

William B. Ewald

James Wilson: The Scottish Enlightenment and British North America

ASLH 2011 Panel Proposal

(Alliances Auld and New: Scotland and the Early Republic)

In this paper, Professor Ewald will explore the influence of Scottish enlightenment thinking on the work of James Wilson. Wilson, Scottish-born and educated, played a central role in framing and early implementation of the Constitution as a member of the Philadelphia convention of 1787 and a Justice of the Supreme Court of the United States.

James E. Pfander

“Non-Contentious Judicial Power:

Scotland, Civil Law, and the Limits of Article III”

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Justiciability doctrines emerged in the decisional law of the Supreme Court in the twentieth century and now impose substantial limits on the power of the federal courts. Said to be drawn from the practice of the English superior courts and linked to such early precedents as *Hayburn’s Case* and the *Correspondence of the Justices*, the doctrines of standing, adversity, and ripeness now implement a restrictive view of federal jurisdiction. Building on these limits, modern commentators have questioned the appropriateness of *ex parte* and non-adverse actions and have assumed that the Declaratory Judgment Act of 1934 represented an exercise of jurisdiction without precedent in the courts of Westminster or of the early republic.

Yet the early federal courts entertained several proceedings that cast doubt on the orthodox account of justiciability. The “feigned or amicable” action, for example, operated in much the same way as the declaratory judgment in that it secured a definitive legal ruling on a disputed issue of law that would provide guidance to the parties in the management of their affairs or as a touchstone for securing later relief. Most commonly, such cases involved the federal government as a party or implicit party, and the Supreme Court issued a number of notable rulings (such as *Ware v. Hylton*, a tax case engineered by Alexander Hamilton, and the admiralty case *Maley v. Shattuck*) based on pretextual jurisdiction. In addition, the federal courts heard a series of *ex parte* proceedings, such as petitions for naturalization, that do not satisfy modern notions of justiciability.

The origin of these cases lies not in innovations from common law practice but in the forms and actions of the civil law, reflected in the law of Scotland (and in equity and admiralty practice). Drawing on civil law precepts, Scotland permitted actions for declaratory relief substantially similar to actions for declaratory judgments. Equally interesting, we find examples of voluntary, or non-contentious, jurisdiction in Scottish courts in which the court itself provided adversity by testing the sufficiency of the petitioner’s proof. Like the European civil lawyers with whom they studied, Scottish jurists in the eighteenth century consistently described a two-fold role of courts: one to settle disputes and the other to administer justice.

This account of Scottish influence presents grounds for questioning the extent to which modern notions of adversity were found in, or imposed upon, the views of those who framed Article III. The receptiveness of the Framers to Scottish legal thinking and their use of voluntary jurisdiction in such actions as naturalization proceedings and the administration of pension benefits suggests that the legal systems of America, in particular of the federal courts, drew more heavily on the European civil law tradition than is currently understood. By contesting the early understanding of jurisdiction, this paper invites alternative narratives of the role that courts might play in the administration of justice in the federal system.

Alison L. LaCroix

“Letters from Edinburgh and Scottish Texts:

Building an American Literary and Legal Culture”

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This paper explores the importance of Scottish literary culture for American legal thinkers in the early nineteenth century, and the specific connections these commentators drew between literary culture and the work of building American nationhood. Beginning in the late eighteenth century, American statesmen such as John Adams, Thomas Jefferson, and James Wilson had cited Scotland and England’s gradual merger between 1603 and 1707 into Great Britain as a positive example of the form a federal union between two distinct peoples, sovereigns, and parliaments might take. In the early decades of the nineteenth century, Scotland continued to serve as a model for many American political and legal thinkers – in particular, for the Federalists, and subsequently their National Republican and Whig heirs. Following the War of 1812, Federalists and their allies viewed themselves as building a political culture that would blend and unite previously autonomous political units and increasingly distinct geographic regions. Prominent politicians and jurists such as Joseph Story emphasized literature as a key ingredient in creating and spreading a specifically federal, union-loving political, legal, and moral sensibility. Informed by Scottish Enlightenment thought as well as emerging notions of Romantic nationalism, Story and other statesmen were deeply invested in building a homegrown version of what they viewed as the Scottish culture of politics and letters. With Nathan Hale and William Tudor’s founding in 1815 of the *North American Review*, a journal modeled on the *Edinburgh Review*, Story and his fellow nationalists found a vehicle and an audience for their interconnected view of literature, politics, and law. The *North American Review* published Story’s essays on American maritime law, the beneficial effects of commerce on morals, and the superiority of common law to legal codes. The message of the journal, like Story’s arguments in his *Commentaries on the Constitution* and his unionist decisions on the Court, emphasized a shared national vision based not only on law but also on a deeper conception of federal culture.