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**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.[[2]](#footnote-2) This paper 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. The paper argues that the culture of unmediated contact with nature ultimately prevailed as a democratic culture became more entrenched in both politics and society.*

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[[3]](#footnote-3), as it is called, is a democratic social practice. It may be exercised by anyone,[[4]](#footnote-4) 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?

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 not only about the development of legal norms but, 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 19th and well into the 20th 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 on 18th and 19th 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 19th century and the 20th 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 18th and 19th 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 18th and early 19th 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 for of sport – hunting. The elites’ vision of the sporting life conflicted with the vision held by non-elites 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 Scotland and, indeed, Britain in general, from the second half of the 19th 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.[[5]](#footnote-5) The whole area has been described as “a tangled mass of contorted rocks.”[[6]](#footnote-6) 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 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. Farms were small, typically no more than a few acres, often consisting of scattered patches.[[7]](#footnote-7) The quality of farming was low, as soil conditions were poor.[[8]](#footnote-8)

A. Land Tenures in the Highlands

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. Johnson observed on his 1773 tour of the Highlands.[[9]](#footnote-9) 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.[[10]](#footnote-10)

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.[[11]](#footnote-11) 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. The result was a re-concentration of land ownership into fewer and fewer hands, and this pattern of re-concentration of ownership continued throughout the eighteenth and into the nineteenth centuries.[[12]](#footnote-12) Moreover, kinship declined in importance as the economic role of land through rents assumed greater and greater prominence.[[13]](#footnote-13)

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 charter[[14]](#footnote-14) 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 non-landowners or truly subordinate tenants.[[15]](#footnote-15)

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.[[16]](#footnote-16) 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 51 largest) owned 44 percent of the county’s valued rent among them.[[17]](#footnote-17) Of that 8 percent the larger landowners held a disproportionately large share, indicating still greater concentration of landownership.

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.[[18]](#footnote-18)

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). The final group was that of the smaller landowners, who were more comparable to modern owner-occupants.[[19]](#footnote-19)

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”[[20]](#footnote-20)), who frequently belonged to branches of the owner-chieftain’s family. They in turn sublet to small tenants.[[21]](#footnote-21)

At the bottom of the feudal hierarchy were the peasants, who constituted the vast majority of the population.[[22]](#footnote-22) 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.[[23]](#footnote-23) 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.[[24]](#footnote-24)

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.[[25]](#footnote-25) 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 99 years.[[26]](#footnote-26) Tacksmen holding large tracts under long-term leases would commonly sublet smaller portions to occupiers, who were at the bottom of the feudal heap.[[27]](#footnote-27) But in time, during the Clearances, the tacksmen would experience the jolt of removal at the hands of large owners, along with the cottars.[[28]](#footnote-28)

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.[[29]](#footnote-29) The Great Landowners 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.”[[30]](#footnote-30)

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.[[31]](#footnote-31) 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.[[32]](#footnote-32) There were legislative reforms, but these did not change the pattern of concentrated landownership.[[33]](#footnote-33) Large estates grew larger, and titled families continued to dominate.[[34]](#footnote-34) 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.[[35]](#footnote-35)

II. The Clearances

The standard version of the story of the Highland Clearances is straightforward enough.[[36]](#footnote-36) 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 were had become Anglicized following the debacle of the ’45 and spurned the old traditional Celtic world-view 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.[[37]](#footnote-37)

Thus told, the story is slightly embellished, but its core is accurate. The complete story, of course, is more complex.[[38]](#footnote-38) Although the main period of the clearances occurred between 1790 and 1855,[[39]](#footnote-39) clearances actually were spread out over a much wider span of time.[[40]](#footnote-40) 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.[[41]](#footnote-41)

Agrarian changes, too, well preceded the Highland Clearances. The wide-ranging changes in agrarian practices that came under the code word “Improvements” 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.[[42]](#footnote-42) 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.[[43]](#footnote-43)

Perhaps the greatest change was the emergence of the sheep economy. Market incentives, mainly demand from southern markets, led to the sheep clearances.[[44]](#footnote-44) The introduction of new breeds of sheep to the Highlands did not go smoothly. Resistance to the new breeds came from peasant farmers who feared, with cause, dislocation and eviction.

The high point of resistance came in 1792, the so-called “Year of the Sheep,” when the “Ross-Shire Insurrection” climaxed.[[45]](#footnote-45) 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.[[46]](#footnote-46) 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.[[47]](#footnote-47) In time, tacksmen as well as tenants-at-will would be cleared.[[48]](#footnote-48)

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.[[49]](#footnote-49) 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 and after 1873, prices of sheep and wool dropped.[[50]](#footnote-50) There was to be a replacement use of the 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 Napoleanic Wars they were virtually gone.[[51]](#footnote-51)

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 wealthy Lowlanders and English. Market changes occurred in several respects. One concerns the decline of sheep farming. Sheep farming 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.[[52]](#footnote-52) 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.

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 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?”[[53]](#footnote-53) Malcolm’s answer was to shift land use from sheep farming to deer farming, and that is precisely what a great many landowners did.

The rate of afforestation quickened as the price of wool declined precipitously.[[54]](#footnote-54) Wool prices began to drop substantially in 1872. In that same year thirty new deer forests were created, as a majority of sheep farmers departed from large parts of the Highlands.[[55]](#footnote-55) 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.[[56]](#footnote-56) By the mid-1880s whole counties that had been heavily dependent upon sheep-farming were virtually emptied of sheep farmers.[[57]](#footnote-57)

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 ₤1,1800. 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.[[58]](#footnote-58) In the succeeding years the difference in revenues between the two uses continued to increase.[[59]](#footnote-59) For the land owner, the real gain now was all in deer foresting.

B. Deer Hunting and the Rise of the Great Deer Forests

1. *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 historically into six types, which fall into two broad categories. The categories are what Smout calls “traditional” and “post-romantic.”[[60]](#footnote-60) 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.[[61]](#footnote-61) The third traditional attitude views land as a resource for industry. This attitude has existed since as early as the seventeenth century, qualifying it traditional. 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 post-romantic attitudes regards land, as Smout puts it, “as an invigorating obstacle course . . . .”[[62]](#footnote-62) 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 nineteenth 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. 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.[[63]](#footnote-63) This attitude had little impact upon the Highlands until after World War II, but at that point it grew dramatically.[[64]](#footnote-64)

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.

2. *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.[[65]](#footnote-65) 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*.[[66]](#footnote-66) Not published until 1754, Burt wrote his letters most in the late 1720s, although the final one was written in 1737.[[67]](#footnote-67) Burt hardly exaggerated when he stated in is 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.”[[68]](#footnote-68) 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.”[[69]](#footnote-69) Only a few decades later, a similar sentiment was reflected in Thomas Pennant in his exceedingly popular 1771 book, *Tour in Scotland*.[[70]](#footnote-70) Pennant stated, “North Britain [i.e., Scotland] was almost as little known to its Southern brethren as Kamschatka.”[[71]](#footnote-71) His account of Highland men was thoroughly disapproving: “The men are thin, but strong; idle and lazy, except employed in that chace [sic], 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.”[[72]](#footnote-72)

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*,[[73]](#footnote-73) first published in 1775, was widely popular and influential. The other publication was James Boswell’s *Journal of a* *Tour to the Hebrides*,[[74]](#footnote-74) 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.”[[75]](#footnote-75)

A more positive literary influence, and one that direct affected the popularity of deer hunting, was William Scrope’s highly influential 1838 book, *The Art of Deer Stalking*.[[76]](#footnote-76) Scrope waxed poetic on the sublime experience to be enjoyed stalking deer in the Highlands in the early morning hours.[[77]](#footnote-77) 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.[[78]](#footnote-78) Victoria and Albert first visited the Highlands in 1842, with Albert shooting two stags. They returned two years later, hunting deer in two forests.[[79]](#footnote-79) Royal approval of deer stalking stimulated interest in the sport among the English aristocracy, many members of which leased or purchased deer forests for deer hunting purposes.[[80]](#footnote-80) Within a short time the sport’s popularity spread to non-titled wealthy individuals, particularly the *nouveaux riches*, for whom stalking became a status symbol.[[81]](#footnote-81) 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.”[[82]](#footnote-82) 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. Hunting as sport had been popular among the wealthy class at least since the early ninteenth century, but deer was not necessary the desired, or available, subject. Fishing and fowling were both highly popular among the landed elite. 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 particularly the newly-made wealthy men of commerce. These men bought or leased huge hunting lodges with pretensions of aristocracy, drawing occasional expressions of disdain from real aristocrats.[[83]](#footnote-83) 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 rich’ joined in the seasonal migration from the centres of fashion to hills of the north.”[[84]](#footnote-84) The Highland estate had become, in Gaskell’s apt phrase, “a machine for sport.”[[85]](#footnote-85)

C. 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,[[86]](#footnote-86) 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 Culrain[[87]](#footnote-87) and Gruids, [[88]](#footnote-88) 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.[[89]](#footnote-89) These actions attracted the attention of the press, and the press’ coverage further stirred public controversy regarding the clearance.[[90]](#footnote-90) This attention did not last long, however, and the Highlands soon dropped out of sight from the newspapers.

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, landowners, and authorities.[[91]](#footnote-91) The Napier Commission,[[92]](#footnote-92) 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.[[93]](#footnote-93) 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.[[94]](#footnote-94) Resistance and occasional violence continued in the so-called “Crofters’ War” of the 1880s. 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, poor infrastructure.[[95]](#footnote-95)

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 wanted, but it recommended intervention nevertheless. Its main recommendation was the recognition, improvement, and enlargement of the Highland township, which was the communal core of crofter agriculture.[[96]](#footnote-96)

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.[[97]](#footnote-97) 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; and (3) it gave the crofters for the first time the legal power to pass their holdings on to their children by inheritance. 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.[[98]](#footnote-98) As T.C. Smout has observed, “[The Act] destroyed the very basis of landlord rights as understood everywhere else in Great Britain . . .”[[99]](#footnote-99) 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 non-market 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.”[[100]](#footnote-100) 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.[[101]](#footnote-101) 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.[[102]](#footnote-102) It was, as Richards puts it, “a vindication of the peasant mentality,”[[103]](#footnote-103) 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.[[104]](#footnote-104) 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.[[105]](#footnote-105)

About the same time as 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.

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.”[[106]](#footnote-106) The problem was the 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. 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.[[107]](#footnote-107)

Once having reached the Highlands, getting about was no easier. Such roads as there existed were basically military roads.[[108]](#footnote-108) 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. 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.

At its peak in 1760, the military road system covered about a thousand miles.[[109]](#footnote-109) The Highland road-building program ceased in 1767 as the Jacobite threat diminished. Upkeep of the roads largely ended, and considerable sections of the road network fell into complete disuse. Some sections were too steep for coaches.[[110]](#footnote-110) By 1790, only 600 miles remained at all useable.[[111]](#footnote-111)

B. The Railroad Arrives

Railroads are often identified as the cause of changes in legal doctrines or institutions.[[112]](#footnote-112) 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.[[113]](#footnote-113)

Inter-urban passenger locomotives first began in 1839,[[114]](#footnote-114) but the first passenger locomotive connecting major population centers opened in 1842.[[115]](#footnote-115) Thereafter the passenger railway system developed in fits-and-starts, and 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.[[116]](#footnote-116) In 1865, the Highland Railway was established,[[117]](#footnote-117) 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).[[118]](#footnote-118)

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. [[119]](#footnote-119) The Royals, too, including Victoria and Albert, used the railways to reach their new “hunting lodge” at Balmoral.[[120]](#footnote-120)

The reasons were clear. The railway was much faster than any other method of reaching the Highlands.[[121]](#footnote-121) It also had the advantage of being far more comfortable than any alternative mode of transportation. 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 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.” This is the scene captured in Earl’s painting.

C. The Rise of the Hikers in the Highlands

If the railways enabled one sporting activity in the Highlands, they soon enabled a second as well. 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.

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.[[122]](#footnote-122) Its purpose was primarily 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. A series of incidents led to prolonged litigation, but the result was that such rights of way were firmly established.[[123]](#footnote-123) The Rights of Way Society continued its efforts to secure public access, fighting landowners on multiple occasions in later years, and on some of these occasions the local population surreptitiously supported them.[[124]](#footnote-124)

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,[[125]](#footnote-125) 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,[[126]](#footnote-126) a great social transformation in recreation occurred in both England and Scotland[[127]](#footnote-127) during the second half of the nineteenth century, and as a 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.[[128]](#footnote-128) 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.[[129]](#footnote-129) Educated at the University of Glasgow, he held an academic post at Oxford as Regius Professor of Civil Law (his book *The American Commonwealth*[[130]](#footnote-130) 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, later returned to Parliament in 1885 to represent South Aberdeen. He remained an MP until 1907, when he was appointed Ambassador to the United States. During his time in Washington, he became close friends with President Theodore 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).[[131]](#footnote-131) Mt. Bryce in the Canadian Rockies is named after him.

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. 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.[[132]](#footnote-132) 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) “Where a person goes upon land in pursuit of game, or for the pursuit of eggs, or accompanied by a dog” and (2) “Where any person so disturbs any sheep or cattle as to cause damage to their owner.”[[133]](#footnote-133) Despite the narrowness of the bill, Bryce had no luck with it. The bill did not survive to the second reading stage.

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. The writer saw it as a vehicle for evaluating “the comparative strength of the various forces now moving and ultimately forming the national character.” 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 classical antiquity.” 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.[[134]](#footnote-134)

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.[[135]](#footnote-135)

The 1888 received a second reading in the House of Commons,[[136]](#footnote-136) but this was due to accidental circumstances.[[137]](#footnote-137) The second reading came to nothing, and the bill was dropped.

Bryce had more success with a third measure, introduced a resolution as in 1892. Obtaining a second reading, the bill[[138]](#footnote-138) was virtually identical to its 1884 predecessor. The debate over the bill in the House of Commons[[139]](#footnote-139) 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.[[140]](#footnote-140) Exclusion from the areas covered by the bill was a relatively new development, he argued; history was not on the owners’ side. “There was 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.”[[141]](#footnote-141) “Eighty years ago,” Bryce claimed, “everybody could go freely wherever he desired over the mountains and moors of Scotland.”[[142]](#footnote-142) 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 date . . . .”[[143]](#footnote-143) 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.[[144]](#footnote-144)

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.[[145]](#footnote-145) “[I]f ever there was a case of unearned increment,” he argued, “it is in the case of deer forests.”[[146]](#footnote-146) 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.[[147]](#footnote-147)

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.”[[148]](#footnote-148)

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.[[149]](#footnote-149)

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,[[150]](#footnote-150) and Bryce later referred to some of George’s newspaper columns, which he read on visits to California.[[151]](#footnote-151) 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”[[152]](#footnote-152) 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.[[153]](#footnote-153)

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, more deeply, the meaning of recreation not only in the context of the debate over public access to the Highlands but, more broadly, in the context of late nineteenth century British culture.

Bryce’s remarks and the debate over his 1892 resolution[[154]](#footnote-154) 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 of Bryce’s access bills and resolutions were) “Access to Mountains,” not “Right to Roam.” 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 a Royal Commission,” Elcho began, “and the Royal Commission reported entirely and absolutely in their favour.”[[155]](#footnote-155) 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.”[[156]](#footnote-156)

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.”[[157]](#footnote-157) 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 these sporting rights without seeing that the economic value of the Highlands is exceedingly large.”[[158]](#footnote-158) 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.”[[159]](#footnote-159) 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.

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. 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. 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.[[160]](#footnote-160)

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*,[[161]](#footnote-161) a widely-read British periodical that appeared between 1817 and 1980 and whose contributors included George Eliot, Joseph Conrad, and Thomas de Quincey. It contained many of the arguments that would be marshalled repeatedly against Bryce’s bill, not only in 1892 but in earlier and debates as well.

Parker Hill 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.”[[162]](#footnote-162) Parker Hill 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 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.”[[163]](#footnote-163)

The tone quickly changed, as Parker Hill notes an anomalous aspect of the bill.[[164]](#footnote-164) 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. As Parker Hill 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.”[[165]](#footnote-165) 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.[[166]](#footnote-166)

Parker Hill 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.” Parker Hill 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.”[[167]](#footnote-167) Put thus, Parker Hill argued, the case for the bill is inconclusive. There is no proof that the class of climbers, especially serious climbers, is substantial greater than that of deer hunters.

Parker Hill 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.”[[168]](#footnote-168) Parker Hill offered into evidence a statement which he had solicited from Professor G.G. Ramsay, a well-known 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.’”[[169]](#footnote-169) Ramsay further stated that 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, as willing to give any reasonable facilities, rather than to any compulsion.”[[170]](#footnote-170)

Next, Parker Hill 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.” Part of the reason why the bill would have this effect, Parker Hill believed, was the uncertain state of the law of trespass in Scotland. The legislation would be “mischievous,” Parker Hill 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.”[[171]](#footnote-171) The Scottish law of trespass is anomalous, Parker Hill observed, because “it conveys a command without a sanction.” 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.[[172]](#footnote-172) In Parker Hill’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 Hill argued that “[i]n reasonable hands deer-forests are open to the public for nearly three-quarters of the year.”[[173]](#footnote-173) 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 Hill, again drawing on the opinion of noted climbers, argued, problems rarely occurred. There 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 establish a general rule. Here, in Parker Hill’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.”[[174]](#footnote-174)

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." 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.”[[175]](#footnote-175)

Commons took Bryce’s measure seriously, debating it for over three hours.[[176]](#footnote-176) 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.”[[177]](#footnote-177) 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.[[178]](#footnote-178)

Bryce would present his bill again in 1898, but without success.[[179]](#footnote-179) His brother, Annan, sought to bring a similar bill before Parliament on three separate occasions (1900, 1905, 1908, and 1909) when James Bryce became ambassador to the United States. These efforts were all unsuccessful.[[180]](#footnote-180)

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 professional and businessmen.[[181]](#footnote-181) English football also grew substantially in popularity, even among working-class men, after 1870.[[182]](#footnote-182)

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.[[183]](#footnote-183) 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.[[184]](#footnote-184) 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.[[185]](#footnote-185) 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 Victorian use of the term “lady.”[[186]](#footnote-186) On the one hand, women (or at least some women) were selectively included “into the mainstream of sociability”[[187]](#footnote-187) 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. 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.[[188]](#footnote-188)

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.[[189]](#footnote-189) One historian has stated that “[t]he emergence of club-based sport is one of the defining characteristics of modern organized sport.”[[190]](#footnote-190) 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.[[191]](#footnote-191) The development of these clubs followed the growth of organized team sport in the English public schools and universities.[[192]](#footnote-192) “[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.”[[193]](#footnote-193)

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 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 membership.[[194]](#footnote-194) The core reason for this exclusion was “a fundamentally new attitude of the middle class to the practice of sport.”[[195]](#footnote-195) The new emphasis on sport maintained a distance between bourgeois and popular cultures.[[196]](#footnote-196) 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.[[197]](#footnote-197) 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.”[[198]](#footnote-198) 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.”[[199]](#footnote-199)

VI. Later Efforts─ And Success

A. Between the Wars

The failure of these failures did not the enthusiasm for outdoor recreation.[[200]](#footnote-200) Scots organized campaigns to establish national parks, and in 1931, The National Trust for Scotland was created.[[201]](#footnote-201)

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 next thirty years following Annan Bryce’s last bill in 1909, nine more access bills, all similar to James Bryce’s original bill, were introduced.[[202]](#footnote-202) In 1939, Parliament did approve the Access to Mountains Act, first introduced by a Labour MP, Arthur Creech-Jones, but landowning 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 provided to walkers and secure further access by means of agreements with landowners, by orders or by purchasing the land. In practice, the 1949 Act, which did not extend rights to Scotland, secured few improvements for walkers.[[203]](#footnote-203) It was later repealed by the National Parks and Access to Countryside Act of 1949.[[204]](#footnote-204)

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.”[[205]](#footnote-205) 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.”[[206]](#footnote-206) 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 Clydebank in Glasgow, where both unemployment and labor activism (“Red Clydebank”) 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.[[207]](#footnote-207) The new breed of working-class mountaineers reached the mountains mainly by hitchhiking, and once in the mountains they slept in caves, barns, and abandoned bothies.[[208]](#footnote-208) 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.[[209]](#footnote-209)

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*,[[210]](#footnote-210) first published in 1939, not only described the adventures of these men but documented the social change that they reflected.[[211]](#footnote-211)

B. Success, At Last

Success for Scotland ultimately came with the Land Reform (Scotland) Act 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.[[212]](#footnote-212) Beginning in the 1980s, political changes in the U.K., 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.”[[213]](#footnote-213) Also 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.[[214]](#footnote-214)

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, specification 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 certainly 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.[[215]](#footnote-215) 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*.[[216]](#footnote-216) 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.[[217]](#footnote-217)

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 on 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.”[[218]](#footnote-218) 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.”[[219]](#footnote-219) Pressed about whether the bill was a matter of redistribution of wealth, the minister responded, “The bill is certainly about a redistribution of rights.”[[220]](#footnote-220) 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.”[[221]](#footnote-221) The debate was spirited, and there certainly was strong opposition.[[222]](#footnote-222) 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. 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 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. 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

1. 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 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.[[223]](#footnote-223) 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 agent for sociopolitical change.[[224]](#footnote-224) 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.”[[225]](#footnote-225)

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.”[[226]](#footnote-226) 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.” 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 legible to those who stood lower on the social ladder. “Hierarchies,” Greig cautions, “might be as much confirmed as contradicted in shared leisure grounds.”[[227]](#footnote-227)

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 United Kingdom throughout the nineteenth and early twentieth centuries.

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 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 U.S., 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 Association[[228]](#footnote-228)* the court held 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,” the court said.[[229]](#footnote-229) 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.[[230]](#footnote-230)

The holding in *Bay Head* was limitedby the fact that the Bay Head Improvement Association was, in its view, a “quasi-public” entity.[[231]](#footnote-231) 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 Avenue Beach Association v. Atlantis Beach Club*,[[232]](#footnote-232) the court applied the four factors it had set out in dicta in *Matthews*. Based 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. However, the club 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. [[233]](#footnote-233)

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 Association*, 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,[[234]](#footnote-234) 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 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 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.[[235]](#footnote-235)

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.”[[236]](#footnote-236) 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.” 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.”[[237]](#footnote-237) 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.”[[238]](#footnote-238)

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.

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 non-hierarchical 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.

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 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,”[[239]](#footnote-239) 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.[[240]](#footnote-240) 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.[[241]](#footnote-241) 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.

1. \* A. Robert Noll Professor of Law, Cornell Law School. An early draft of this paper was discussed at a faculty workshop at the University of Edinburgh Faculty of Law. I am extremely grateful to Kenneth Reid and George Gretton, my hosts at Edinburgh, for their hospitality and their indispensable help on this paper. I am also grateful to Ross Anderson (Glasgow), Josh Chafetz, John Lovett, Roderick Paisley (Aberdeen), and Danaya Wright for very valuable comments and suggestions. All errors remain mine, of course. [↑](#footnote-ref-1)
2. The debates was about access rights mainly in the Highlands but not exclusively so. [↑](#footnote-ref-2)
3. *See* Land Reform (Scotland) Act, 2003, (A.S.P. 2). [↑](#footnote-ref-3)
4. *Id.*, §1(1) (“*Everyone* has the statutory rights established by this Part of this Act.”) (italics added). [↑](#footnote-ref-4)
5. *See* Malcolm Gray, The Highland Economy 1750-1850 (Edinburgh 1957), p. 3 [↑](#footnote-ref-5)
6. *Id*. at 4. [↑](#footnote-ref-6)
7. *See* Gray, The Highland Economy, p. 7. [↑](#footnote-ref-7)
8. *Id*. at 5. [↑](#footnote-ref-8)
9. James Boswell, The Journal of a Tour to the Hebrides with Samuel Johnson, LL.D. (1931), p. 130. [↑](#footnote-ref-9)
10. *See* Robin Fraser Callender, A Pattern of Land Ownership in Scotland (Finzean, Aberdeenshire, 1987), p. 31). [↑](#footnote-ref-10)
11. *See id.*, p. 32. [↑](#footnote-ref-11)
12. *See id.*, p. 33. [↑](#footnote-ref-12)
13. *See ibid.* [↑](#footnote-ref-13)
14. 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 (Edinburgh 1996), pp. 57-76. [↑](#footnote-ref-14)
15. *See* Callender, A Pattern of Land Ownership in Scotland, *supra* , p. 33-34. [↑](#footnote-ref-15)
16. T.C. Smout, A History of the Scottish People, 1560-1830 (London, 1969), p. 126. The exception is the South-West, where very small estates were common. [↑](#footnote-ref-16)
17. Callander, Pattern of Landownership in Scotland, *supra*, p. 38. [↑](#footnote-ref-17)
18. *See* Smout, A History of the Scottish People, *supra*, p. 126. [↑](#footnote-ref-18)
19. *See* Callander, Pattern of Land Ownership in Scotland, *supra*, p. 38-39. [↑](#footnote-ref-19)
20. On the historical origins of the tack, see Martin Hogg, *Leases: Four Historical Portraits*, in Kenneth Reid & Reinhard Zimmermann eds., A History of Private Law in Scotland (Oxford, 2000), p. 363. [↑](#footnote-ref-20)
21. *See* David M. Walker, A Legal History of Scotland, vol. V: The Eighteenth Century (Edinburgh 1998), 58-59). [↑](#footnote-ref-21)
22. One estimate places the peasant population as constituting 3/4ths of the entire Scottish population. *See* Smout, A History of the Scottish People, p. 135. [↑](#footnote-ref-22)
23. *See ibid.* [↑](#footnote-ref-23)
24. *See ibid.* Crofters were generally a little better off than cottars, who sometimes had no more than a single cow and a thin strip to farm. [↑](#footnote-ref-24)
25. *See* Prebble, The Highland Clearances, *supra*, p. 14. [↑](#footnote-ref-25)
26. *See* Walker, A Legal History of Scotland, *supra*, p. 750. [↑](#footnote-ref-26)
27. *See ibid.* [↑](#footnote-ref-27)
28. *See* Prebble, The Highland Clearances, *supra*, p. 64,. [↑](#footnote-ref-28)
29. *See* L. Timperley, *The Pattern of Landholding in Eighteenth-Century Scotland*, in M.L. Parry & T.R. Slater, The Making of the Scottish Countryside (London 1980), p. 137. [↑](#footnote-ref-29)
30. *Id.*, p. 44. [↑](#footnote-ref-30)
31. *See id.*, pp. 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. The lairds controlled 41.6 percent nationally that year. Timperley, *Pattern of Landholding*, *supra*, at 151. [↑](#footnote-ref-31)
32. *See* Callander, Pattern of Land Ownership in Scotland*, supra*, pp. 45, 48. [↑](#footnote-ref-32)
33. *See id.*, p. 46. [↑](#footnote-ref-33)
34. Two-third of the owners with land valued over ₤4,000 (Scots) were titled. *Id.*, p. 51. [↑](#footnote-ref-34)
35. *See* Eric Richards, A History of the Highland Clearances: Agrarian Transformation and the Evictions 1746-1886 (London 1982), I, p. 32. [↑](#footnote-ref-35)
36. *See id.* I, p. 3-5. [↑](#footnote-ref-36)
37. *See id.*, I, pp. 3-4. [↑](#footnote-ref-37)
38. For example, Eric Richards points out that the word “clearances” itself is a relatively late addition to the narrative. Earlier accounts had referred to removals. 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*., I, pp. 5-6. [↑](#footnote-ref-38)
39. *See id.*, I, pp. 162, 199, 237. [↑](#footnote-ref-39)
40. *See id.* I, p. 6. [↑](#footnote-ref-40)
41. *See id.*, I, p. 141. [↑](#footnote-ref-41)
42. *See* Gray, The Highland Economy, *supra*, p. 76. [↑](#footnote-ref-42)
43. *See id.*, I, p. 129. [↑](#footnote-ref-43)
44. *See* Richards, History of the Highland Clearances, *supra*, I. p. 161. [↑](#footnote-ref-44)
45. On the Ross-Shire Insurrection, see id., I, at 255-272; Prebble, The Highland Clearances, *supra*, at 31-47 [↑](#footnote-ref-45)
46. *See* Richards, History of the Highland Clearances, *supra*, I, at 173, 175 [↑](#footnote-ref-46)
47. *See id.*, I, at 177. [↑](#footnote-ref-47)
48. *See* Prebble, The Highland Clearances, *supra*, at 64. [↑](#footnote-ref-48)
49. See Richards, History of the Highland Clearances, *supra*, at I, 237. [↑](#footnote-ref-49)
50. *See id.* at I, 239. [↑](#footnote-ref-50)
51. *See* Willie Orr, Deer Forests, Landlords and Crofters: The Western Highlands in Victorian and Edwardian Times (Edinburgh 1982), at 2-3. [↑](#footnote-ref-51)
52. *See* Orr, Deer Forests, *supra*, at15-16, 20-22. [↑](#footnote-ref-52)
53. *Id.*, Q 42269, p. 2832. *See also* Napier Commission, Testimony of Commissioner Charles Fraser-MacIntosh, MP, Napier Commission, *id.*, III, Q 26905, at 1710. (“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 in 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.”) [↑](#footnote-ref-53)
54. *See* George Malcolm, *Deer Forests: Past, Present, and Future*, The Nineteenth Century (1887), XXI, 683, 692. 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 fitting, or shall we say justifiable, than that the landlords so situated , when they could, could converted these unsought sheep-farms into profitable deer forests?” [↑](#footnote-ref-54)
55. *See* Hunter, *Sheep and Deer*, *supra*, at 217. [↑](#footnote-ref-55)
56. *See ibid.* The Napier Commission reported that by 1885, 110 deer forests existed. *See* Orr, Deer Forests, *supra*, p. 35. [↑](#footnote-ref-56)
57. *See* Hunter, *Sheep and Deer*, *supra*, pp. 217. [↑](#footnote-ref-57)
58. *See ibid.* [↑](#footnote-ref-58)
59. *See ibid.* [↑](#footnote-ref-59)
60. 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). [↑](#footnote-ref-60)
61. *See id.* at 44. [↑](#footnote-ref-61)
62. *See id*. at 45. [↑](#footnote-ref-62)
63. *See ibid.* [↑](#footnote-ref-63)
64. *See ibid.* [↑](#footnote-ref-64)
65. *See id.* at 215. [↑](#footnote-ref-65)
66. Burt’s Letters from the North of Scotland (Andrew Simmons ed, 1998). [↑](#footnote-ref-66)
67. 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 lead to mass emigration. *See* Charles W.J. Wither, *Introduction*, in *id*., at vii. [↑](#footnote-ref-67)
68. *Id.* at 3. [↑](#footnote-ref-68)
69. *Id.* at 157. [↑](#footnote-ref-69)
70. Thomas Pennant, Tour in Scotland, 2 vols., 4th ed. (1776; 1st publ. 1771). [↑](#footnote-ref-70)
71. Quoted in [Book Reviews,] *Travelling in England*, 116 Q. Rev. 212, 219 (1864). [↑](#footnote-ref-71)
72. Pennant, Tour in Scotland,  *supra*, at I, 131. [↑](#footnote-ref-72)
73. Samuel Johnson and James Boswell, A Journey to the Western Islands of Scotland, with The Journal of a Tour to the Hebrides (Everyman’s Lib. 2002). [↑](#footnote-ref-73)
74. *Ibid.* [↑](#footnote-ref-74)
75. G.G. Ramsay, *Rise and Progress of Mountaineering in Scotland – VI*, 4 Scottish Mountaineering Club J. 1, 4 (1897). [↑](#footnote-ref-75)
76. *See id.*, pp. 215-216. [↑](#footnote-ref-76)
77. Here is a representative passage from Scrope’s book: “Tis gladness to ride by 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 blackcock . . . .” William Scrope, The Art of Deer Stalking (Google eBook; orig. pub. 1838) p. 327. 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 (London, 1978), pp. 81- 91. [↑](#footnote-ref-77)
78. *See* Malcolm, *Deer Forests*, *supra*, p. 691. [↑](#footnote-ref-78)
79. *See* Orr, Deer Forests, *supra*, pp. 4, 29. [↑](#footnote-ref-79)
80. *See ibid.* [↑](#footnote-ref-80)
81. *See* Hunter, *Sheep and Deer*, *supra*, p. 216. [↑](#footnote-ref-81)
82. *See* Orr, Deer Forests, *supra*, , p. 148. [↑](#footnote-ref-82)
83. So, Cameron of Locheil would sniff at “the accumulation of wealth among the trading and commercial classes.” D. Cameron of Locheil, *In Defense of Deer Forests*, Nineteenth Century, XXIII (1885), p. 197. [↑](#footnote-ref-83)
84. Orr, Deer Forests, *supra*, p. 4. [↑](#footnote-ref-84)
85. Gaskell, Morvern Transformed, *supra*, p. 81. [↑](#footnote-ref-85)
86. *See* Orr, Deer Forests, *supra*, p. 5. [↑](#footnote-ref-86)
87. For an account of the riot, see Prebble, The Highland Clearances, *supra*, pp. 121-126. [↑](#footnote-ref-87)
88. *See id.*, pp. 128-129. [↑](#footnote-ref-88)
89. *See* Richards, History of the Highland Clearances, *supra*, I, p. 220. [↑](#footnote-ref-89)
90. *See id.*, pp. 220-226. [↑](#footnote-ref-90)
91. 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, History of the Highland Clearances, *supra*, I, pp. 241-242. [↑](#footnote-ref-91)
92. 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. [↑](#footnote-ref-92)
93. *See* Hunter, *Sheep and Deer*, *supra*, p. 220. [↑](#footnote-ref-93)
94. *See id*., p. 221. [↑](#footnote-ref-94)
95. *See* Richards, History of the Highland Clearances, *supra*, p. 491; Report of the Commissioners of Inquiry into the Conditions of the Crofters and Cottars of the Highlands and Islands of Scotland, 1884, XXXII-XXXVI. [↑](#footnote-ref-95)
96. *See* Richards, History of the Highland Clearances, *supra*, pp. 492-493. [↑](#footnote-ref-96)
97. *See* J.P. Day, Public Administration in the Highlands and Islands of Scotland (London, 1918), p. 191. [↑](#footnote-ref-97)
98. *See* Richards, History of the Highland Clearances, *supra*, p. 494. [↑](#footnote-ref-98)
99. Smout, A Century of the Scottish People, *supra*, p. 73. [↑](#footnote-ref-99)
100. *See* Clive Dewey, *Celtic Agrarian Legislation and the Celtic Revival: Historicist Implications of Gladstone’s Irish and Scottish Land Acts 1870-1886*, Past and Present, vol. 64 (1974), pp. 30-70. [↑](#footnote-ref-100)
101. *See* Smout, A Century of the Scottish People, *supra*, p. 73. Smout, A Century of the Scottish People, *supra*, p. 74. [↑](#footnote-ref-101)
102. *See* Richards, History of the Highland Clearances, *supra*, p. 495. [↑](#footnote-ref-102)
103. *See id.*, p. 496. [↑](#footnote-ref-103)
104. *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*, Parliamentary Papers 1895, xxxviii-xxxix, ii, Q. 29705 *passim*. [↑](#footnote-ref-104)
105. *See* Hunter, *Sheep and Deer*, *supra*, p. 222. [↑](#footnote-ref-105)
106. Duff Hart-Davis, Monarchs of the Glen: A History of Deer-Stalking in the Scottish Highlands (London, 1978), p. 77. [↑](#footnote-ref-106)
107. *See id.*, p. 77. [↑](#footnote-ref-107)
108. Devine, The Scottish Nation, *supra*, p. 41. [↑](#footnote-ref-108)
109. *See* Michael Pollard, A Traveller’s Guide to Walking the Scottish Highlands (Harrisburg, 1984), p. 16. [↑](#footnote-ref-109)
110. *See* *The Creation of the Military Roads*, Scottish History Online, available at http://www.scotshistoryonline.co.uk/bridges/html/mil-roads.htm [↑](#footnote-ref-110)
111. *See* Pollard, A Traveller’s Guide, *supra*, pp. 36-37, 147. [↑](#footnote-ref-111)
112. [check Gordon Yale LJ art/ Lawrence Friedman bk]. [↑](#footnote-ref-112)
113. *See The Victorian Achievement: Railways*, available at http://www.bbc.co.uk/history.scottishhistory/victorian/features\_victorian\_railways.shtml [↑](#footnote-ref-113)
114. The Glasgow, Paisley, Kilmarnock & Ayr Railway first opened a section between Irvine and Ayr in August 1839. *See* Ransom, Iron Road, *supra*, p. 47. [↑](#footnote-ref-114)
115. *See ibid.* [↑](#footnote-ref-115)
116. *See* H.A. Vallance, The Highland Railway (London, 1963), p. 27. [↑](#footnote-ref-116)
117. *See id.*, p. 29. [↑](#footnote-ref-117)
118. *See* Ransom, Iron Road, *supra,* p. 75. [↑](#footnote-ref-118)
119. *See id.*., pp. 92-93. [↑](#footnote-ref-119)
120. *See id.*, p. 71. [↑](#footnote-ref-120)
121. Vallance, The Highland Railway, *supra,* at 74-80. [↑](#footnote-ref-121)
122. *See* T.C. Smout, *The Highlands and the Roots of Green Consciousness, 1750-1990*, in T.C. Smout, Exploring Environmental History: Selected Essays 21, 30 (2009). [↑](#footnote-ref-122)
123. *See ibid. See* National Archives of Scotland (NAS): G.D. 335, Records of the Scottish Rights of Way Society. [↑](#footnote-ref-123)
124. *See* NAS: G.D. 335. [↑](#footnote-ref-124)
125. *See* W.D. Brooker, *A Century of Mountaineering in Scotland*, available at <http://www.alpinejournal.org.uk/Contents/Contents_1989-90_files/AJ%201989%20190-196%20Brooker%20Scotland.pdf>, pp. 190-191. [↑](#footnote-ref-125)
126. *See* Part V.C. *infra*. [↑](#footnote-ref-126)
127. On the revolution in recreation specifically in Scotland, see Smout, A Century of the Scottish People, *supra*, pp. 148-159. [↑](#footnote-ref-127)
128. *See id.*, p. 148. [↑](#footnote-ref-128)
129. *See* Christopher Harvie, *Bryce, James, Viscount Bryce (1838-1922)*, Oxford Dictionary of National Biography, online edn, 2011, at <http://www.oxforddnb.com/view/article/321141>, accessed 8 May 2013. The best full-length biography of Bryce remains H.A.L. Fisher’s 2-volume work, H.A.L. Fisher, James Bryce (Viscount Bryce of Dechmont, O.M.), 2 vols. (1927). [↑](#footnote-ref-129)
130. James Bryce, The American Commonwealth , 2d ed. (London 1898; orig. pub. 1888). [↑](#footnote-ref-130)
131. *See* Fisher, James Bryce, *supra*, at 168-69. [↑](#footnote-ref-131)
132. *See* “A Bill to Secure to the Public Access to Mountains and Moorlands in Scotland” (Bill 122), 47 Vict. (1884), available at <http://parlipapers.chadwyck.co.uk.ezproxy.webfeat.lib.ed.ac.uk> (last visited on March 27, 2014). [↑](#footnote-ref-132)
133. *Id*., sec. 4 (a) and (c). [↑](#footnote-ref-133)
134. The Times, 25 March 1884. [↑](#footnote-ref-134)
135. *Ibid.* [↑](#footnote-ref-135)
136. *See Hansard*, 3d Series, vol. 324, col 1463, 17 April 1888. [↑](#footnote-ref-136)
137. *See* *Hansard*, 4th Series, vol. 2, col. 104, 4 March 1892. [↑](#footnote-ref-137)
138. *See* “A Bill to Secure to the Public the Right of Access to Mountains and Moorlands in Scotland” (Bill 213), 55 Vict. (1892), available at <http://parlipapers.chadwyck.co.uk.ezproxy.webfeat.lib.ed.ac.uk> (last visited on March 27, 2014). [↑](#footnote-ref-138)
139. *See* Access to Mountains (Scotland), House of Commons Debate 04 March 1892 vol 2 cc91-128, Hansard 1892, available at <http://hansard.millbanksystems.com/commons/1892/mar/04/access-to-mountains-scotland> (last visited March 27, 2014) [↑](#footnote-ref-139)
140. *See* David Sellar, *Community Rights and Access to Land in Scotland*, available at <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/58/community_rights.pdf.?sequence=1> (last visited March 25, 2014). [↑](#footnote-ref-140)
141. Access to Mountains (Scotland), House of Commons Debate 04 March 1892 vol 2 cc91-128§ (9.5), cc 100, *supra* note 154. [↑](#footnote-ref-141)
142. *Id*., cc 96. [↑](#footnote-ref-142)
143. *Ibid.* [↑](#footnote-ref-143)
144. *See ibid.* [↑](#footnote-ref-144)
145. *Id.*, cc. 100-101. [↑](#footnote-ref-145)
146. *Id.*, cc. 100. [↑](#footnote-ref-146)
147. *Ibid.* [↑](#footnote-ref-147)
148. *Id.*, cc. 100-101. 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”). Viscount James Bryce, The American Commonwealth, 2d ed. rev. (1889), vol. 2, pp. 385-408. [↑](#footnote-ref-148)
149. On George and his single tax, see John L. Thomas, Alternative America: Henry George, Edward Bellamy, Henry Demarest Lloyd and the Adversary Tradition (1983), 102-131. [↑](#footnote-ref-149)
150. *See* Henry George, Jr., The Life of Henry George (1903), p. 45. [↑](#footnote-ref-150)
151. *See* Bryce, The American Commonwealth, *supra* note , at 408. [↑](#footnote-ref-151)
152. *Id.* c 98. [↑](#footnote-ref-152)
153. 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 (Court of Session). 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 minimum 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 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. Juris. 431, 431 (1885). [↑](#footnote-ref-153)
154. 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. [↑](#footnote-ref-154)
155. House of Commons, *Hansard*, Mar. 4, 1892, l. 116 (comments of Lord Elcho), available at http://hansard.millbanksystems.com/commons/1892/mar /04/access-to-mountains-scotland (last visited Dec. 19, 2014) [↑](#footnote-ref-155)
156. *Ibid.* 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 Report of the Napier Commission, supra* note , at vol. 5, 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=T qqUVJTKGsG1ggTxmYPwCQ&usg=AFQjCNHKDYASGdG9Ou3mi2pl49NwI6qBsw&bvm=bv.82001339,d.eXY (last visited Dec. 19, 2015). [↑](#footnote-ref-156)
157. House of Commons, *Hansard*, vol l, col.120, Mar. 4, 1892, (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 Dec. 19, 2014) [↑](#footnote-ref-157)
158. *Id.* at vol. l, col. 123. [↑](#footnote-ref-158)
159. *Id.* at vol. 1, col. 124. [↑](#footnote-ref-159)
160. *See* Simon Thompson, Unjustifiable Risk?: The Story of British Climbing (2010). [↑](#footnote-ref-160)
161. J. Parker Hill, MP, *Access to Mountains*, 150 Blackwood’s Edinburgh Magazine 259 (1891). [↑](#footnote-ref-161)
162. *Ibid.* [↑](#footnote-ref-162)
163. *Id.*at 259-260. [↑](#footnote-ref-163)
164. *See* Parker Hill, MP, *Access to Mountains*, *supra*, at 259-272, 260. [↑](#footnote-ref-164)
165. *Id.* at 260. [↑](#footnote-ref-165)
166. In this respect Parker Hill 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.” *Ibid.* [↑](#footnote-ref-166)
167. *Id.* at 261. [↑](#footnote-ref-167)
168. *Id.* at 262. [↑](#footnote-ref-168)
169. *Id.* at 263. [↑](#footnote-ref-169)
170. *Ibid.* [↑](#footnote-ref-170)
171. *Id.* at 264. [↑](#footnote-ref-171)
172. *Ibid.*, quoting John Rankine, The Law of Land Ownership in Scotland 123 (1891).. [↑](#footnote-ref-172)
173. *Id.* at 266. [↑](#footnote-ref-173)
174. *Id.* at 270. [↑](#footnote-ref-174)
175. [Review,] *The Magazines*, The Spectator, Aug. 8, 1891, at 200, 201. [↑](#footnote-ref-175)
176. *See* Marion Shoard, A Right to Roam 172 (1999). [↑](#footnote-ref-176)
177. House of Commons, *Hansard* , vol. l, col. 128, Mar. 4, 1892, available at http://hansard.millbanksystems.com/commons/1892/mar /04/access-to-mountains-scotland (l. 128). [↑](#footnote-ref-177)
178. *See* Shoard, A Right to Roam, *supra*, at 173. [↑](#footnote-ref-178)
179. 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, James Bryce, *supra*, at I, 176. [↑](#footnote-ref-179)
180. *See id.* at 173-174. [↑](#footnote-ref-180)
181. *See* Metcalfe, Leisure and Recreation, *supra*, at 118-119. [↑](#footnote-ref-181)
182. *See* Anderson, The Sporting Life, *supra*, at 93, 95-97. [↑](#footnote-ref-182)
183. *See* *id*., pp. 67-86. [↑](#footnote-ref-183)
184. *See id*., p. 67; Lowerson, Sport and the English Middle Classes, *supra*, p. 65; Bailey, Leisure and Class in Victorian England, *supra*, p. 72. “Muscular Christianity,” a narrower term, was a volunteer movement in the Victorian period. *See* S.M. Ellis ed., Letters and Memoirs of Sir William Hardman, a Mid-Victorian Pepys (1923), p. 23. [↑](#footnote-ref-184)
185. *See, e.g.,* Metcalfe, Leisure and Recreation, *supra*, p. 18. [↑](#footnote-ref-185)
186. *See* Lowerson, Sport and the English Middle Classes, *supra*, p. 204. [↑](#footnote-ref-186)
187. Michael Curtin, *A Question of Manners*, 57 J. of Mod. Hist. 518 (1985). [↑](#footnote-ref-187)
188. *See* Lowerson, Sport and the English Middle Classes, *supra*, p. 204. [↑](#footnote-ref-188)
189. *See* Metcalfe, Leisure and Recreation, *supra*, at 117. [↑](#footnote-ref-189)
190. *Id*., p. 117. [↑](#footnote-ref-190)
191. *See id.*, p. 118. [↑](#footnote-ref-191)
192. *See* Lowerson, Sport and the English Middle Classes, *supra*, p. 72. [↑](#footnote-ref-192)
193. *Ibid.* [↑](#footnote-ref-193)
194. *See* Bailey, Leisure and Class, *supra*, p. 131. [↑](#footnote-ref-194)
195. *Id.*, pp. 131-132. [↑](#footnote-ref-195)
196. *See id.*, p. 132. [↑](#footnote-ref-196)
197. *See* Anderson, The Sporting Life, *supra*, 93, 95-97. [↑](#footnote-ref-197)
198. *Id.*, p. 95. [↑](#footnote-ref-198)
199. Bailey, Leisure and Class, *supra*, p. 136. [↑](#footnote-ref-199)
200. *See* Andy Wightman, The Poor Had No Lawyers: Who Owns Scotland (And How They Got It) 208 (2013). [↑](#footnote-ref-200)
201. *See ibid.* Wightman tells the fascinating story of the origins of the Scottish National Trust. [↑](#footnote-ref-201)
202. *See* Stephenson, Forbidden Land, *supra*, at 140. 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* *Hansard*, vol. 173, cols. 1152-55, 13 May 1924. Later bills included those introduced in 1930 (*see Hansard*, 5th Series, vol. 235, cols. 419-21, 12 Feb. 1930), 1931 (*see Hansard,* 5th Series, vol. 252, cols. 1357-8, 14 May 1931), and a bill introduced in 1938 which was enacted as the 1939 Access to Mountains Act, discussed above. [↑](#footnote-ref-202)
203. *See Winning the Right to Roam*, available at <http://www.ramblers.org.uk/wales/what-we-do/protecting-and-expanding-where-we-walk/right-to-roam-crow.aspx> (last visited Dec. 23, 2014). [↑](#footnote-ref-203)
204. National Parks and Access to Countryside Act 1949, 12, 13, & 14 Geo. 6, ch. 97, s. 84 (U.K.).

     For the story of the 1930 Act, see Tom Stephenson, Forbidden Land: The Struggle for Access to Mountain and Moorland 165-81 (1989).

     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 (2012); Stephenson, Forbidden Land, *supra,* 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. *Ibid.*

     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, A Right to Roam, *supra*, at 276. [↑](#footnote-ref-204)
205. Dennis Brailsford, British Sport: A Social History (Lanham, MD, 1992), p. 104. [↑](#footnote-ref-205)
206. Alastair Borthwick, Always a Little Further 57 (1969) [↑](#footnote-ref-206)
207. *See* Ronald W. Clark and Edward C. Pyatt, Mountaineering in Britain (1957), pp. 195-197; Peter Donnelly, *Social Climbing: A Case Study of the Changing Class Structure of Rock Climbing and Mountaineering in Britain*, in Studies in the Sociology of Sport, Aidan O. Dunleavy et al., eds. (1982), pp. 13, 21-22. [↑](#footnote-ref-207)
208. *See id.* at 195. [↑](#footnote-ref-208)
209. *See* Clark and Pyatt, Mountaineering in Britain, *supra*, at 195-196. [↑](#footnote-ref-209)
210. Borthwick, Always a Little Further,  *supra*. Evidencing its enduring popularity, this book has never gone out of print. [↑](#footnote-ref-210)
211. *See* Alastair Borthwick, <http://en.wikipedia.org/wiki/Alastair_Borthwick> (last visited April 2, 2014); Alastair Borthwick (obituary), <http://www.theguardian.com/news/2003/oct/09/guardianobituaries.booksobituaries> (last visited April 2, 2014) [↑](#footnote-ref-211)
212. *See* James Mitchell, *The Creation of the Scottish Parliament: Journey Without End*, 52 Parliamentary Affairs 649 (1999). [↑](#footnote-ref-212)
213. *Id.* at 655. [↑](#footnote-ref-213)
214. *See id.* at 657-660. [↑](#footnote-ref-214)
215. *See* Comments byRoss Finnie, Minister for Environment and Rural Development, Parliamentary Debates on Land Reform (Scotland) Bill (SP Bill 44), 20 March 2002, available at  <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4365&mode=pdf> (last visited April 4, 2014) [↑](#footnote-ref-215)
216. Access to the Countryside for Open-Air Recreation (Scottish Natural Heritage 1998). [↑](#footnote-ref-216)
217. *Id.* at par. 14. [↑](#footnote-ref-217)
218. Comments byRoss Finnie, Minister for Environment and Rural Development, Parliamentary Debates on Land Reform (Scotland) Bill (SP Bill 44), 20 March 2002, at 7380, available at  <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4365&mode=pdf> (last visited April 4, 2014) [↑](#footnote-ref-218)
219. *Id.*, p. 7383.

     The bill, which was very long and quite complex, is filled 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 local level.” *Id.*, p. 7384. [↑](#footnote-ref-219)
220. *Ibid.* [↑](#footnote-ref-220)
221. *Id.*, p. 7421 (comment of Richard Lochhead). [↑](#footnote-ref-221)
222. 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.*, p. 7398 (comment of Bill Aitken). He further compared the bill to Robert Mugabe’s land confiscations in Zimbabwe. [↑](#footnote-ref-222)
223. 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). [↑](#footnote-ref-223)
224. *See, e.g.,* Miles Ogborn, Spaces of Modernity: London’s Geographies, 1680-1780 (1998). [↑](#footnote-ref-224)
225. Greig, *“All Together and All Distinct,”* supra, at 54. [↑](#footnote-ref-225)
226. *Id.* at 62. [↑](#footnote-ref-226)
227. *Id.* at 73 [↑](#footnote-ref-227)
228. 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984). [↑](#footnote-ref-228)
229. *Id.* at 366. [↑](#footnote-ref-229)
230. *Id.* at 365. [↑](#footnote-ref-230)
231. *Ibid.* 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. [↑](#footnote-ref-231)
232. 879 A.2d 112 (N.J. 2005). [↑](#footnote-ref-232)
233. *Id.* at 121. [↑](#footnote-ref-233)
234. 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. [↑](#footnote-ref-234)
235. *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 A. Amin (ed.), Post-Fordism: A Reader 409 (1994). [↑](#footnote-ref-235)
236. James Freeman, *Democracy and Danger on the Beach: Class Relations in the Public Space of Rio de Janeiro*, 5 Space and Culture 9, 14 (2002). [↑](#footnote-ref-236)
237. *Id.* at 19. [↑](#footnote-ref-237)
238. *Id.* at 25. [↑](#footnote-ref-238)
239. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 Va. L. Rev. 437 (2006). [↑](#footnote-ref-239)
240. *Id.* at 464. [↑](#footnote-ref-240)
241. *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)). [↑](#footnote-ref-241)