note 85, at 217.

96. *See id.*

97. *See id.*

ued to increase.⁹⁸ For the land owner, the real gain now was all in deer foresting.

At the same time, deer forests were not new to late nineteenth-century Scotland.⁹⁹ In the 1790s, there were several deer forests in which no sheep existed.¹⁰⁰ More such forests were established in the succeeding decades. But it was not until the 1830s that interest in deer forests as a source of income to replace that of sheep farming became serious.¹⁰¹ Even as late as 1857, there was no large-scale conversion of sheep farms to deer forests, largely because the price of wool was still relatively high. An 1858 treatise of estate management counseled that pasture land for sheep was an “ever valuable” asset and warned that “the demand for shootings . . . may possibly subside as suddenly as it arose, yielding to the capricious influence of fashion.”¹⁰² This attitude would soon change.

B. *Two Sets of Cultural Attitudes Toward the Highlands*

T.C. Smout, the distinguished Scottish historian and Historiographer Royal for Scotland, has usefully categorized Scottish attitudes toward land use over the last 250 years into six types, which fall into two broad categories. The categories are what Smout calls “traditional” and “post-romantic.”¹⁰³ Traditional attitudes include (1) a view of land as a resource from which to make a living by farming, foresting, and commercial fishing; and (2) regard of land as the resource for the pursuits of the private, aristocratic sports of hunting, shooting, and fishing. These two attitudes have long existed and, Smout argues, dominated Highland land use, law, and policy throughout the eighteenth and nineteenth centuries, although in varying proportions.¹⁰⁴ The third traditional attitude views land as a resource for industry. This attitude has existed since as early as the seventeenth century, qualifying it as traditional.¹⁰⁵ What all three traditional attitudes have in common is a perception of land as a resource to be exploited. This assumption sets these traditional attitudes apart from next group of attitudes.

The first of the postromantic attitudes regards land, as Smout puts it, “as an invigorating obstacle course.”¹⁰⁶ Mountains are to be climbed; rivers are to be swum. As we shall see, this attitude developed with the outdoor recreational movement that began to blossom in the late nine-

98. *See id.*

99. *See* Malcolm, *supra* note 91, at 683–88.

100. *See* Hunter, *supra* note 85, at 214. Establishment of great deer forests during this period also involved imposition of English-styled game laws. *See generally* Adam Watson & Elizabeth Allan, *Papers Relating to Game Poaching on Deeside, 1766–1832*, 7 N. SCOTLAND 39 (1986).

101. *See* Hunter, *supra* note 85, at 215.

102. GEORGE G. MACKAY, ON THE MANAGEMENT OF LANDED PROPERTY IN THE HIGHLANDS OF SCOTLAND 37–38 (1858).

103. T.C. Smout, *The Highlands and the Roots of Green Consciousness, 1750–1990*, in T.C. SMOUT, *EXPLORING ENVIRONMENTAL HISTORY: SELECTED ESSAYS* 21, 43–44 (2009).

104. *See id.* at 44.

105. *Id.*

106. *See id.* at 45.

teenth century. The fifth attitude overall is older. It is the outlook of one who regards nature as refreshing to the human spirit and so something to be maintained unspoiled.¹⁰⁷ This attitude has led to the creation of national parks and the conservation movement. The sixth and final attitude views land not only from a recreational perspective but also as a refuge for other species, which are regarded as worth preserving for their own sakes.¹⁰⁸ This attitude had little impact upon the Highlands until after World War II, but at that point it grew dramatically.¹⁰⁹

Smout's categories and their periodization are useful because they help place in context the clash between the two modes of "the sporting life" that emerged as tastes for deer hunting and mountain climbing and hiking developed over the course of the second half of the nineteenth century. Deer hunting was the older sport, and was popular among the aristocracy quite early. Hence, Smout's categorization of it as traditional is quite correct. Mountaineering dates to a later period, as we shall see, and belongs under Smout's label as "post-romantic." Smout's categories are cultural, and an important aspect of the struggle for access to mountains was a cultural clash as the traditional cultural attitudes toward the Highlands confronted and slowly gave way to the post-romantic cultural attitudes.

C. *The King of Sport Rules the Highlands*

What was the attraction of deer forests, and what drove the increasing demand for renting deer forest land? One answer to both questions is obvious: sport, specifically, hunting. A less obvious but important, and related, reason is wealth.

Turning to the first answer, there are several reasons why interest in deer hunting as a sport grew increasingly popular beginning in the 1830s. One reason is the awakened Romantic interest in the Highlands, spurned by writers such as Sir Walter Scott.¹¹⁰ Throughout most of the eighteenth century, English attitudes toward Scotland—to the extent that the English thought about Scotland at all—was dismissive and condescending. This was especially true regarding the Highlands, which the English tended to think of as primitive and gloomy in the extreme. An example of this attitude is the account written by a Captain Burt, *Letter from A Gentleman in the North of Scotland to His Friend in London*.¹¹¹ Not published until 1754, Burt wrote his letters most in the late 1720s, although the final one was written in 1737.¹¹² Burt hardly exaggerated when he

107. *Id.*

108. *See id.*

109. *See id.*

110. *See id.* at 229.

111. EDWARD BURT, BURT'S LETTERS FROM THE NORTH OF SCOTLAND (Andrew Simmons ed., 1998).

112. As Charles Withers points out, the timing is significant, for this was prior to the final Jacobite defeat at Culloden and well before the population crisis led to mass emigration. *See* Charles W.J.

stated in his opening letter, “The Highlands are but little known even to the inhabitants of the low country of Scotland But to the people of England, excepting some few, and those chiefly the soldiery, the Highlands are hardly known at all.”¹¹³ His description of the Highlands themselves was certainly not encouraging: “[T]here is not much variety in it, but gloomy spaces, different rocks, heath, and high and low . . . the whole of a dismal gloomy brown drawing upon a dirty purple; and most of all disagreeable when the heath is in bloom.”¹¹⁴ Only a few decades later, a similar sentiment was reflected in Thomas Pennant in his exceedingly popular 1771 book, *Tour in Scotland*.¹¹⁵ Pennant stated, North Britain [i.e., Scotland] was almost “as little known [to its Southern brethren] as Kamschatka.”¹¹⁶ His account of Highland men was thoroughly disapproving: “The men are thin, but strong; idle and lazy, except employed in that chace, or any other thing that looks like amusement; are content with their hard fare, and will not exert themselves farther than to get what they deem necessaries.”¹¹⁷

Two literary publications began to change English attitudes toward Scotland and the Highlands even before Walter Scott’s time. Samuel Johnson’s *Journey to the Western Islands of Scotland*,¹¹⁸ first published in 1775, was widely popular and influential. The other publication was James Boswell’s *Journal of a Tour to the Hebrides*,¹¹⁹ first published in 1785. Like Johnson’s book, it was widely read and discussed. Both books opened up the largely-unknown world of Scotland, especially the Highlands, to English readers with information never before available to them. Neither Johnson nor Boswell, however, portrayed the Highlands in terms that were especially inviting. Over a hundred years later, the famous Scots mountaineer G.G. Ramsay would aptly characterized Johnson’s depiction of the Highlands thus: “Here the mountains are simply a nuisance in the traveller’s [sic] path: a nuisance which be happily circumvented, were it not for the perverse ingenuity with which Nature insists on making the road uncomfortable, even where mountains fail to do so, by other annoying methods.”¹²⁰

A more positive literary influence, and one that directly affected the popularity of deer hunting, was William Scrope’s highly influential 1838 book, *The Art of Deer Stalking*.¹²¹ Scrope waxed poetic on the sublime

Wither, *Introduction to BURT’S LETTERS FROM THE NORTH OF SCOTLAND*, at vii (Andrew Simmons ed., 1998).

113. BURT, *supra* note 111, at 3.

114. *Id.* at 157.

115. 2 THOMAS PENNANT, *A TOUR IN SCOTLAND* (4th ed. 1776).

116. *Travelling in England*, 116 Q. REV. 212, 219 (1864).

117. 1 THOMAS PENNANT, *A TOUR IN SCOTLAND* 131 (4th ed. 1776).

118. SAMUEL JOHNSON & JAMES BOSWELL, *A JOURNEY TO THE WESTERN ISLANDS OF SCOTLAND, WITH THE JOURNAL OF A TOUR TO THE HEBRIDES* (2002).

119. *Id.*

120. G.G. Ramsay, *Rise and Progress of Mountaineering in Scotland—VI*, 4 SCOT. MOUNTAINEERING CLUB J. 1, 4 (1897).

121. WILLIAM SCROPE, *THE ART OF DEER STALKING* (1838).

experience to be enjoyed stalking deer in the Highlands in the early morning hours.¹²² Wealthy Victorians were much enamored with his accounts.

Yet another factor contributing to the rise in popularity of deer hunting were the original Victorian couple themselves.¹²³ Victoria and Albert first visited the Highlands in 1842, with Albert shooting two stags. They returned two years later, hunting deer in two forests.¹²⁴ Royal approval of deer stalking, or hunting, stimulated interest in the sport among the English aristocracy, many members of which leased or purchased deer forests for deer hunting purposes.¹²⁵ Within a short time, the sport's popularity spread to nontitled wealthy individuals, particularly the *nouveaux riches*, for whom stalking became a status symbol.¹²⁶ As Orr has observed, "The economic surplus in the South, as a source of [high deer forest] rents, is perhaps the most significant aspect of the entire development."¹²⁷ The new tenants, ones who were able to pay the high rents for the sheep-farms-cum-deer-forests were wealthy men from the South, both Scotland and England, whose attraction to deer forests was as a locus of a sport of growing popularity among the very wealthy. That fashionable (though hardly new) sport was deer stalking. Hunting as sport had been popular among the wealthy class at least since the early nineteenth century, but deer was not necessary the desired, or available, subject. Fishing and fowling were both highly popular among the landed elite.¹²⁸ But the king of sport would soon become deer hunting. By the 1880s, deer hunting had replaced fishing and fowling as the sport of choice not only among the aristocracy but also particularly the newly-made wealthy men of commerce.¹²⁹ These men bought or leased huge hunting lodges with pretensions of aristocracy, drawing occasional expressions of disdain from real aristocrats.¹³⁰ As Orr has stated, "Once Royalty had bestowed its approval on the sport of deer stalking, the prestige of renting or owning a Highland deer forest increased and the 'new

122. Scrope quoted the following passage from the poem "The Moors" by the Honorable Henry Liddell in his book: "Tis gladness to ride, At the peep of dawn o'er the dewy moors! For the sportsmen have mounted the topmost crags, And the fleet dogs bound o'er the mossy hags, And the mist clears off, as the lagging sun, With his first ray gleams on the glancing gun, And the startled grouse and the black cock spring, At the well-known report on whirring wing." *Id.* at 331 (quoting Hon. Henry Liddell, *The Moors*, in *THE KEEPSAKE FOR MDCCCXXXIII* 8, 10 (Frederick Mansel Reynolds ed., 1833)). For more on Scrope and his influence on the rise of deer hunting, see DUFF HART-DAVIS, *MONARCHS OF THE GLENS: A HISTORY OF DEER-STALKING IN THE SCOTTISH HIGHLANDS* 81-91 (1978).

123. See Malcolm, *supra* note 91, at 691.

124. See ORR, *supra* note 84, at 4, 29.

125. See *id.*

126. See Hunter, *supra* note 85, at 216.

127. See ORR, *supra* note 84, at 148.

128. PAUL CHRISTESEN, *SPORT AND DEMOCRACY IN THE ANCIENT AND MODERN WORLDS* 196 (2012).

129. *Id.* at 200.

130. So, Cameron of Lochail would sniff at "the accumulation of wealth among the trading and commercial classes." D. Cameron of Lochail, *In Defence of Deer Forests*, 23 *NINETEENTH CENTURY* 197 (1885).

rich' joined in the seasonal migration from the centres of fashion to hills of the north."¹³¹ The Highland estate had become, in Gaskell's apt phrase, "a machine for sport."¹³²

D. *The Plight of the Crofters*

The transition from sheep farms to deer forests did not always go peacefully or without protest. There were victims of the change—the crofters, whose very livelihood depended upon the continued use of the land for sheep farming. Although actual evictions of crofters were far fewer than crofters and their supporters often claimed,¹³³ those that did occur further fueled resentment and a sense of injustice that already existed.

The crofters' resentment is understandable. They were twice squeezed: first, during the Clearances to make room for sheep farms and the great sheep-walks, and second, by the transition to deer forests. Neither sheep farmers nor deer forest owners had much use—or room—for crofters, who eked out a miserable existence on the margins of farms, and the feeling was mutual. Crofter resentment on occasion spilled into action against both types of user-owners. In the first half of the nineteenth century, Highland Clearances had triggered violent action when crofters mounted collective opposition. In 1820, clearances for sheep farms at Culrain¹³⁴ and Gruids,¹³⁵ for example, led to organized expressions of protest that were violently and summarily suppressed. Militant resistance to evictions continued in several locations the following year.¹³⁶ These actions attracted the attention of the press, and the press' coverage further stirred public controversy regarding the Clearance.¹³⁷ This attention did not last long, however, and the Highlands soon dropped out of sight from the newspapers. There were later acts of violence, such as at Strathcarron, in Ross-shire, in 1845,¹³⁸ but none attracted the kind of attention that the earlier incidents had. Even without violence, however, the Clearances became matters of public controversy. Clearances in various locations received unfavorable publicity, including reports about the plight of the crofters and the behavior of the landlords.

It was not until the late part of the nineteenth century that public officials at higher levels paid serious attention to the conditions of the crofters. In 1883, Prime Minister William Gladstone called for a public inquiry into more recent violent clashes between crofters facing eviction,

131. ORR, *supra* note 84, at 4.

132. PHILIP GASKELL, *MORVERN TRANSFORMED: A HIGHLAND PARISH IN THE NINETEENTH CENTURY* 81 (1968).

133. See ORR, *supra* note 84, at 5.

134. For an account of the riot, see PREBBLE, *supra* note 35, at 121–26.

135. See *id.* at 128–29.

136. See RICHARDS, *supra* note 57, at 220.

137. See *id.* at 220–26.

138. See PREBBLE, *supra* note 35, at 225–38.

landowners, and authorities.¹³⁹ The Napier Commission,¹⁴⁰ established with Royal approval, was charged with holding hearings at various locations throughout the Highlands to investigate the conditions of the crofters and the sources of the unrest. The problem now was not solely, or even primarily, sheep farms but deer forests. As sheep farms had given way to the great deer forests, crofters initially delighted in the sheep farmers' decline in fortune.¹⁴¹ Their glee was not long lived, however. The deer forest as a sporting preserve served their interests no better than did the hated sheep farms. Deer trampled on their crops, and when crofters took action to chase deer out of the area, there were tense encounters between crofters and hunters.¹⁴² Resistance and occasional violence continued in the so-called "Crofters' War" of the 1880s.¹⁴³ The creation of the Napier Commission did little to diminish the resistance and agitation. The report of the commission, published in 1884, identified the causes of the crofters' poverty—insecure tenure, the smallness of the holdings, high rents, and poor infrastructure.¹⁴⁴

The Napier Commission expressed concern that the crofter class might pass into extinction unless actions were taken to protect them. The commission recommended far milder forms of intervention than many of the crofters who had testified wanted, but it recommended intervention nevertheless.¹⁴⁵ Its main recommendation was the recognition, improvement, and enlargement of the Highland township, which was the communal core of crofter agriculture.¹⁴⁶ The commission also recommended independent valuation of the crofters' rent and compensation for improvement.¹⁴⁷

The further agitation for land reform that the Napier Commission's report stirred culminated two years later in passage of the Crofters' Holding Act of 1886.¹⁴⁸ The Act incorporated many of the commission's recommendations. It had three main features: (1) it established an independent body with legal authority to adjust rents; (2) it provided strong security of tenure for crofters who paid newly determined "fair" rents;

139. The most violent of these recent incidents was the so-called Battle of the Braes, on Skye, in 1882. The landlord of the Lochcarron estate attempted to evict two families on the grounds of the bad conduct of the sons. The tenants involved were very old and frail, and the case quickly attracted people from all over the area opposing the effort to evict. The landlord tried to persist, but the sheriff's party eventually was successfully resisted and stood down. *See* RICHARDS, *supra* note 57, at 241–42.

140. The official name for the Commission was the Royal Commission of Inquiry into the Condition of the Crofters and Cottars of the Highlands and Islands of Scotland. *See id.* at 490.

141. *See* Hunter, *supra* note 85, at 220.

142. *See id.* at 221.

143. *See* RICHARDS, *supra* note 57, at 490.

144. *See* REPORT OF THE COMMISSIONERS OF INQUIRY INTO THE CONDITIONS OF THE CROFTERS AND COTTARS OF THE HIGHLANDS AND ISLANDS OF SCOTLAND XXXII-XXXVI (1884) available at <http://www.alastairmcintosh.com/general/resources/Napier-Commission-Vol-5.pdf>; RICHARDS, *supra* note 57, at 491.

145. *Id.* at 490–93.

146. *See id.* at 492–93.

147. *See id.* at 493.

148. *See* J.P. DAY, PUBLIC ADMINISTRATION IN THE HIGHLANDS AND ISLANDS OF SCOTLAND 190–91 (1918).

and (3) it gave the crofters for the first time the legal power to pass their holdings on to their children by inheritance.¹⁴⁹ The Act did not provide for land redistribution, however, as the Highland Land Law Reform Association and its political wing, the Crofters' Party, had sought.

As a social movement, the crofters' agitation was certainly democratic in aim and spirit. What it sought was nothing less than a substantial dismantling of the old hierarchical social order with its radical imbalance of power between landowners and peasants. How democratic, then, were the crofters' gains at the end of the day under the Crofters' Holding Act? The picture is mixed. The Act represented a modest advance for democratic culture in Scotland. On the one hand, it provided clear gains for the crofters at the landlords' expense.¹⁵⁰ As T.C. Smout has observed, "[The Act] destroyed the very basis of landlord rights as understood everywhere else in Great Britain."¹⁵¹ Crofters were given rights that no other tenants in Britain enjoyed. Insofar as it did undermine the owners' authority and redistribute power between landowners and crofters, it promoted the further dismantling of the old intensely hierarchical arrangement of social control.

Historians have offered nonmarket theories to explain why such concessions were granted uniquely to Scottish peasants. Clive Dewey has argued that the explanation lies in an ideological shift away from classical *laissez-faire* political economy among Victorian Liberals to a new "historicism."¹⁵² Doubts about the capacity of the market alone to lead to adequate responses to the growing frustration among peasants in the Scottish Highlands and Ireland led policy makers to recognize that special concessions for these peasants were necessary and justified in light of their peculiar historical experience.

Smout points out that both Gladstone and Lord Napier were heavily influenced by the British experience in India.¹⁵³ Indigenous understandings of land in India were completely foreign to the nineteenth-century British colonist administrators. Drawing on this experience, both men recognized that unique historical understandings and practices of land required that colonists create unique land arrangements in the present. The solution lay not in the market but in history.

The advance in democratic culture for the Highlands was only limited, for the Crofters' Holding Act failed to get at the root cause of the anti-democratic social hierarchy: the poverty of the underclass. The Act made no real attempt, nor did it seek to make any attempt, to address the impoverished conditions of the Highland crofters and cottars.¹⁵⁴ It was, as

149. See *id.*

150. See RICHARDS, *supra* note 57, at 494.

151. T.C. SMOUT, *A CENTURY OF THE SCOTTISH PEOPLE, 1830–1950*, at 73 (2010).

152. See Clive Dewey, *Celtic Agrarian Legislation and the Celtic Revival: Historicist Implications of Gladstone's Irish and Scottish Land Acts 1870–1886*, 64 *PAST AND PRESENT* 30 (1974).

153. See SMOUT, *supra* note 151 at 73, 74.

154. See RICHARDS, *supra* note 57, at 495.

Richards puts it, “a vindication of the peasant mentality,”¹⁵⁵ but it did nothing to end peasantry.

In 1895, another royal commission, seeking further protection of the crofters, recommended a curb on the expansion of deer forests.¹⁵⁶ Parliament did not act upon this recommendation, however. The political climate had changed by this time, and both the crofters’ agitation and the general public opposition had substantially diminished.¹⁵⁷

About the same time as the enactment of the Crofter Act, there was agitation for another form of democratic culture, one that would eventually gain acceptance, although it would take over a century to achieve legal recognition. The right to roam is certainly a more modest form of democratic culture than land redistribution, but in its own way, what it lacks in thickness it makes up for in breadth. The truly democratic characteristic of the right to roam is that it may be, as its proponents from the nineteenth century to the present advocated, exercised by anyone, regardless of class, rank, wealth, or any other form of social hierarchy. Legal recognition of this levelling social practice would not come until much later, but the seeds were sown even as the crofters’ gains modestly improved the democratic character of the Scottish social order.

IV. THE IRON HORSE ARRIVES

A. *Reaching the Highlands Before the Railroad*

If deer stalking in the Scottish Highlands was all the rage among the English aristocracy and their pretenders, how would these hunters get there? Roaming in the Scottish Highlands prior to the mid-eighteenth century was no easy feat. Essentially there were no roads either to the Highlands or within them, meaning that the Highlands were virtually inaccessible to outsiders and that internal travel was extremely difficult.¹⁵⁸

Even after the sport of deer-stalking began to gain in popularity among English aristocrats and wealthy industrialists in the early nineteenth century, access to the Scottish Highlands, the Mecca of deer-stalking, was difficult to say the least. The alternatives for getting there were very limited, and none was appealing. One was by coach. As one writer observes, “Before the railways were built, a journey from the south of England to the north of Scotland was a major expedition, and if made by coach could scarcely be accomplished in less than a fortnight, and might cost a single traveler as much as £20.”¹⁵⁹ The problem was the

155. *See id.* at 496.

156. ROYAL COMMISSION ON THE HIGHLANDS AND ISLANDS, REPORT OF THE ROYAL COMMISSION ON THE HIGHLANDS AND ISLANDS APPOINTED TO INQUIRE INTO LAND OCCUPIED FOR THE PURPOSE OF DEER FORESTS OR OTHER SPORTING PURPOSES OR FOR GRAZING, 1895, Q. 29705 *passim*, at xxxviii-xxxix, ii (U.K.).

157. *See* Hunter, *supra* note 85, at 222.

158. DUFF HART-DAVIS, MONARCHS OF THE GLEN: A HISTORY OF DEER-STALKING IN THE SCOTTISH HIGHLANDS 77 (1978).

159. *Id.*

deplorable conditions of what few roads connected the South to the North.

Another popular method was by sea. One could sail either up the east coast of Scotland to the port of Leith, near Edinburgh, and then travel by coach, or up the west coast, accessing the interior via a series of canals.¹⁶⁰ A third method became available later with the completion of the Caledonian Canal, which opened up a navigable channel across the entirety of Scotland from sea to sea.¹⁶¹

Travel by canal was slow and cumbersome at best. Yet until the railroad arrived in the Highlands, it was the best means for the visitor from the South to get there. The trip from South to North was not always safe. The memoir of one regular English visitor to the Highlands, the Earl of Malmesbury, captures the possible perils. “My servants, too, had a very dangerous journey by sea, their steamer having run aground between Aberdeen and Inverness;” he wrote, “they saved their lives but lost all their luggage and some of ours.”¹⁶²

Once having reached the Highlands, getting about was no easier. Such roads as there existed were basically military roads. Levine notes that “[b]etween 1725 and his departure from Scotland in 1740, General George Wade built 250 miles of roads and bridges to facilitate the movement of government troops throughout the Highland region.”¹⁶³ Relatively easy movement of troops in the Highlands was necessary in the eighteenth century because of Jacobite uprisings, which drew their greatest strength from the Highland clans.¹⁶⁴ Uprisings in 1715 and then an abortive Spanish expedition in 1719 led to the Disarming Act of 1725.¹⁶⁵ Wade’s roads not only facilitated troop movement but also linked together military fortresses in various Highland locations, intended to serve as government information-collecting points throughout the Jacobite region.¹⁶⁶ Ironically, Wade’s roads later facilitated Bonnie Prince Charlie’s lightning descent into the Lowlands in 1745.¹⁶⁷ But these roads, though adequate for military purposes, were far less adequate for the needs of the titled and wealthy English would-be hunters who would eventually make their way up to the Highlands in growing numbers.

Following Wade’s departure from the Highlands in 1737, construction of military roads continued. At its peak in 1760, the military road system covered about a thousand miles.¹⁶⁸ The Highland road-building

160. *Id.*

161. *See id.*

162. *Id.* at 78.

163. DEVINE, *supra* note 64, at 41.

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.*

168. *See* MICHAEL POLLARD, A TRAVELLER’S GUIDE TO WALKING THE SCOTTISH HIGHLANDS 16 (1984).

program ceased in 1767 as the Jacobite threat diminished.¹⁶⁹ Upkeep of the roads largely ended, and considerable sections of the road network fell into complete disuse. Some sections were too steep for coaches.¹⁷⁰ By 1790, only 600 miles remained at all useable.¹⁷¹

B. *The Railroad Arrives*

Railroads are often identified as the cause of changes in legal doctrines or institutions.¹⁷² They were certainly an important factor in the development of the modern Scottish right to roam. By the time Victoria came to the throne in 1837, very few railroad lines had been established in Scotland. The few that existed operated mainly in the triangle between Glasgow, Edinburgh, and Dundee, and were used solely for industrial purposes, specifically, transporting coal and other raw materials.¹⁷³

The global trade revolution of the second half of the nineteenth century was the greatest stimulant to the railroad's spread in the Highlands.¹⁷⁴ Scottish coal found ready markets overseas; two-thirds of Scottish pig iron was exported; and the giant ships that poured out of the shipyards into the River Clyde went to ports around the world.¹⁷⁵ By 1860, Scotland had become an industrial giant, fueled by international trade.¹⁷⁶ Its industrial and entrepreneurial growth demanded an effective transportation system that reached throughout the entire country, including the Highlands, not just the main cities of the Lowlands.

The public Scottish railway system began in 1812 with the opening of the Kilmarnock & Troon Railway ["K&T"].¹⁷⁷ The principal impetus behind the K&T's establishment was the carriage of coal from the mines to the coast, where it would be loaded onto ships. But the K&T also carried passengers, who were delighted to discover that the steam locomotive was far faster than any other mode of transportation. Despite its initial promise, the K&T was not a success. Design problems soon rendered it virtually unusable and unused. Parliament did not authorize construction of any further railways until 1824. Within a few years Parliament authorized five more public railways.¹⁷⁸ The last of these, the Dundee & Newtyle, was the first Scottish railway that did not have carriage of coal

169. See *The Creation of the Military Roads*, SCOT. HIST. ONLINE, available at <http://www.scots-historyonline.co.uk/bridges/html/mil-roads.htm> (last visited Oct. 19, 2015).

170. *Id.*

171. See POLLARD, *supra* note 168, at 36–37, 147.

172. See, e.g., JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* (2001); HOWARD H. SCHWEBER, *THE CREATION OF AMERICAN COMMON LAW, 1850–1880* (2004).

173. See *The Victorian Achievement: Railways*, BBC, http://www.bbc.co.uk/history/scottishhistory/victorian/features_victorian_railways.shtml (last visited Oct. 19, 2015).

174. See DEVINE, *supra* note 64, at 253.

175. See *id.* at 254.

176. See *id.*

177. See P.J.G. RANSOM, *IRON ROAD: THE RAILWAY IN SCOTLAND* 23 (2007).

178. *Id.* at 27–28.

as its prime purpose.¹⁷⁹ Its purpose was to transport a variety of other goods; steam locomotives for passengers would come later.

Interurban passenger locomotives first began in 1839,¹⁸⁰ but the first passenger locomotive connecting major population centers was the Edinburgh & Glasgow Railway, which opened in 1842.¹⁸¹ Thereafter the passenger railway system developed in fits-in-starts, but all of it was located in the South of Scotland. The first railway to reach the North did not do so until 1865, and its reach was quite limited, extending only as far north as Inverness.¹⁸² In 1865, the Highland Railway was established,¹⁸³ and it eventually had lines reaching from Perth all the way to the northern coast, and from Dingwall, on the east coast, across to Kyle of Lochalsh, on the west coast (opposite the Isle of Skye).¹⁸⁴

Once the Highland railway system was constructed, it became the preferred method for well-to-do from the South to travel to the Highlands for a season of deer hunting. A painting by George Earl made in 1895, entitled *Perth Station, Coming South*, depicts what must have been a typical scene of a large number of wealthy passengers, complete with their servants and hunting dogs, returning to points in the South in the late summer.¹⁸⁵ The Royals too, including Victoria and Albert, used the railways to reach their new “hunting lodge” at Balmoral.¹⁸⁶

The reasons were clear. The railway was much faster than any other method of reaching the Highlands.¹⁸⁷ It also had the advantage of being far more comfortable than any alternative mode of transportation. Carriages were divided into first-, second-, and third-class,¹⁸⁸ with accommodations suitable to each class.¹⁸⁹ Passenger service included dining cars, and sleeping cars were also available for the longer trips from points south. Hence, the aristocratic and other wealthy hunters from the South could travel to the Highlands in a style suitable to their station.

The new Highland railway lines both enabled and supported the development of the Highland sporting estate. Without a relatively fast and comfortable mode of access to the Highlands and its deer forests, few in the South, other than the heartiest and most dedicated of hunters, would have bothered to make the long and arduous journey. The railways assured that there would be wealthy tenants for the sporting estates from the South, thereby stimulating their growth. Once the deer forests and sporting estates, complete with all of the comforts that aristocratic

179. *See id.* at 28.

180. The Glasgow, Paisley, Kilmarnock & Ayr Railway first opened a section between Irvine and Ayr in August 1839. *See id.* at 47.

181. *See id.*

182. *See* H.A. VALLANCE, *THE HIGHLAND RAILWAY* 26–29 (1963).

183. *See id.* at 29.

184. *See* RANSOM, *supra* note 177, at 75.

185. *See id.* at 92–93.

186. *See id.* at 71.

187. VALLANCE, *supra* note 182, at 74–80.

188. *See id.* at 144–45; *see also* RANSOM, *supra* note 177, at 92.

189. *See id.* at 103–04.

and wealthy tenants would expect, had been established, even more visitors from the South began to make the journey, particularly during the late summer months known as “the season.”¹⁹⁰ This is the scene captured in Earl’s painting.

If the railways enabled one sporting activity in the Highlands, they soon enabled another. Hikers and mountaineers from the South were now able to access the Highlands with far greater ease than ever. Hiking and mountaineering had gained greatly in popularity in Scotland during the second half of the nineteenth century. Mountaineering clubs, such as the Cairngorm Club, first established in 1887, and the Scottish Mountaineering Club, established in 1889, were organized to meet the needs, social as well as logistical, of growing ranks of hikers and mountaineers.¹⁹¹

More significant for purposes of recognition of a right to roam, seeds of a movement to secure public rights of access were planted in the mid-nineteenth century. The Scottish Rights of Way Society was established in Edinburgh in 1843.¹⁹² Its purpose was mainly to maintain footpaths near the capital from encroachment by landowners who wanted to close them. Members of the Society soon found themselves in the thick of a notorious controversy over access down a road that passed through a glen. An Edinburgh science professor led an excursion of his students down the road, and one of Scotland’s best known sporting landowners (also friend of the Royal Family), the Duke of Atholl, sought to block their access.¹⁹³ A series of incidents led to prolonged litigation, but the result was that such rights of way were firmly established.¹⁹⁴ The Rights of Way Society continued its efforts to secure public access, fighting landowners on multiple occasions in later years. On some of these occasions the local population surreptitiously supported them.¹⁹⁵

The same factors that contributed to the interest in deer hunting also stimulated interest in hiking in the Scottish Highlands. Mountaineers had long ascended high peaks in the Highlands,¹⁹⁶ but it was not until the second half of the nineteenth century when hill walking became more widely popular. The sport of walking was not the exclusive province of the aristocracy or *nouveau riche*. As the next Part of this Article discusses,¹⁹⁷ a great social transformation in recreation occurred in both England and Scotland¹⁹⁸ during the second half of the nineteenth century, and as a

190. See ORR, *supra* note 84, at 40–41.

191. See RICHARD PARADIS, A COMPARATIVE LANDSCAPE STUDY OF THE MOUNTAINS OF NORTHERN NEW ENGLAND AND THE HIGHLANDS OF SCOTLAND 228 (2008).

192. See Smout, *supra* note 103, at 30.

193. *Id.*

194. See *id.*; see also NATIONAL ARCHIVES OF SCOTLAND (“NAS”): G.D. 335, RECORDS OF THE SCOTTISH RIGHTS OF WAY SOCIETY.

195. See *id.*

196. See W.D. Brooker, *A Century of Mountaineering in Scotland*, ALPINE J. 190–91, available at http://www.alpinejournal.org.uk/Contents/Contents_1989-90_files/AJ%201989%20190-196%20Brooker%20Scotland.pdf (last visited Oct. 19, 2015).

197. See *infra* Part V.C.

198. On the revolution in recreation specifically in Scotland, see SMOUT, *supra* note 29, at 148–59.

result of this transformation, forms of recreation that had previously been either unknown or largely confined to the social elites were now practiced by the middle class.

What facilitated the revolution in recreation in Scotland were several social and economic changes that improved the lives of working-class Scots as well as the middle class. Notable among these changes were a substantial rise in real wages for the working class in the last three decades of the nineteenth century and more leisure time, largely due to the adoption of the Saturday half-holiday in the 1870s and, later, the shortening of the work day.¹⁹⁹ These changes made it possible for Scots of all classes to participate in outdoor activities that previously had been either unknown or available only to social elites. Among these activities were hill walking and mountaineering. For some Scots, however, uncertainty about their rights was a sufficient deterrence to pursue that activity. For some other Scots, as the debates over the Land Reform (Scotland) Act 2003 revealed, anecdotes about unpleasant encounters between hikers or walkers and land owners—or their ghillies—were a sufficient reason to clarify the right to roam. Whatever the incentive, to many Scots it seemed that the time was finally ripe for legislating on the matter. The issue was, yet again, rejoined.

V. A RIGHT TO ROAM: THE EARLY EFFORTS

The first attempt to gain legislative recognition of a right to roam came in the late nineteenth century. Although it was ultimately unsuccessful, it created a record that figured importantly in later debates that eventually led to recognition of the right to roam by the Scottish Parliament.

A. *James Bryce*

The early efforts were led by one man—the remarkable James Bryce. Bryce was a jurist, academic historian, Liberal politician, diplomat, peer, and avid mountaineer.²⁰⁰ Educated at the University of Glasgow, he held an academic post at Oxford as Regius Professor of Civil Law (his book *The American Commonwealth*²⁰¹ was highly influential on both sides of the Atlantic) but was also deeply involved in politics. He was first elected to Parliament in 1880 to represent the Tower Hamlets constituency in London, and he later returned to Parliament in 1885 to represent South Aberdeen. He remained a Member of Parliament until 1907, when he was appointed Ambassador to the United States. During his time in Washington, he became close friends with President Theo-

199. See *id.* at 148.

200. See Christopher Harvie, *Bryce, James, Viscount Bryce (1838-1922)*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, www.oxforddnb.com/view/article/32141?docPos=3 (last visited Oct. 19, 2015). The best full-length biography of Bryce remains H.A.L. Fisher's two-volume work, H.A.L. FISHER, JAMES BRYCE (VISCOUNT BRYCE OF DECHMONT, O.M.) (1927).

201. JAMES BRYCE, *THE AMERICAN COMMONWEALTH* (2d ed. 1898).

dore Roosevelt, with whom he shared a passion for outdoor activity. Bryce was an avid and highly skilled mountain climber. His climbing successes were legendary, including the Alps, the Pyrenees, Mt. Ararat, Mauna Loa (Hawaii), and Mt. Myogi-San (Japan).²⁰² Mt. Bryce in the Canadian Rockies is named after him.²⁰³

B. Bryce's Bills

Bryce's passion for hiking and mountaineering stirred him to lead the effort to obtain Parliamentary recognition of a public right of access to the mountains in Scotland. He introduced in Parliament several "Access to Mountains (Scotland)" bills, beginning in 1884, with subsequent bills being introduced in 1888 and 1892.²⁰⁴ The first bill, presented in 1884, proceeded on the assumption that the public had previously held a right to walk on "uncultivated mountain and moor land for purposes of recreation and scientific or artistic study" and that the recent development of deer forests had thrown the existence of that right in doubt.²⁰⁵ Bryce carefully tailored the claimed right in ways designed not to interfere with farmers, including sheep and cattle farmers, or with deer hunters. His bill specified several grounds for exclusion. Among these were (1) "[w]here a person goes upon land in pursuit of game, or for the pursuit of eggs, or accompanied by a dog" and (2) "[w]here any person so disturbs any sheep or cattle as to cause damage to their owner."²⁰⁶ Despite the narrowness of the bill, Bryce had no luck with it. The bill did not survive to the second reading stage.²⁰⁷

Despite its dismissal, the 1884 bill did gain the attention of the esteemed newspaper *The Times*. A column on the newspaper's leader page opined that the bill had value quite apart from its lack of Parliamentary success.²⁰⁸ The writer saw it as a vehicle for evaluating "the comparative strength of the various forces now moving and ultimately forming the national character."²⁰⁹ The writer continued, "The sportsman is a survival of prehistoric times. The lover of the picturesque is a creature of modern civilisation [sic], insomuch that some have doubted whether he existed in

202. See 1 H.A.L. FISHER, JAMES BRYCE (VISCOUNT BRYCE OF DECHMONT, O.M.) 168–69 (1927).

203. *Id.* at 170 n.1.

204. See TOM STEPHENSON, FORBIDDEN LAND: THE STRUGGLE FOR ACCESS TO MOUNTAIN AND MOORLAND 131 (1989).

205. See A Bill to Secure to the Public Access to Mountains and Moorlands in Scotland, 1884, H.C. Bill [122] (Gr. Brit.), available at <https://books.google.com/books?id=KngTAAAYAAJ&pg=PR4-IA1&dq=Bill+to+Secure+to+the+Public+Access+to+Mountains+and+Moorlands+in+Scotland+122&hl=en&sa=X&ved=0CB0Q6AEwAGoVChMIxqrTiqeMyAIVCVaSch13KQh3#v=onepage&q=Bill%20to%20Secure%20to%20the%20Public%20Access%20to%20Mountains%20and%20Moorlands%20in%20Scotland%20122&f=false> (last visited Oct. 19, 2015).

206. *Id.* §§ 4(a), 4(c).

207. See John A Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 90 NEB. L. REV. 739, 759–760 (2011).

208. Editorial, *TIMES* (London), Mar. 25, 1884, at 1.

209. *Id.*

classical antiquity.”²¹⁰ Moving on to the contemporary scene, the writer observed that increasing numbers of tourists visit Scotland each year looking for its natural scenery and beauty.

They find the Scotch Highlands not cheap, nor even everywhere accessible. They are confronted with a fortification of strong fences, locked gates, resolute gamekeepers, men of action, and the terrors of the law. They entreat, they parley, they offer to bribe, they bluster, they threaten and finally they retire with the loss of half a day and trudge the next half hour on a hard road between fences and plantations.²¹¹

The writer concludes by asking:

Is it not a matter of compromise? Surely the lords of the soil cannot claim so absolute a monopoly of earth’s surface and of the most beautiful parts of it, as wholly to shut out the poor holiday folk, the artist, the naturalist. Surely the many have rights as well as the few, and they that wish to see are entitled to legislative protection as much as they that wish to kill also. On the other hand, numbers cannot claim utterly to destroy the rights of property; the right to some exclusive of it. The problem cannot be insoluble.²¹²

The 1888 bill received a second reading in the House of Commons,²¹³ but this was due to accidental circumstances.²¹⁴ The second reading came to nothing, and the bill was dropped.²¹⁵

Bryce had more success with a third measure, introduced as a resolution in 1892. Obtaining a second reading, the bill²¹⁶ was virtually identical to its 1884 predecessor. The debate over the bill in the House of Commons²¹⁷ reveals much about Bryce’s intended scope of the right of access. It also reveals much about the meaning of recreation and sport in the late nineteenth century, a meaning that was very much to change by the time the modern “right to roam” was finally recognized.

In his opening remarks Bryce asserted a myth about the public’s access right that continued to be asserted even through the end of the next century.²¹⁸ Exclusion from the areas covered by the bill was a relatively

210. *Id.*

211. *Id.*

212. *Id.*

213. See 324 PARL. DEB., H.C. (3d ser.) (1888) 1472 (Scot.), available at <http://hansard.millbank systems.com/sittings/1888/apr/17> (last visited Oct. 19, 2015).

214. See 2 PARL. DEB., H.C. (4th ser.) (1892) 104 (Scot.), available at <http://hansard.millbanks ystems.com/commons/1892/mar/04/access-to-mountains-scotland> (last visited Oct. 19, 2015).

215. See *id.* at 128.

216. See A Bill to Secure to the Public the Right of Access to Mountains and Moorlands in Scotland, *supra* note 205.

217. See 2 PARL. DEB., H.C. (4th ser.) (1892) 91–128 (Scot.), available at <http://hansard.millbank systems.com/commons/1892/mar/04/access-to-mountains-scotland> (last visited Oct. 19, 2015).

218. See David Sellar, Community Rights and Access to Land in Scotland (Mar. 12, 2003) (abbreviated version of a paper given at *Landscape, Law and Justice Seminar*, Oslo), available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/58/community_rights.pdf?sequence=1 (last visited Oct. 19, 2014). The myth was related to another myth—that there is no cause of action for trespass under Scottish law. The pre-reform (pre-1999) position in trespass in Scotland was somewhat complex. The civilian-based law of delict of Scots law does not recognize a right to damages arising from the act of

new development, he argued; history was not on the owners' side. "There is no such thing," Bryce firmly asserted:

in the old customs of this country as the right of exclusion for purposes of the mere pleasure of the individual [owner]; and there is no ground in law or reason for excluding persons from a mountain, the right having there no value except to prevent other people [from] enjoying themselves.²¹⁹

"Eighty years ago," Bryce claimed, "everybody could go freely wherever he desired over the mountains and moors of Scotland."²²⁰ Bryce continued:

Until 80 years ago no attempt was made to exclude people from wandering freely over the mountains of Scotland. I am informed by friends familiar with Scottish law that there is no case in our law books of an attempt to interdict [enjoin] any person from walking over open moors or mountain, except of recent date²²¹

Bryce set the time of the change in practice at eighty years in recognition of the influence of Scott's novels on popular interest in the Scottish Highlands.²²²

Rejecting the notion that the right to exclude from land is absolute, Bryce argued that there was no basis for claims of compensation by landowners.²²³ "[I]f ever there was a case of unearned increment," he argued, "it is in the case of deer forests."²²⁴ Bryce's reasoning was that deer forests had no value eighty years ago, and they owe their present value to circumstances deer forest owners neither brought about nor could have predicted:

[B]ecause a passion for renting a deer forest has sprung up, and there are wealthy people who like to enjoy themselves in that way, and because railways and steamboats have made it easy to get to these happy hunting grounds—made it easy for the wealth of England to get to the moorlands of Scotland.²²⁵

trespass alone. D. L. Carey Miller, *Public Access to Private Land in Scotland*, 15 POTCHEFSTROOM ELECTRONIC L.J. 119, 120 (2012). Trespass to land is potentially a basis for liability only where it has resulted in damage. See KENNETH G.C. REID, *THE LAW OF PROPERTY IN SCOTLAND* ¶ 185 (1996). However, a landowner could exclude a person on his land without permission, and the Scottish remedy of interdict (injunction) is potentially available against repeated occurrences. *Id.* ¶ 183. Hence, it is, in the words of Lord Traynor, "loose and inaccurate" to say that there is no law of trespass. See R.R.M. PAISLEY, *ACCESS RIGHTS AND RIGHTS OF WAY: A GUIDE TO THE LAW IN SCOTLAND* 40 (2006) (quoting *Wood v. North British Railway*, (1899) 2 F. 1, 2 (Scot.)); see also Lovett, *supra* note 207, at 759–64; Miller, *supra*, at 569.

219. See 2 PARL. DEB., H.C. (4th ser.) (1892) 100 (Scot.), available at <http://hansard.millbank systems.com/commons/1892/mar/04/access-to-mountains-scotland> (last visited Oct. 19, 2015).

220. *Id.* at col. 95.

221. *Id.*

222. See *id.*

223. *Id.* at col. 100–01.

224. *Id.* at col. 100.

225. *Id.*

The landowner had hardly any right to complain, then, if the “enormous unearned increment were, after all these years, somewhat diminished by the resumption of their rights by the people.”²²⁶

Bryce’s notion of an “unearned increment” resonates with a theory of land and value that Henry George had famously developed in his 1879 book *Progress and Poverty*. There, George developed his “single-tax” (a phrase he nowhere used) idea as a mechanism to confiscate the ostensibly unearned profits of landowners. Like Bryce, George based his objection to such unearned profits on moral rather than economic, or efficiency, reasons. In George’s view the only legitimate moral basis entitling a person to ownership was labor, and here was precisely the problem with landowners claiming to themselves the exclusive benefits of land.²²⁷

Although we cannot be certain, it is not at all implausible to suppose that Bryce was familiar with George’s theory, which had attracted widespread attention on both sides of the Atlantic. George visited Bryce during an 1885 trip to England,²²⁸ and Bryce later referred to some of George’s newspaper columns, which he read on visits to California.²²⁹ At any rate, the similarity between them is striking.

Bryce carefully sculpted the contours of the right that he asked Commons to vindicate. He emphasized all of these “precautions”²³⁰ in his opening address, adding that he had made “full inquiry” among land owners, sportsmen, and sheep farmers as to whether they would recommend any additional precautions. He had heard none, but he remained opened to any reasonable suggestions.²³¹

226. *Id.* at col. 100–01. Bryce was to put his “unearned increment” concept and phrase to work in his famous and influential book, *The American Commonwealth*. The immense influence of the railroad magnates in the state of California was just one instance he cited of the unearned increment phenomenon in the United States (“Kearneyism in California”). 2 VISCOUNT JAMES BRYCE, *THE AMERICAN COMMONWEALTH*, 385–408 (2d ed. Rev. 1889).

227. On George and his single tax, see JOHN L. THOMAS, *ALTERNATIVE AMERICA: HENRY GEORGE, EDWARD BELLAMY, HENRY DEMAREST LLOYD AND THE ADVERSARY TRADITION* 102–31 (1983).

228. See HENRY GEORGE, JR., *THE LIFE OF HENRY GEORGE* 454 (1905).

229. See BRYCE, *supra* note 201, at 411.

230. See 2 PARL. DEB., H.C. (4th ser.) (1892) 98 (Scot.), available at <http://hansard.millbank systems.com/commons/1892/mar/04/access-to-mountains-scotland> (last visited Oct. 19, 2015).

231. Bryce was confident that the overwhelming majority of owners of deer forests would not object to his proposal. The few who did were likely to be foreign owners, men who either did not understand or did not respect the longstanding customary rights of Scotsmen. As the case-in-chief, Bryce cited the infamous “pet lamb” case, *Winans v. Macrae*, (1885) 12 R. 1051 (Sess. Scot.). In the case *Macrae* was a cottar whose cottage was near a public road that ran through an extensive deer forest. One of *Macrae*’s lambs strayed off the unfenced road and onto *Winan*’s land, and *Winan* sought to interdict (enjoin) him from permitting any of his animals from trespassing on the forest. The court denied the interdict. As one member of the court, Lord Young stated, “I think a trespass . . . may be committed by means of a pet lamb, for it may be put where it can do harm. But if you have 200,000 acres of rough grass land, with a public road running through it and a cot at the side of the road, the land being unfenced, to fence that land against children or against a pet lamb by an interdict of a Court of justice would, I think, be an outrageous proceeding. . . . Interdicts are granted by this and other Courts of law where appreciable wrong to a man . . . is threatened. Here there was no appreciable wrong.” *Id.* at 1063. Lord Young was simply stating in plain words what in Latin is captured in the famous maxim *de minimis non curat lex*, and the case might be passed off on that basis alone. But there is more to it than that. What was particularly galling about the case was the fact that the owner of the

Moreover, the right applied only to mountain land and moorland. This was an important limitation for more than one reason. First, it restricted the domain of the right's exercise to the Highlands—mountains and moorland—rather than throughout the entirety of Scotland. Second, and more important for present purposes, it signals not only range of intended beneficiaries of right but also, more deeply, the meaning of recreation not only in the context of the debate over public access to the Highlands but also, more broadly, in the context of late nineteenth century British culture.

Bryce's remarks and the debate over his 1892 resolution²³² generally make clear that the intended beneficiaries of the right which the resolution would protect was not the public as a whole but a rather narrow segment of the public, namely, mountaineers and serious mountain and moorland hikers and walkers. After all, the resolution was titled (as all of Bryce's access bills and resolutions were) "Access to Mountains," not "Right to Roam."²³³ Members of Commons on both sides of the debate consistently referred to the class of individuals who had been the subjects of exclusion in recent years as mountaineers, and it was these sportsmen whose sporting life Bryce and his supporters sought to vindicate as against the competing interests of a different class of sportsmen: deer hunters.

C. *Reasons for the Failures of Bryce's Bills*

Several factors contributed to the repeated defeats of Bryce's bills. One important factor was the strength and variety of the opposition. Opposition to Bryce's efforts came from several quarters. One quarter, not surprisingly, was the aristocracy which owned the great landed estates, some of whom included owners of deer forests. One MP, Lord Elcho (Hugo Charteris, 11th Earl of Wemyss), stoutly and directly defended deer forests. "The deer forests were attacked and were examined into by

deer forest was an American millionaire, a fact that was noted by a number of (Scottish) commentators on the case. *See, e.g.*, Hugh Barclay, *Notes in the Inner House*, 29 J. JURISPRUDENCE 431, 431 (1885).

232. Bryce's previous proposals had been brought before Parliament as bills. The 1892 measure, however, was brought as a resolution. Bills are aimed at becoming laws, which means that they have to go through the parliamentary bicameral system (i.e., passage by the Commons and scrutiny by the Lords, under the Parliament Act of 1911, and then royal assent). Resolutions are used by a single house of Parliament for matters that are wholly within the purview of that house. Bryce was, essentially, arguing that the right to roam already existed in law, and that his measures were in some sense simply declaratory of a preexisting right. If this is the case, then a resolution might be effective (equivalent to what in the United States today might be a "sense of the House/Senate resolution"). If it were aimed at changing the law, it would have to be a bill, but if Bryce's claim was that the law did not require change, only a proper understanding, then a resolution might be a good second-best option. Courts would not necessarily give effect to a resolution the way that they would to a statute, but the resolution might nevertheless exert some sway.

233. A Bill to Secure to the Public the Right of Access to Mountains and Moorlands in Scotland, 1892, H.C. Bill [213] (Scot.).

a Royal Commission,” Elcho began, “and the Royal Commission reported entirely and absolutely in their favour.”²³⁴ He continued:

It was said that the population had been displaced to make way for the deer, but that was denied before the Royal Commission; it was also disproved that the pasture was deteriorated by the evidence taken by the commission; and it was that the deer forests did not do any harm to the country, but did good to the community at large. It was shown that deer forests employed a large number of people, who, if there were no deer forests, would not be employed at all. It was shown that on 50 deer farms in the last 40 years over £2,500,000 had been laid out by the owners and lessees in making fences, planting, and making paths and roads. And, above all, it was shown that owing to the deer forests the rates in Scotland were infinitely less than if the deer forests were abolished.²³⁵

The British Government expressed ambivalence toward Bryce’s resolution. In his opening statement in the debate in Parliament, the Solicitor General for Scotland (Andrew Graham Murray) flatly stated, “I cannot assent to some of the statement of [Bryce] that the Highlands of Scotland are completely closed, and that if permission was asked it was generally refused.”²³⁶ Graham Murray went on to assess the value of “sporting rights”: “[T]here is no reason to treat these sporting rights differently from other rights of property. You cannot touch the sporting rights without seeing that the economic value of the Highlands is exceedingly large.”²³⁷ Graham Murray’s point was that the deer forests, which were leased to tenants at high rental rates, brought in large sums and the beneficiaries of that wealth included the local population. He concluded by stating the Government’s official position:

[T]he attitude of the Government is to accept the Resolution . . . , but, at the same time, to reserve to themselves, entire freedom of judgment as to the sufficiency of the privileges which may be put into any future legislation under the declaration that they do not recognize the important interests involved and will not permit them to be unduly sacrificed.²³⁸

What the Government gave with one hand—support for the resolution—it took away with the other, reserving to itself total freedom regarding the nature and extent of safeguards.

234. 2 PARL. DEB., H.C. (4th ser.) (1892) 116 (Scot.) (statement of Lord Elcho),

235. *Id.* Lord Elcho was wrong regarding the Royal Commission’s conclusions. The Napier Commission, which was appointed by Lord Lothian, the Minister for Scotland, recommended restricting expansion of deer forests. See NAPIER COMMISSION, *supra* note 87, at vol. V, 94–95, available at <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CD0QFjAE&url=http%3A%2F%2Fwww.alastairmcintosh.com%2Fgeneral%2Fresources%2FNapier-Commission-Vol-5.pdf&ei=TqqUVJTKGsG1ggTxmYPwCQ&usg=AFQjCNHKDYASGdG9Ou3mi2pl49NwI6qBsw&bvm=bv.82001339.d.eXY> (last visited Oct. 19, 2015).

236. 1 PARL. DEB., H.C. (4th ser.) (1892) 120 (Scot.) (comments of Andrew Graham Murray, Solicitor General for Scotland), available at <http://hansard.millbanksystems.com/commons/1892/mar/04/access-to-mountains-scotland> (last visited Oct. 19, 2015).

237. *Id.* at col. 123.

238. *Id.* at col. 124.

Another, and far more surprising, source of opposition, was a group of mountaineers themselves. Climbers were divided on the question of a right of way. The Cairngorm Club, which was based in Glasgow and the first president of which was Bryce himself, actively fought for rights of way.²³⁹ Part of the reason why this group supported a legally-recognized right was the fact that its members were less affluent than other climbers. Their summer climbs were necessarily confined to the Scottish Highlands, as they were unable to afford traveling abroad to more exotic sites. The influential Scottish Mountaineering Club (“SMC”), based in Edinburgh, on the other hand, held a very different view. Its members regarded private ownership of deer forests as a means of preserving the landscape.²⁴⁰ SMC members tended to be wealthy, and their class sympathies lay with those who owned or leased the great deer forests. During the late summer, which was the stalking season, SMC members typically went to Switzerland to climb the Alps. Hence, they had no occasion for confrontations with deer forest proprietors and had less reason to demand a right of access.²⁴¹

A clear example of this group of opponents and the reasons for its opposition comes from J. Parker Smith, a Scottish Member of Parliament (Partick/Glasgow) who was himself a mountaineer and an active member of the Scottish Mountaineering Club. A year prior to the debate over Bryce’s 1892 bill, Parker Smith had published an influential essay in *Blackwood’s Edinburgh Magazine*,²⁴² a widely-read British periodical that appeared between 1817 and 1980 and whose contributors included George Eliot, Joseph Conrad, and Thomas de Quincey.²⁴³ It contained many of the arguments that would be marshalled repeatedly against Bryce’s bill, not only in 1892 but in earlier debates as well.

Parker Smith opened his essay, titled “Access to Mountains,” with a somewhat denigrating reference to Bryce and his previous efforts: “Amongst the hardiest perennials with which we associate the names of our legislators, Professor Bryce’s yearly Access to Mountains Bills is not the least known.”²⁴⁴ Parker Smith began his analysis of the bill favorably enough, stating:

It must be confessed that the proposal is at first blush an attractive one, especially perhaps to Southern ears. Englishmen who find themselves in Scotland as lawful and exclusive occupiers of its mountains and moorlands are few. Those who desire from them that enjoyment which is not exclusive are many. The problem which

239. See SIMON THOMPSON, UNJUSTIFIABLE RISK?: THE STORY OF BRITISH CLIMBING 100 (2010).

240. *Id.* at 133.

241. See generally *id.*

242. J. Parker Smith, MP, *Access to Mountains*, 150 BLACKWOOD’S EDINBURGH MAG. 259 (1891).

243. See Philip V. Allingham, *Blackwood’s Edinburgh Magazine*, VICTORIAN WEB (June 19, 2013), <http://www.victorianweb.org/periodicals/blackwood/allingham.html>.

244. Smith, *supra* note 242, at 259.

Mr. Bryce has set himself is to improve the position of this latter class. Many a tourist whose only knowledge of the Highlands is in the months of August and September, and who finds himself hampered by the restrictions of deer forests, thinks wistfully how ‘purposes of recreation or of scientific or artistic study’ should set himself free of the country, and blesses Mr. Bryce.²⁴⁵

The tone quickly changed, as Parker Smith notes an anomalous aspect of the bill.²⁴⁶ Very curiously, the beneficiaries of the access right did not include crofters. Only those who are in the mountains or moorlands for “purposes of recreation or of scientific or artistic study” were subject to the bill’s protection.²⁴⁷ As Parker Smith pointed out, “[T]he bill does not touch the case of those who have occasion to traverse the hills, not for purposes of recreation or scientific or artistic study, but in pursuance of the needs of daily life.”²⁴⁸ This is worthy of note because it indicates that what motivated Bryce and his supporters was not a broadly democratic political or social vision. Their vision was confined to sportsmen, more immediately, one group of sportsmen—mountaineers and hikers, whose interests were set against those of another group of sportsmen—deer hunters.²⁴⁹

Parker Smith seemed to have been keenly aware of this aspect of the bill, and he drove the point home. “Mr. Bryce,” he stated, “constitutes himself the champion of men on pleasure bent.”²⁵⁰ Parker Smith realized that Bryce’s bill implicated a clash between two competing visions of the sporting life. He pointed out that Bryce “makes an attack upon one class of her Majesty’s subjects who use the mountains of Scotland for the recreation of sport, on behalf of another class of her Majesty’s subjects who would use the same mountains for the recreation of climbing.”²⁵¹ Put thus, Parker Smith argued, the case for the bill is inconclusive. There is no proof that the class of climbers, especially serious climbers, is substantially greater than that of deer hunters.

Parker Smith then offered two related arguments that seemed to have had particular traction in the debate that followed. First, he argued that the bill was unnecessary because climbers currently encountered few or no obstructions. “[Climbers] experience no general or systemic hindrance to their freedom. They have much more unquestioned liberty than the law concedes. They care nothing for the right to access, which is not in fact obstructed.”²⁵² Parker Smith offered into evidence a statement which he had solicited from Professor G.G. Ramsay, a well-known

245. *Id.* at 259–60.

246. *See id.* at 259–72.

247. *See id.* at 260.

248. *Id.*

249. In this respect, Parker Smith seemed quite correct in arguing that “[Bryce] is absorbed in the interests of the climber, and merely throws in as a makeweight the pursuit of scientific or artistic study.” *Id.*

250. *Id.* at 261.

251. *Id.*

252. *Id.* at 262.

mountaineer and President of the Scottish Mountaineering Club. Ramsay stated,

For all persons who do not wish to annoy their neighbors, all grouse-moors, all pasture-farms, are practically open to the pedestrian as it is. Unless a man wants to traverse a beat where sportsmen are actually shooting, no difficulties are placed in the way of persons crossing moors or open grounds, except, perhaps, where these are in the neighbourhood of towns. But in such cases restrictions must be imposed.²⁵³

Further, Mr. Gilbert Thomson stated that it was the consensus of members of the Scottish Mountaineering Club who he had consulted that “we should be better to trust to the common-sense of proprietors, who, as a rule, [are] willing to give any reasonable facilities, rather than to any compulsion.”²⁵⁴

Next, Parker Smith worried about the perverse consequences of Bryce’s bill. “[Climbers] believe that as its [the bill’s] result they might find themselves with smaller facilities for mountaineering than at present; for there are many indirect hindrances which landowners and sporting tenants, if really driven to the defensive, could throw in their way.”²⁵⁵ Part of the reason why the bill would have this effect, Parker Smith believed, was the uncertain state of the law of trespass in Scotland. The legislation would be “mischievous,” Parker Smith argued, because “it will set people to stand on their rights in a province of law where those rights are singularly ill-defined and overlapping, and where peace depends on mutual forbearance and reasonableness.”²⁵⁶ The Scottish law of trespass is anomalous, Parker Smith observed, because “it conveys a command without a sanction.”²⁵⁷ He quoted a treatise on Scottish land law to the effect that although people are prohibited from entering another’s land on foot or horseback without permission, there is no penalty for simple trespass.²⁵⁸ In Parker Smith’s view, Bryce’s bill would set the two sides against each other, upsetting the delicate balance of forbearance that is necessary to keep the peace in the current legal environment. It would be all too easy for landowners or their managers to challenge the purposes of climbers as not being with the confines of the bill’s restrictions.

As to the deer forests specifically, Parker Smith argued that “[i]n reasonable hands deer-forests are open to the public for nearly three-quarters of the year.”²⁵⁹ Only in August, September, and part of October—deer-hunting season—was it necessary to exclude climbers and walkers. At other times of the year, Parker Smith, again drawing on the opinion of noted climbers, argued, problems rarely occurred. There

253. *Id.* at 263.

254. *Id.*

255. *Id.* at 262.

256. *Id.* at 264.

257. *Id.*

258. *Id.* (quoting 3 JOHN RANKINE, THE LAW OF LAND OWNERSHIP IN SCOTLAND 120 (1891)).

259. *Id.* at 266.

were, to be sure, notable exceptions, notorious cases in which owners of large deer-forests had acted outrageously. Such cases were “extreme and . . . extraordinary,” and they should not be used as the basis for establishing a general rule.²⁶⁰ Here, in Parker Smith’s view, the old saw that “hard cases make bad law” applied, and “it would scarcely be reasonable to alter the general law of trespass in order to checkmate such isolated instances of selfishness.”²⁶¹

Parker Smith’s essay drew attention from important quarters. A review in *The Spectator*, a widely-read British magazine, found his critique of Bryce’s bill “admirably clear and convincing.”²⁶² The reviewer stated that Parker Smith

shows that Mr. Bryce’s bill is not the best way to accomplish th[e] object [of protecting those in search of health and recreation in the mountains]. Unless we are prepared to do what is practically to confiscate the deer-forests of the Highlands, it is essential, in the interests of the tourists, not to put up the backs of the proprietors. In a word, as long as we allow proprietary rights to landlords, the tourists’ best passport is their acquiescence and good will. . . . If . . . we attempt to give statutory rights of walking, we shall make the owners feel that it is war, and that they may use every weapon the law still allows them—and it must allow them a great many—to harry the pedestrian.²⁶³

Commons took Bryce’s measure seriously, debating it for over three hours.²⁶⁴ In the end the House of Commons did pass the following diluted resolution: “Resolved, That in the opinion of this House, legislation is needed for the purpose of securing the right of the public to enjoy free access to uncultivated mountains and moorlands, especially in Scotland, subject to proper provisions for preventing any abuse of such right.”²⁶⁵ Even that victory proved hollow, for although a government-sponsored bill similar to Bryce’s did receive a first reading in Commons a few months later, a few weeks thereafter, Parliament dissolved, and the bill died.²⁶⁶

Bryce would present his bill again in 1898, but without success.²⁶⁷ His brother, Annan, sought to bring a similar bill before Parliament on four separate occasions (1900, 1905, 1908, and 1909) when James Bryce

260. *Id.* at 270.

261. *Id.*

262. Review, *The Magazines*, SPECTATOR, Aug. 8, 1891, at 201.

263. *Id.* at 200–01.

264. See MARION SHOARD, A RIGHT TO ROAM 172 (1999).

265. 1 PARL. DEB., H.C., (4th ser.) (1892) 128 (U.K.), available at <http://hansard.millbanksystems.com/commons/1892/mar/04/access-to-mountains-scotland> (l. 128) (last visited Oct. 19, 2015).

266. See SHOARD, *supra* note 264, at 173.

267. Contributing to the reasons for the failures of Bryce’s bills was his general lack of stature in Parliament. His biographer, H.A.L. Fisher, observes that “Bryce was not a first class Parliamentary figure. Neither in the House nor in the country did he exert the kind of authority which belongs to a man whose word is decisive in shaping public opinion.” FISHER, *supra* note 200, at vol. I, 176.

became ambassador to the United States. These efforts were all unsuccessful.²⁶⁸

D. Sport and Recreation in Late Victorian and Edwardian Britain

The narrowness of Bryce's conception of sportsmen results from a deeper understanding, one that concerns the forms and limits of sport and recreation in the late Victorian and Edwardian periods. Thanks to several excellent recent monographic studies, we now know quite a lot about the social composition of sportsmen and the social characteristics of recreation in Britain during these periods. Several themes emerge from these studies.

First, new sports developed as alternatives to the traditional forms of sport and recreation. No longer was sport confined to hunting (fox, bird, or deer) and other traditional pastimes of the aristocracy and English upper class. In late Victorian England, cycling, swimming, lawn tennis, and golf became popular forms of sport, particularly among professionals and businessmen.²⁶⁹ English football also grew substantially in popularity, even among working-class men, after 1870.²⁷⁰

Second, to a substantial degree the transformation of sport was very much a part of the broader social phenomenon of inculcating certain Christian values throughout society. Sport came to be viewed as not solely a matter of pleasure but also as part of the project of creating a rational, orderly, productive, and God-fearing society.²⁷¹ The terms "rational recreation" and "manly Christianity" have been applied to this view of sport, which emphasized robust physical activity, good gamesmanship, competition, and success.²⁷² Such activities helped nurture virtues that were considered the foundation of a well-ordered, rational Christian society.

Third, as befits the view of sport as "manly" activities, the transformation of sport and recreation was very much a gendered matter. This is hardly surprising, given what is now widely known regarding the subordinated social place of women and their location in the domestic sphere.²⁷³ What is perhaps surprising is that there existed a public debate about women and sport in the late Victorian period, a debate that revealed tensions in the view of women, captured in ambiguities in the Vic-

268. See SHOARD, *supra* note 264, at 173–74.

269. See ALAN METCALFE, *LEISURE AND RECREATION IN A VICTORIAN MINING COMMUNITY: THE SOCIAL ECONOMY OF LEISURE IN NORTH-EAST ENGLAND, 1820–1914*, at 118–19 (2008).

270. See NANCY FIX ANDERSON, *THE SPORTING LIFE: VICTORIAN SPORTS AND GAMES* 93, 95–97 (2010).

271. See *id.* at 67–86.

272. See *id.* at 67; PETER BAILEY, *LEISURE AND CLASS IN VICTORIAN ENGLAND: RATIONAL RECREATION AND THE CONTEST FOR CONTROL, 1830–1885*, at 72 (1987); JOHN LOWERSON, *SPORT AND THE ENGLISH MIDDLE CLASSES, 1870–1914*, at 65 (1995). "Muscular Christianity," a narrower term, was a volunteer movement in the Victorian period. See *A MID-VICTORIAN PEPYS: LETTERS AND MEMOIRS OF SIR WILLIAM HARDMAN*, 26 (S.M. Ellis ed., 1923).

273. See, e.g., METCALFE, *supra* note 269, at 18.

torian use of the term “lady.”²⁷⁴ On the one hand, women (or at least some women) were selectively included “into the mainstream of sociability”²⁷⁵ while still denying them central places in positions of power. The development of “manners” was the key to maintaining this balance, allowing women to develop something like a career ladder while still confined to the domestic realm.²⁷⁶ From this perspective sport could be viewed as an additional point of assimilation and sociability. At the same time, however, sport threatened the very assumptions on which this model of women’s behavior was built. Sports fostered virtues that were perceived as threatening to the innocence of women.²⁷⁷

A fourth theme that emerged from recent scholarship on sport and recreation in later Victorian Britain is that this transformation of sport was largely club-oriented.²⁷⁸ One historian has stated that “[t]he emergence of club-based sport is one of the defining characteristics of modern organized sport.”²⁷⁹ In late Victorian England new sports such as lawn tennis and lawn bowling were very much a club-oriented activity, and the clubs often continued to provide opportunities for socialization even during the offseason months.²⁸⁰ The development of these clubs followed the growth of organized team sport in the English public schools and universities.²⁸¹ “[F]ormer public schoolboys,” one historian observes, “played an organisationally [sic] . . . dominant role until the ethos was so well established that imitation could run of its own accord.”²⁸²

Finally, and for present purposes, most important, it is clear that a form of democratization did occur in sport in Britain during the late Victorian era. This form of democratization was decidedly thin in the sense that it involved only a weakening of the rigid class-based forms of exclusion of the public to recreational spaces. Recreation and sport were no longer the exclusive domain of the aristocracy. However, the weakening of the class hierarchy in sport was by no means widespread. The democratization was decidedly middle class. Late nineteenth-century Britain remained very much a class society, and the rise of sport became enmeshed in the intricacies of its distinctions. Sport did spread beyond the social elite, but the cult of athleticism was largely confined to the new middle class, leaving out the working class. Clubs and other organizations for amateur sport performed a key role in the exclusion of working-class men from most sports. New governing bodies of various sports adopted restrictions that effectively barred mechanics, artisans, and laborers from

274. See LOWERSON, *supra* note 272, at 204.

275. Michael Curtin, *A Question of Manners: Status and Gender in Etiquette and Courtesy*, 57 J. MOD. HIST. 395, 419 (1985).

276. *See id.*

277. See LOWERSON, *supra* note 272, at 204.

278. See METCALFE, *supra* note 269, at 117.

279. *Id.*

280. *See id.* at 118.

281. See LOWERSON, *supra* note 272, at 72.

282. *Id.*

membership.²⁸³ The core reason for this exclusion was “a fundamentally new attitude of the middle class to the practice of sport.”²⁸⁴ The new emphasis on sport maintained a distance between bourgeois and popular cultures.²⁸⁵ Working class athletes were relegated to the ranks of professionals, where unwholesome activities such as drinking and gambling permeated. The few amateur sports and associated clubs that were open to working-class men strongly tended to be outside the mainstream of the newly popular sports. In particular, football was the one activity in which working-class men could and did freely participate.²⁸⁶ Early Victorian reformers had tried to stamp out football, but despite their efforts the sport continued throughout the nineteenth century as “a backstreet working-class game.”²⁸⁷ But athletic or recreational outlets for working-class men beyond football were few and far between. The great social transformation in sport did not reach that far. As one historian observes, “If sport was indeed the great leveller [sic], its social utility to the established or aspiring bourgeoisie was that it might level up, not level down.”²⁸⁸

VI. LATER EFFORTS—AND SUCCESS

A. *Between the Wars*

These failures did not dampen the enthusiasm for outdoor recreation.²⁸⁹ Scots organized campaigns to establish national parks, and in 1931, The National Trust for Scotland was created.²⁹⁰

Nor had the efforts to obtain legal recognition of a right to roam in Scotland escaped the attention of those who lived south of the Scottish border. During the thirty years following Annan Bryce’s last bill in 1909, nine more access bills, all similar to James Bryce’s original bill, were introduced.²⁹¹ In 1939, Parliament did approve the Access to Mountains Act, first introduced by a Labour MP, Arthur Creech-Jones, but land-owning MPs added so many amendments compromising walkers’ rights that the original bill was virtually emasculated. The Act required local authorities to survey open countryside, assess the level of access provid-

283. See BAILEY, *supra* note 272, at 131.

284. *Id.* at 131–32.

285. See *id.* at 132.

286. See ANDERSON, *supra* note 270, at 93, 95–97.

287. *Id.* at 95.

288. BAILEY, *supra* note 272, at 136.

289. See ANDY WIGHTMAN, *THE POOR HAD NO LAWYERS: WHO OWNS SCOTLAND (AND HOW THEY GOT IT)* 208 (2013).

290. See *id.* Wightman tells the fascinating story of the origins of the Scottish National Trust.

291. See TOM STEPHENSON, *FORBIDDEN LAND: THE STRUGGLE FOR ACCESS TO MOUNTAIN AND MOORLAND* 140 (1989). At least one of these bills, introduced by P. Gilchrist Thompson in 1924, would extend the access right to England and Wales as well as Scotland. See 173 PARL. DEB., H.C. (5th ser.) (1924) 1152–55 (U.K.). Later bills included those introduced in 1930 (see 235 PARL. DEB., H.C. (5th ser.) (1930) 419–21 (U.K.)), 1931 (see 252 PARL. DEB., H.C. (5th ser.) (1931) 1357–58 (U.K.)), and a bill introduced in 1938 which was enacted as the 1939 Access to Mountains Act, discussed above.

ed to walkers and secure further access by means of agreements with landowners, by orders or by purchasing the land. In practice, the 1939 Act, which did not extend rights to Scotland, secured few improvements for walkers.²⁹² It was later repealed by the National Parks and Access to Countryside Act of 1949.²⁹³

The period between the wars witnessed enormous social changes throughout Britain, including Scotland, and these changes both broadened and thickened the democratic, i.e., non-hierarchical, character of society and culture, including sport and recreation. One has only to compare the composition of golfers in the late nineteenth century with those of today to see evidence of this change. In the late Victorian and Edwardian eras golf was by and large the domain of the middle class. Working-class golfers were rare or non-existent. As one writer pithily makes the point, “the only role for the worker was as club servant.”²⁹⁴ Today the picture on the golf course is entirely different, as the tools of social exclusion have slowly given way to a more diversified sport.

À propos access rights, the period between the wars saw the tremendous surge of interest in outdoor activity and rural sports, especially hiking. Alastair Borthwick noted this development in his book *Always a Little Further*: “There had been walkers, and cyclists, and climbers before; but not in these numbers. The great hiking craze of the early nineteen-thirties, which sent thousands, curiously clad, out into the country for the first time, was the beginning of it all as a mass movement.”²⁹⁵ What was unique about this new wave of interest in fresh-air pursuits was that it was led by industrial working-class men rather than the middle class. These working-class sportsmen were eager to escape the grime, the poverty, and the grinding existence of life in such poor urban areas as Clydebanks in Glasgow, where both unemployment and labor activism (“Red Clydebanks”) were very high during the Great Depression. In the 1930s, increasing numbers of these young Scottish men took up the sport of mountaineering, which up until then had been the exclusive province of men like James Bryce.²⁹⁶ The new breed of working-class mountain-

292. See *Winning the Right to Roam*, RAMBLERS, <http://www.ramblers.org.uk/get-involved/campaign-with-us/past-campaigns/right-to-roam-crow.aspx> (last visited Oct. 19, 2015).

293. National Parks and Access to Countryside Act 1949, 12, 13, & 14 Geo. 6, ch. 97, § 84 (U.K.).

For the story of the 1939 Act, see STEPHENSON, *supra* note 291, at 165–81.

The 1939 Act was preceded by a public campaign to gain a right to roam. The campaign included a mass trespass in 1932 on Kinder Scout in the Peak District. See GEOFFREY P. GLASBY, *MASS TRESPASS ON KINDER SCOUT IN 1932 AND THE FOUNDING OF OUR NATIONAL PARKS* (2012); STEPHENSON, *supra* note 291, at 153–64. Stephenson states that there was in fact no mass trespass on the summit of Kinder Scout. See *id.* at 153. The mass victory meeting actually occurred on a public path in another location. *Id.*

The Ramblers’ Association, England’s leading walkers’ lobby group, was founded in the wake of the mass trespasses, in 1935. Like Bryce, the Ramblers have spurned universal access in favor of partial access, specifically access to upland areas as their real goal. See SHOARD, *supra* note 264, at 276.

294. DENNIS BRAILSFORD, *BRITISH SPORT: A SOCIAL HISTORY* 104 (1992).

295. ALASTAIR BORTHWICK, *ALWAYS A LITTLE FURTHER* 57 (1969).

296. See RONALD W. CLARK & EDWARD C. PYATT, *MOUNTAINEERING IN BRITAIN 195–97* (1957); Peter Donnelly, *Social Climbing: A Case Study of the Changing Class Structure of Rock Climbing*

eers reached the mountains mainly by hitchhiking, and once in the mountains they slept in caves, barns, and abandoned bothies.²⁹⁷ Although excluded from elite clubs like the Alpine Club, these young working-class mountaineers joined new clubs, better suited to their harder, tougher methods of climbing, not to mention their social ways. In Glasgow alone, at least three such clubs appeared, including the Creagh Dru Mountaineering Club, whose members came mainly from Clydebank.²⁹⁸

Through these new clubs, a new tradition of mountaineering developed, one whose popular chronicler was the Glaswegian journalist Alastair Borthwick (1913–2003). Through his newspaper column “Open Air,” Borthwick took up mountaineering and became familiar with the new subculture of working-class mountaineers. His well-known first book, *Always a Little Further*,²⁹⁹ first published in 1939, not only described the adventures of these men but also documented the social change that they reflected.³⁰⁰

B. *Success, At Last*

Success for Scotland ultimately came with the Land Reform (Scotland) Act of 2003. There were, of course, multiple factors that contributed to this ultimate victory. A key factor has already been discussed—the gradual weakening of the class-based hierarchy that characterized British sport and recreation throughout the nineteenth century.

The democratization of sport was not the only development that facilitated legislative recognition of a right of access in Scotland. Another very important dimension of the democratization process was the creation of the Scottish Parliament in 1999. Devolution had been on and off the Scottish and British political agendas since 1979 when Scots narrowly voted in favor of an earlier measure of legislative devolution in a referendum but sufficient numbers to achieve the required weighted majority.³⁰¹ Beginning in the 1980s, political changes in the United Kingdom, notably the election of Margaret Thatcher and the development of Thatcherite economic policies, changed the internal Scottish political dynamic regarding devolution. The Labor Party now actively supported it, and opposition diminished as the sentiment grew that “the Conservatives were ruling Scotland against the wishes of a majority of its people.”³⁰² Al-

ing and Mountaineering in Britain, in *STUDIES IN THE SOCIOLOGY OF SPORT* 13, 21–22 (Aidan O. Dunleavy et al., eds., 1982).

297. See CLARK & PYATT, *supra* note 296, at 195.

298. See *id.* at 195–96.

299. BORTHWICK, *supra* note 295. Evidencing its enduring popularity, this book has never gone out of print.

300. See *Alastair Borthwick*, WIKIPEDIA, http://en.wikipedia.org/wiki/Alastair_Borthwick (last visited Oct. 19, 2015); Obituary, *Alastair Borthwick*, GUARDIAN (Oct. 9, 2003), <http://www.theguardian.com/news/2003/oct/09/guardianobituaries.booksobituaries> (last visited Oct. 19, 2015).

301. See James Mitchell, *The Creation of the Scottish Parliament: Journey Without End*, 52 PARLIAMENTARY AFF. 649 (1999).

302. *Id.* at 655.

so important to the ultimate success of devolution were internal Scottish legislative policies designed to enhance the democratic character of the eventual Scottish Parliament, including proportional representation and measures concerned with gender equality.³⁰³

Devolution was extremely important to the ultimate recognition of the right of access for several reasons. First, it meant that, for the first time, the right of access to Scottish mountains, moorlands, and other areas would be decided solely by Scots. Although Scottish MPs had certainly been active in previous attempts to gain recognition of access rights, the real decisional power lay in the hands of English representatives, whose values did not always coincide with those of the Scots. Second, because the decision would be made by the Scottish Parliament, it would affect Scottish land alone. Bryce and other early proponents of access rights had really focused only on the Highlands of Scotland anyway, but their bills did not distinguish between Scottish and non-Scottish areas in the United Kingdom. Third, devolution brought land reform, specifically the question of access rights, back onto to the political agenda after a long hiatus. Following passage of the 1939 bill, Parliament in London apparently had little disposition once again to consider the question of whether to recognize access rights in certain Scottish areas. With political control over the question now secured in a Scottish Parliament, it was virtually certain that the matter would be revisited. This was especially true in view of the fact that the clear majority of those who voted in the 1999 Scottish parliamentary election did so in favor of parties that supported legislation on land reform.³⁰⁴ Fourth, by allowing recognition of a uniquely Scottish right of access, devolution facilitated expression of rising Scottish nationalism in a concrete form.

Another factor contributing to recognition of the Scottish access right was a 1998 publication of the Scottish Natural Heritage, entitled *Access to the Countryside for Open-Air Recreation*.³⁰⁵ The report concluded that a compelling case to reform the extant situation existed. One reason was the lack of clarity regarding legal rights of access:

[T]he existing law may be understood by lawyers but it is not clear to members of the public, who are deterred from exercising reasonable access by uncertainty about their rights and by fear of, or previous experience of, confrontations with owners who in their turn have difficulty in protecting their interests in the face of irresponsible or provocative behaviour by the public.³⁰⁶

303. See *id.* at 657–60.

304. See 20 Mar. 2002, PARL. DEB., S.P.. (2002) 7380 (comments by Ross Finnie, Minister for Environment and Rural Development), available at http://www.scottish.parliament.uk/parliamentary_business/28862.aspx?r=4365&mode=pdf (last visited Oct. 19, 2015).

305. MACPHERSON RESEARCH, SCOT. NATURAL HERITAGE, PERCEPTIONS AND EXPERIENCES OF ACCESS TO THE SCOTTISH COUNTRYSIDE FOR OPEN AIR RECREATION OF VISITORS FROM MAINLAND EUROPE (1998).

306. See 22 Jan. 2003, PARL. DEB., S.P. (2003) 14179 (comments by Allan Wilson, Deputy Minister for Environment and Rural Development), available at <http://www.scottish.parliament.uk/>

The democratic character of the aspirations behind the Land Reform (Scotland) Act is apparent from comments made during the debates leading up to passage of the bill. The provision of access rights was only one part of a much larger and more ambitious package of land law reforms. However complex the package was, it was unified by a common aim, articulated by a leading member of the government: “[The bill] is about adjusting the balance between private rights and the public interest in ways that are appropriate to the 21st century.”³⁰⁷ The Minister further remarked, “The bill is . . . important for social inclusion, because it provides people with more opportunity to pursue those activities [referring to “participation in outdoor pursuits and the benefits to health”] around where they live.”³⁰⁸ Pressed about whether the bill was a matter of redistribution of wealth, the minister responded, “The bill is certainly about a redistribution of rights.”³⁰⁹ The minister was hardly the only participant in the debates to hold this view of the bill. As one member of the Scottish Parliament stated, “The debate is important because it is about dispersing power within Scotland. The bill is about liberating and empowering communities and individuals.”³¹⁰ The debate was spirited, and there certainly was strong opposition.³¹¹ Even those who opposed the bill implicitly agreed that it was fundamentally about the dispersal of power and access to land in Scotland, which was precisely one of the main reasons for their opposition.

In the end, the Conservative Party, the only political party to oppose the bill, lost by a substantial margin. There were several diverse reasons for their defeat. To some extent, they were their own worst enemy, going so far as to characterize the bill as Marxist and compare its proponents to Che Guevara.³¹² But even if their arguments had been restrained, they would have lost, for too many other factors conspired against them. Confusion about the legal status of public rights to access the mountains and other open lands for hiking and similar recreational

parliamentarybusiness/report.aspx?r=4421&mode=pdf (last visited Oct. 19, 2015) (quoting Scottish Natural Heritage’s advice).

307. 20 Mar., 2002, PARL. DEB., S.P. (2002) 7380 (comments by Ross Finnie, Minister for Environment and Rural Development) available at <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4365&mode=pdf> (last visited Oct. 19, 2015).

308. *Id.* at 7383. The bill, which was very long and quite complex, is filled with other examples that reveal its democratic aspirations. Comments on other provisions of the bill made clear those aspirations. For example, Minister Finnie, commenting on a land development provision, noted, “[T]he conclusions of the land reform policy group sought to remove the land-based barriers to the development of rural communities through increased diversity and community involvement in the way in which land is owned and used. That will pave the way for less concentration of ownership and management in a limited number of hands, especially at [the] local level.” *Id.* at 7384.

309. *Id.*

310. *Id.* at 7421 (comment of Richard Lochhead).

311. One member, for example, made the following, rather striking comparison: “It is ironic that, at a time when every country—with the exceptions of Cuba and North Korea—has spurned Marxism, we are attempting a bill of which Kim Jong-il or Fidel Castro would be proud.” *Id.* at 7398 (comment of Bill Aitken). He further compared the bill to Robert Mugabe’s land confiscations in Zimbabwe. *Id.* at 7388.

312. *Id.* at 7427 (comment of Michael Matheson).

purposes seemed genuine, and for some supporters of access rights, the need for clarity was a sufficient reason for the statute. For many other supporters, the bill addressed a deeper social and political need—remedying the longstanding inequality of land distribution in Scotland. The provisions on access rights were packaged with other parts dealing with crofters' rights and rights of communities to buy land.³¹³ By packaging the reforms in this way, the bill's proponents straightened the democratic character of the bill overall, addressing longstanding social and economic perceived injustices. It made opponents appear to be retrograde defenders of an unjust social order. For proponents, access rights were no longer just a matter of an amenity for the rising middle class. They were part and parcel of a broad-based redress of historical injustices against all segments of Scottish society, including its lowest ranks.

VII. RECREATION, DEMOCRACY, AND MODERN AMERICAN PROPERTY LAW

A. *The Limits of Recreation and Democracy*

This Article has argued that the Scottish Law Reform Act forms part of a gradual evolution toward a more democratized vision of sport and recreation in Scotland, indeed Britain generally from the late nineteenth through the twentieth centuries. The vision is democratized in the specific sense that the access to space for recreation is not based on rigid hierarchies formed by class distinctions; rather, the public generally has been provided access to recreational spaces.

This conception of democracy, thin as it is, has limits which are important not only for purposes of the historical story told here but also for broader theoretical purposes. What does democracy have to do with recreation? Recreation and leisure might be linked with democracy in more than one way, especially depending on the conception of democracy that one holds. Until quite recently a consensus of sorts has existed among historians regarding the social and political effects of social mixing in eighteenth-century Britain.³¹⁴ According to this consensus view, the new discourse of politeness reduced rigid social distinctions of rank, allowing everyone who interacted to present themselves as equally polite and genteel. Further, commercial venues opened spaces for such polite interaction to the public generally, rather than restricting them on the basis of inherited rank. These histories draw attention, for example, to associational opportunities created by the urban coffeehouse culture of eighteenth-century England, with historians viewing this venue as a potential

313. *Id.* at 7417 (comment of John Farquhar Munro).

314. For a concise overview of this historiographical model, see Hannah Greig, "All Together and All Distinct": Public Sociability and Social Exclusivity in London's Pleasure Gardens, ca. 1740-1800, 51 J. BRIT. STUDIES 50, 53-57 (2012).

agent for sociopolitical change.³¹⁵ This historical literature emphasizes the new discourse of politeness. “[T]here is general acceptance that this new social landscape was partnered by emergent social mores that stressed the necessity of sociable exchange and free interactions within a modern, civilized, and polite society.”³¹⁶

More recently, however, this historical consensus about the socio-political effects of creating shared spaces has been drawn into question. In her important study of eighteenth-century London pleasure gardens, Hannah Greig shows that shared spaces such as pleasure gardens, although indeed loci of social mixing of classes, nevertheless were construed as places “to behold the spectacle of glamorous elite exclusivity.”³¹⁷ On the basis of her evidence, Greig warns us not to presume that the “simple fact that different social groups were accommodated within a shared public space . . . necessarily denoted integration.”³¹⁸ Indeed, eighteenth-century London’s pleasure gardens, although open to all, were more effective as sites for performance of social hierarchy precisely because they were open and therefore accessible to those who stood lower on the social ladder. “Hierarchies,” Greig cautions, “might be as much confirmed as contradicted in shared leisure grounds.”³¹⁹

This Article does not claim a linkage, certainly not a necessary linkage, between shared spaces and building social capital. The Scottish story of access to open spaces does not support such a claim, and evidence such as Hannah Greig’s makes such a claim seem quite unconvincing. Sharing a space may be a necessary condition for democratizing interactions in the sense of building social capital, but it is surely not a sufficient one. This Article’s claim regarding the connection between shared recreational or leisure spaces and democracy is weaker: It is that the 2003 Scottish Land Reform Act forms a part of a gradual evolution to a more democratized vision of sport and recreation in the specific sense of providing more public access to recreational spaces against a historical practice of excluding the public on the basis of a rigid class-based social hierarchy. The evolution of an inclusionary model of shared spaces for sport and recreation, both in Scotland and Britain more broadly, is part and parcel of the larger story of the gradual weakening of a class social system that governed many aspects of life throughout the U.K. during the nineteenth and early twentieth centuries.

315. See, e.g., MILES OGBORN, SPACES OF MODERNITY: LONDON’S GEOGRAPHIES, 1680–1780 (1998).

316. Greig, *supra* note 314, at 54.

317. *Id.* at 62.

318. *Id.* at 73.

319. *Id.*

B. Recreation and Democracy in Modern American Property Law

Controversy over public access rights is hardly unique to Scotland. In the United States, beaches are today what the Highlands were in the late nineteenth century Scotland—a contested ground for the assertion of public rights of access for recreational purposes. In the modern American context, as in the Scottish context, the debate implicates questions about the meaning of recreation and the relationship between recreation and democracy.

Not a great deal of historical knowledge is required to think of examples of times and societies in which recreation was anything but democratic in this inclusive and non-hierarchical sense. As we have discussed, recreation in Victorian Britain was hardly non-hierarchical or all-inclusive. In the United States, the same is even true today in certain regions (e.g., wealthy suburban areas) or certain activities (e.g., golf, polo). Still, recreation is important to this inclusionary conception of democracy because of its potential to develop attitudes, perceptions, and practices that are themselves indispensable to building a stable inclusionary democracy. Public access to beaches illustrates this point.

The New Jersey Supreme Court has taken the lead in the expansion of public beach access via the public trust doctrine in recent years. In *Matthews v. Bay Head Improvement Ass'n*,³²⁰ the court held that a private nonprofit entity which owned or leased most of the beachfront lots in the Borough of Bay Head did not have unlimited right to exclude members of the public from the dry sand portion of its beach: “The public must be afforded reasonable access to the foreshore [i.e., wet sand area] as well as a suitable area for recreation on the dry sand.”³²¹ In defining the contours of this right of reasonable access to privately-owned dry sand area, the court identified four factors as relevant: “(1) the [l]ocation of the dry sand area in relation to the foreshore; (2) the extent and availability of publicly-owned sand area; (3) the nature and extend of the public demand; and (4) the usage of the upland sand land by the owner.”³²²

The holding in *Bay Head* was limited by the fact that the Bay Head Improvement Association was, in its view, a “quasi-public” entity.³²³ The court subsequently expanded the scope of public access under the public trust doctrine when it held that a private beach club that was not a quasi-public entity was required under the *Matthews* reasonable access norm to provide members of the public access to the beach across its dry sand area. In *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*,³²⁴ the court applied the four factors it had set out in dicta in *Matthews*. Based

320. 471 A.2d 355 (N.J. 1984), cert. denied, 469 U.S. 821 (1984).

321. *Id.* at 366.

322. *Id.* at 365.

323. *Id.* at 368. The court concluded that the improvement association satisfied its obligation by opening up its membership to everyone rather than limiting it to Bay Head residents and by making daily passes as well as seasonal passes available for sale to nonresidents.

324. 879 A.2d 112 (N.J. 2005).

on those factors and the circumstances of the case, the court concluded that the club was required to make its upland sand area, though privately owned, available for use by the general public. The club, however, could charge appropriate fees for certain services that it provided. The court stated:

[R]ecognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not coextensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.³²⁵

The significance of this holding is that it lifts the restriction on public beach access to dry sand areas owned by quasi-public entities. Under *Raleigh Avenue Beach Ass'n*, the public is entitled to access dry sand areas regardless of who the owner is.

This expansion of the public's right to access the beach is a form of democratization of recreation in the non-hierarchical sense of the term. Recreation at the beach is for many Americans today what mountain-hiking and walking in open areas is for Scots. Just as the mountains, moorlands, and other open areas have become open to Scots of all backgrounds to enjoy, so beaches are becoming in the United States. There have long been public beaches where access has been fully open to the public,³²⁶ but public beaches are not always widely available. In some coastal states, long stretches of the beach are privately owned. For a person without a car, even a distance of a mile or two between public beaches may make access practically impossible (e.g., elderly persons, single mothers with young children). For such persons the expansion of

325. *Id.* at 121. The public right that the court recognized in *Matthews* is not without historical precedent. In colonial America and well into the nineteenth century, American courts recognized a public right to hunt on unenclosed and uncultivated land. A hunter on such private land without the owner's permission did not commit trespass. *See, e.g., McConico v. Singleton*, 9 S.C.L. 244 (S.C. Const. Ct. App. 1818). In fact, the Vermont constitution expressly incorporated this right to hunt on private land. *See Jeffrey Omar Usman, "The Game Is Afoot": Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 75 (2009). Nor until the Civil War did trespass lie against a person who went upon another person's land to graze cattle, collect firewood, or otherwise forage. *See, e.g., Nashville & Chattanooga R.R. Co. v. Peacock*, 25 Ala. 229 (Ala. 1854); *Macon & W. R.R. Co. v. Lester*, 30 Ga. 911 (Ga. 1860). (I am indebted to Eric Freyfogle for bringing these cases to my attention.) The purpose of the public right in these cases was economic rather than, as in both the modern American and Scottish settings, recreational, but they illustrate the fact that a public right to cross privately-owned land has old roots in this country as well as in Scotland. For a comprehensive study of rights to use the countryside in early America, see Brian Sawyers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665 (2011).

326. Not always to all Americans. Throughout most of the American South, access to public recreational facilities, including beaches, existed, if at all, only on a racially discriminatory basis. Racial discrimination in access to public recreational facilities continued as late as the 1970s. Even after the famous "pool closing" cases, many Southern cities tried to avoid federal legal orders to end discrimination against access. Taunya Lovell Banks, *Still Drowning in Segregation: Limits of Law in Post-Civil Rights America*, 32 LAW & INEQ. 215, 218-19 (2014).

public access is an important step toward a more inclusionary culture of recreation.

In arguing that public access to beaches strengthens and deepens the democratic character of a society, I do not claim public access alone creates social capital or that it facilitates the creation of participatory democracy. Such a claim is implausible, given what we know from recent ethnographic work as well as our own every day experiences. The shared space/discursive democracy thesis that historians have made in connection with eighteenth-century Britain is echoed in recent political geographic studies of urban shared spaces. Some urban geographers and political scientists have argued that urban public spaces can serve as loci of discursive democracy, places where unequals meet as equals, debate the problems of their societies, and form consensuses that influence public policy.³²⁷

More recent ethnographic work has challenged this thesis. For example, an important study of class relations on Rio de Janeiro's beaches finds that these public beaches are not democratic in this strong sense but that "there is a politics of class in the public space whereby the legitimacy of the social order is challenged, renegotiated, and ultimately reproduced."³²⁸ After studying the practices of self-location by social groups along Rio's famed beach at Ipanema, the author found that "the beach seems to be divided into many small cells of sociability that exist side by side but whose boundaries are clearly demarcated by space, time, behavior, and dress."³²⁹ At the same time, the author continues,

[T]he idea of the beach as democratic space . . . resonates with lower class beach users, maybe because there is a degree of truth to it: There does seem to be a certain anonymity to the bathing suit, and to the culture of public space more generally, that provides an opening for socializing across status groups.³³⁰

On the whole, however, the conclusion is that "[r]ather than being democratic in the sense of unmarked space free of power relations where every citizen is an equal participant in a conversation with nothing at stake, the beaches of Ipanema and Copacabana are the highly stratified location of an unequal conversation that has winners and losers."³³¹

In ordinary modern life, especially in cosmopolitan urban areas, there are many occasions in which people of different backgrounds are in regular contact with each other at work, while shopping, or in public transportation. Despite these repeated interactions, perceived social differences persist and certain boundaries are maintained.

327. See, e.g., ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 6 (1993); Susan Christopherson, *The Fortress City: Privatized Spaces, Consumer Citizenship*, in *POST-FORDISM: A READER* 409 (Ash Amin ed., 1994).

328. James Freeman, *Democracy and Danger on the Beach: Class Relations in the Public Space of Rio de Janeiro*, 5 *SPACE AND CULTURE*, Feb. 2002, at 10, 14.

329. *Id.* at 19.

330. *Id.*

331. *Id.* at 25.

These data do not contradict the claim made here regarding the democratic character of Scotland's right to roam or the right to reasonable beach access in New Jersey and other forms of providing public access to recreational spaces. As this Article has already discussed, the conception of democracy used here is weaker than the participatory or social capital models upon which work such as Robert Putnam's relies. It is nonhierarchical in the sense that access to recreational space is no longer restricted by a right to exclude that is strictly allocated along class lines. Both the mountains in Scotland and the beaches in New Jersey are open to the public at large. They are public spaces, and the legal rights creating these spaces represent a more inclusionary vision of land ownership.

VIII. CONCLUSION

The right to roam may not be an appropriate property practice for every society, but there are other property practices that may perform the same democratic function as the right to roam. Public access to beaches is one of these, but there are others. One need only to look at national parks and other sorts of public lands available to the public for recreational purposes to see the same democratizing work being performed. The same is true of municipal parks, swimming pools, bicycle paths, and the multiple other forms of shared access recreational resources that exist throughout the United States and other advanced democracies.

Many opportunities for social exclusion and for social and cultural practices that are inconsistent with the ideal of inclusionary ownership remain in the United States, of course (as perhaps they do in Scotland). Lior Strahilevitz has written convincingly about what he calls "exclusionary amenities,"³³² various sorts of club goods by which developers of residential communities effectively exclude members of particular social groups based on religion, race, wealth, or other forms of discrimination. For example, a developer may require that purchasers in a particular residential community pay a substantial membership fee to join a golf club that is adjacent to the residential community. Until quite recently, only 3.1 percent of all golfers in the United States were African American.³³³ Hence, the effect, doubtless intended, of the requirement was to exclude African Americans from the residential community despite the existence of federal, state, and local statutes prohibiting such exclusion.³³⁴ The United States is hardly a democratic utopia. But it continues to expand the availability of inclusionary property practices, as Scotland has done. As it does so, it continues to fulfill its democratic promise.

332. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006).

333. *Id.* at 464.

334. *See, e.g.*, Fair Housing Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73, 83 (codified at 42 U.S.C. § 3604 (2000)).