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Legal Ideology and Incorporation III: Reason Regulated - The Post-Restoration English Civilians, 1653-1735

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Thus are the civilians excluded both from Publick and Private Business. As for my self, I have done my Part in showing how highly the Civil Law was once esteem'd and regarded by the English, and that both the English and French Lawyers, Forcatulus and Chopinus, were true Prophets; in foretelling, that one time or other, the Civil Law would be no longer in use in this Kingdom.**

Dr. Arthur Duck, D.C.L.

"The Law in all Jurisdictions is but Reason Regulated . . ."***

Dr. John Godolphin, LL.D.

This Article is the third in a four-part series entitled Legal Ideology and Incorporation. In this series, Dean Coquillette demonstrates that, although England has fostered a strong common law system, significant intellectual work was done in England during the sixteenth and seventeenth centuries by students of the civil law systems dominant on the Continent, particularly in their mercantile and diplomatic specialties. Dean Coquillette traces the development of the juristic works of these English civilians, and examines the civilians' intellectual influence on the English common law. His central thesis is that the English civilian jurists never intended to achieve a direct "incorporation" of civil law or mercantile doctrines into the common law. Rather, their lasting achievement has been the significant influence that their ideas

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Earlier versions of this Article were presented on October 21, 1983 at a conference, Courts and the Development of Commercial Law, held at the Universita di Genova and sponsored by the Henkel Foundation, and on October 20, 1984, at the American Society for Legal History, Annual Meeting. It is appropriate to thank here my Administrative Assistant, Mr. David W. Price, whose dedication and intelligence was invaluable in bringing this work to successful completion. I am also particularly grateful for the assistance of Professor Charles Donahue, Jr. of the Harvard Law School. All errors, of course, are my own.


about law—their "legal ideology"—have exercised on leading common lawyers and on modern commercial and international law.

Dean Coquillette divides the development of English civilian jurisprudence into three periods. The first period includes the years from the publication of Christopher St. German's seminal *Doctor and Student* in 1523 to the storm of protest from common lawyers following the publication of John Cowell's highly controversial *The Interpreter* in 1607. During this significant period, English civilian writing tended to promote synthesis and accommodation with the common law, and formed a pioneering venture in comparative law, a remarkable ideological effort that rewards study for its own sake. This period was discussed in the first Article in this series, *The Early Civilian Writers, 1523-1607*, which appeared in the January, 1981 issue of the *Boston University Law Review*.

The second period of English civilian juristic development included the years from the publication of the civilian Sir Thomas Ridley's major work, *A View of the Ecclesiastical and Civile Law*, in 1607 to the publication of the common lawyer Charles Molloy's great *Treatise of Affairs Maritime and of Commerce* in 1676. During this period, the common lawyers, initially led by Coke, mounted increasing jurisdictional and political attacks on the civilians and at the same time attempted to co-opt civilian methodology in those vital, growing fields in which the civilians had claimed particular expertise, most notably the law merchant. In response, the civilians became defensive in their juristic attitudes. Instead of continuing previous attempts to synthesize civil and common law, they tried to isolate and maintain whatever pockets of influence they had already established. The critical struggle was in important part literary and intellectual, and it centered on the traditional civilian strongholds of the international law merchant and Admiralty jurisdiction. This period was discussed in the second Article in the series, *Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607-1676*, which appeared in the March, 1981 issue of the *Boston University Law Review*.

This Article discusses the third period of English civilian juristic development. The period commences with the years during and after the Commonwealth, and extends into the eighteenth century. By then, the common lawyers were succeeding in their attacks, leaving civilian scholars, such as Godolphin, Duck, Wiseman, Zouche, Exton, Jenkins, Wood, Strahan, and Ayliffe with what could have been an increasingly narrow and specialized role in the English legal system. In the final installment, *Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, Dean Coquillette will argue that the most important contribution of these later civilian writers to Anglo-American law lies in their juristic influence, both direct and indirect, on such leading common lawyers as Hale, Holt, and Mansfield. This last installment will appear in the July, 1987 issue of the *Boston University Law Review*.
I. THE MYTH AND REALITY OF DOCTRINAL INCORPORATION: HEREIN OF THE "RECEPTION" AND "LAW MERCHANT" CONTROVERSIES

These articles conclude an extensive project, the examination of the legal ideas of a small, select group of practicing English legal specialists and jurists, the civilians of Doctors' Commons. For more than three hundred years, these lawyers jealously preserved their own legal culture, professional monopolies, and distinct ideological identity despite civil war, political prejudice, vastly changing economic and social conditions, and the growing envy of the powerful common lawyers. In 1858, the English civilians became extinct as a professional group, but their long heritage of specialty practice and juristic writing had a powerful impact on the development of Anglo-American law. It has also left us with historical questions of the first order.

There is no better way to begin any study of the influence of civil law on English legal thought than with these words of warning from Professor Charles Donahue, Jr.:

As is the case with so many controversies, the controversy over the influence of the civil law on the development of English law is one in which the polemical has often preceded the descriptive, in which questions are answered before they have been precisely stated.¹

There are at least two separate major controversies that focus respectively on the "reception" of civil law as a specific doctrinal system, and the "incorporation" of foreign legal thought, including commercial practices, into English law generally. The latter involves subsidiary controversies about what "foreign law" means, what "law merchant" means, and what "law" means. Further, these controversies are not just the invention of legal historians—they were part of the actual historical and ideological disputes that we are trying to understand.

With Professor Donahue's caveat firmly in mind, I rashly, perhaps foolishly, will attempt to define these issues. I will then try to let the historical record speak for itself, looking first at the civilian intellectual record in Restoration England, and then (in the fourth of this series of articles, which will appear in a subsequent issue) at the development of the commercial law.

We must begin with the major controversies. The first of these is surely a classic in all of English legal history—the "reception issue," i.e., to what extent did English law adopt Roman-based civil law doctrine? Great scholars—the Maitlands and the Thornes—have jostled on this hallowed ground, but they focused almost exclusively on the alleged medieval or sixteenth-century doctrinal "reception." Although university training in civil law took place in England from at least the 13th century, the professional origins of the English civilians of the early modern period date from the sixteenth century, just after the accession of Henry VIII. Henry gave them direct encouragement and patronage, probably because they were useful counter-weights to the growing power of the common lawyers and because of the demonstrable usefulness of their cosmopolitan learning in diplomacy and their expertise in foreign affairs. The very existence of such a group, one could argue, represents some kind of "reception" of civil law influence. But I conclude that these English civilians did not represent a significant "reception" of specific Roman doctrinal law in England. Although some civilian leaders tried, they were unable to add much to the "reception" that the university curriculum and canon law of the Church already represented. As we shall see, the reasons for this failure are highly instructive.

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2 For recent reassessments of the classic debates see Jenkins, English Law and the Renaissance Eighty Years On: In Defence of Maitland, 2 J. LEGAL HIST. 107, 107-09 (1981); Stein, Continental Influences on English Legal Thought 1600-1900, in 3 ATTI DEL TERZO CONGRESSO INTERNAZIONALE DELLA SOCIETA ITALIANA DI STORIA DEL Diritto, 1105-07 (L. Olschiki ed. 1977).


4 Coquillette, supra note 3, at 17-19.
This leads to the second major controversy. The civilian specialist monopolies were ecclesiastical, marine, and mercantile—as Dickens would say, the civilians had "an ancient monopoly in suits about people's wills and people's marriages, and disputes among ships and boats." The similarity of shipwreck and divorce aside, the consistent thread of these monopolies is that they all looked originally to either the cosmopolitan law of the Roman Church (ecclesiastical, domestic, and testamentary) or to the cosmopolitan practices of trade, navigation, and foreign relations (admiralty and diplomatic). This otherwise incomprehensible hodgepodge—which also included the allegedly civilian sciences of chivalry and heraldry—survived until very recently in the peculiar Probate, Divorce, and Admiralty Division of the English Supreme Court and in the High Court of Chivalry.

The issue, simply put, is whether the English civilians used these specialties to "incorporate" foreign legal ideas—or ideas from the customary practices known as the "law merchant"—into the English law. This is known as the "incorporation" issue, to distinguish it from the "reception" controversy about Roman law, from which it is quite distinct.

Just defining the terms of this "incorporation" issue has been extremely difficult. It involves at least three subsidiary controversies, each a classic in its own right: what does one means by "foreign" law, what does one mean by "law merchant," and what does one mean by "law" at all?

Let us begin with defining "foreign law." Edward Coke, when attacking rival jurisdictions, had no trouble defining both canon law and admiralty practices (or anything that was not strictly speaking "common law") as characterized by "foreign" elements, even after conceding that this "foreign law" had been applied by English courts to English legal disputes for centuries. This was partly propaganda, and even Coke, when in an objective mood, acknowledged that some of these practices were part of the "laws of this realm," just like any localized English customary law. Coke clearly believed that desirable doctrines or procedures should be "accli-..."
English civilians, on the other hand, were fascinated by the idea of *ius gentium*, the customary law of nations. By Roman law definition, *ius gentium* was not "foreign" law because it was an inherent part of the law of all, or most, countries. It was, on the other hand, distinct from "national" positive law, including English common law. It was also very distinct from "natural law," which could be defined in the strictly Roman sense of the unchanging laws of nature, e.g., the laws of animal biology, sex, and physics, or in the Enlightenment style, namely, that unchanging law dictated by natural reason to all intelligent peoples. By either definition, natural law was distinguished from other law by its inherent immutability. Yet, by the time the English civilians were developing their professional commercial specialties, they clearly recognized that the law of these specialties was evolving and dynamic. The continental civilians completed the first comparative and scientific studies of legal history. These studies strongly influenced the English civilians, who became convinced of an historical legal dynamic long before most of their common law counterparts. Thus the

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10 See A. d’Entreves, Natural Law 24-26 (1951); Coquillette, supra note 3, at 22-24 & nn.77 & 80; see also W. Buckland, A Text-Book of Roman Law From Augustus to Justinian 52-55 (3d ed. P. Stein rev. 1966) (tracing the origin of the term *ius gentium* and its relation to the term *ius naturale*); H. Jolowicz, Historical Introduction to the Study of Roman Law 100-05 (2d ed. 1954) (discussing how in ancient Rome *ius gentium* came to refer to the law applied to foreigners); F. Schulz, History of Roman Legal Science 70-73 (1946) (tracing the concept of *ius gentium* to ancient Greece); A. Watson, The Making of the Civil Law 83-98 (1981) (discussing *ius gentium* and *ius naturale*).


very definition of "foreign" law—as opposed to the national law or the ius gentium—could and did become part of the ideological debate itself, and must be treated with care.13

This leads to the second sub-controversy: is "law merchant" a kind of "foreign law," and if not, what is it? Here, J.H. Baker has contributed greatly to the scholarship, setting out no less than four alternative definitions for "law merchant":

The obscurity begins with the very concept of the "law merchant," which had been differently understood by different writers and continues to be used in widely divergent senses. Some have regarded it as a distinct and independent system of legal doctrine, akin in status to civil or Canon law, and perhaps derived from Roman law. Others have supposed it to be a particular aspect of natural law or the universal ius gentium, and as such akin to international law. Another school regards it as a form of immemorial custom, which by familiarity was eventually noticed by the common-law judges in the same way as the customs of gavelkind and borough English were judicially noticed before 1926, without formal proof. Yet a fourth view, which was doubtless influenced by the seventeenth-century writer Malynes, is that the law merchant is the same thing as mercantile practice, the changeable usages of merchants. On any of these views, the law merchant could not originally have been "law" as far as the courts of common law were concerned. Whether or not it was law elsewhere, the law merchant at

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Westminster must have been—like foreign law or trade usage—a matter of fact to be ascertained by evidence or judicial notice.\textsuperscript{14}

Baker is surely correct that, at least to the early common lawyers, "law merchant" was "foreign" law—a matter of fact to be independently ascertained—regardless of which of these formal definitions is adopted.\textsuperscript{15} But we also need a practical definition of "law merchant," not to replace all its historical meanings, but just to make clear what we are talking about now.

I believe the most useful definition is, ironically, that inspired by a layman, the influential seventeenth-century merchant Gerard Malynes: "the law merchant is the same thing as mercantile practice, the changeable usages of merchants."\textsuperscript{16} This, Baker's fourth option, is the best for several reasons. First, to regard law merchant as an independent system of legal doctrine—akin to the Roman-based canon or civil law—is simply not historically realistic. The English civilians, as a profession, identified with a taught civil law heritage that was based on centuries of analytical jurisprudence, but there was no university curriculum of "law merchant," no independent profession of "lawyers merchant," and not even any analytical English literature of "law merchant," at least not until after Malynes himself published Consuetudo, vel Lex Mercatoria, or the Ancient Law-Merchant (hereinafter Lex Mercatoria) in 1622, and John Marius, another layman, published Advice Concerning Bills of Exchange in 1651.\textsuperscript{17}

Second, to define law merchant as part of the "natural law" or the

\textsuperscript{14} Baker, supra note 8, at 295-96.

\textsuperscript{15} Baker is equally correct in observing that the often quoted views of Coke and Hale to the effect that lex mercatoria "is part of laws of this realm, for the advancement and continuance of commerce and trade," E. Coke, supra note 8, at 182, or that "the Common Law includes... Lex Mercatoria, as it is applied under its proper Rules to the Business of Trade and Commerce," M. Hale, History of the Common Law of England 18 (C. Gray ed. 1971), are in reference to that ordinary common law which happens to deal with trade, rather than reference to a separate body of incorporated doctrine. Baker, supra note 8, at 316. Civilians, such as Sir Thomas Ridley, were deeply suspicious of Coke's definition because it was inherently circular. It defined out of existence the notion of rival rules for specialized situations. Under Coke's formulation, law merchant was either recognized by the common law, or it was not law. Such "incorporation" of specific doctrine by bits and pieces, either openly or by use of fictions, violated the civilians' sense of methodology and system. The important thing was not the isolated doctrine, but the process by which it was developed and applied. Doctrinal incorporation threatened this process, and it eventually forced civilian jurists to adopt a narrow, and hardly classical, notion of the ius gentium. See Coquillette, supra note 3, at 83-84; Coquillette, supra note 9, at 351-71. That was one reason why the leading "first generation" civilian jurist, John Cowell, defined law merchant as "a privilege or speciall lawe differing from the Common lawe of England" in his great 1607 work, The Interpreter. See Coquillette, supra note 3, at 71-84.

\textsuperscript{16} Baker, supra note 8, at 296; G. Malynes, Consuetudo, vel Lex Mercatoria 2-3 (London 1622).

\textsuperscript{17} Coquillette, supra note 9, at 346-63.
universal *ius gentium* creates juristic confusion. Even the English civilians would not call law merchant "natural law." They identified *lex mercatoria* with the changing *ius gentium*, not the fixed *ius naturale*. On the other hand, the *ius gentium* was a useful concept, which could be used to describe not only the *lex mercatoria*, but also many other international usages, such as the privileges of ambassadors, the rights of prisoners of war, and even the custom of slavery. More important, much interesting mercantile practice was far from being universally accepted among trading nations and traders. And the concept of *ius gentium*, as classically conceived, left no room for legal orders among specialized classes that were neither fully incorporated into national law, nor fully universal among nations.

Finally, as to Baker's third option, treating such a customary system as "immemorial custom," like gavelkind and borough English, was just a patent fiction. What was interesting about law merchant in the seventeenth century was that it was relatively novel. To a large extent, this was candidly acknowledged at the time.

This leaves us with a final controversy: is "law merchant" of the kind we have just described any kind of "law" at all? Fortunately, legal history is not jurisprudence. Actual empirical usage does matter to the legal historian.

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18 Coquillette, supra note 3, at 22-26.
19 Id. at 83-84.

Such other laws also as be common to other nations as well as to us, have been received and used time out of mind by the kings and people of England in divers cases, namely the general law of nations and the law merchant, which is a branch of the law, the imperial civil law, the common or ecclesiastical law . . . .

Id. (quoting Sir John Davies).
21 See Coquillette, Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law, 67 B.U.L. Rev. (forthcoming) at text accompanying notes 90-251. The "time immemorial" view may reflect confusion about the formulas used in the old fair courts, which would often assert that they proceeded "according to the law merchant and the usage and custom of that town used and approved from time immemorial." See, e.g., Pleas in the Court ... of Bristol, in Select Cases Concerning the Law Merchant 131 (Selden Soc'y Pub. No. 23, C. Gross ed. 1908). But the statement refers to two sources of law, the law merchant and the immemorial custom of the town. Indeed, surviving correspondence forms between one fair court and another, even between fair courts of different countries, show a formula that clearly distinguishes between the law merchant, which the form letters assume to be common between the fairs, and the town customs, which are not assumed to be universal. See Lex Mercatoria, in 1 The Little Red Book of Bristol 81-85 (F. Bickely ed. 1900) (original c. 1280) [hereinafter Little Red Book].
Even the merchant Malynes called his book of mercantile customs, *Consuetudo, vel, Lex Mercatoria*.\(^{22}\)

It is also true that a great deal of legal history, at least before the last few decades, relied exclusively on published sources, which were thin on pure custom. But "law," as understood by the likes of Theophilus Parsons' "intelligent trader," included customary rules of conduct that met reasonable expectations of fairness and consistent dealing.\(^{23}\) As any practicing commercial lawyer knows, there are many ways of enforcing fair practices, and punishing unfair practices, outside of the courtroom. These patterns of informal enforcement are "law" to those who operate in that context, and have been called "law" for centuries.\(^{24}\)

\(^{22}\) Modern positivist writers have adopted schemes of analysis that are most useful in examining such juristic assumptions. It is true, these schemes have emphasized legislative and formal judicial action. But great positivists, such as H.L.A. Hart, would not wish to be understood as completely denigrating custom, at least as a source of law. *See* H.L.A. HART, *THE CONCEPT OF LAW* 44-47 (1961). More directly culpable is the tradition of taught law in formal Anglo-American legal education, which greatly over-emphasizes formal enactments and judicial decisions.

\(^{23}\) *See* T. PARSONS, *THE LAW OF BUSINESS FOR BUSINESS MEN* 1-15 (1866).

\(^{24}\) This definition of *lex mercatoria* coincides with that in the only surviving medieval English treatise on law merchant, *Little Red Book*, *supra* note 21, at 57: "*INCIPIT LEX MERCATORIA, QUE, QUANDO, UBI, INTER QUOS ET DE QUIBUS SIT .... Lex mercatoria a mercato peruenire ....*", translated in Teetor, *England's Earliest Treatise on the Law Merchant*, 6 AM. J. LEGAL HIST. 178, 181 (1962) ("Begins the Law Merchant, What, When, Between Whom and Regarding What It is .... The law merchant is understood to come out of the market[place] ...."). The treatise continues:

*In What Way the Law Merchant Differs from the Common Law*

The Law of the market [place] differs from the common law of the realm in three ways. In the first place, it reaches decisions more quickly. Secondly, whoever, pledges for anyone to answer to a [plea of] trespass, convenant, debt or detinue of chattels pledges for the whole debt, damages and expenses sought. If the one pledged be convicted and have not sufficient [assets] the one pledged first be attached by gage or by chattels and afterward remove that gage or it shall be released by the clerk of the market, the one pledged outside the bounds of the market, the one pledged [pledging?] is to answer for such gage or its value to the Court or plaintiff. And in the third place, it differs in that it does not admit anyone to [wage] law on the negative side: but always in the law it is for the plaintiff and not the defendant to make proof, whether by suit or by deed or otherwise. And as for other [matters] such as prosecutions, defenses, essoins, defaults, delays, judgments and executions of judgements, the same procedure is to be observed as in other laws.

*Id*. at 182-83. Baker has used this passage to make the point that 'when medieval lawyers distinguished systems of 'law' they usually had procedure in mind. Substantive justice was immutable, invariable and, of course, unattainable on earth ....' *Baker, supra* note 8, at 300. But Baker points out that the procedure of the law merchant was "not at first regarded as being totally divorced from the procedure of
The "incorporation" issue, therefore, is simply a question of whether the English civilians, through their specialty practices, introduced the ever dynamic, cosmopolitan usages of merchants into the national law of England. It would be reasonable to suppose that this group of specialists would be central to any such "incorporation." For three hundred years they were quartered directly between the great financial districts of London and the docks of one of the world's busiest ports, and they also had a monopoly in the vital Admiral Court. But as we will see (in my next article), a careful review of the mercantile law, focusing on the negotiable bills of exchange, tells a different story. When "incorporation" did occur, it was largely through the common law jurisdictions.

One might suggest, based on these doctrinal facts, that the English civilians were really of little significance to the development of Anglo-American law. But nothing could be further from the truth. Indeed, the true influence of English civilians on English jurisprudence has been consistently underestimated. That is because conventional English and American legal histories have looked too long at legal doctrine, and not long enough at legal methodology and the legal process. This is particularly true with commercial law. My thesis is that the English civilians learned early on that a direct doctrinal "reception" of civil law, or even direct "incorporation" of foreign or mercantile practices into the common law, was of very limited benefit to them both as practitioners and as jurists. Their extensive juristic writing showed little serious interest in either of these goals, at least for their own sake. They cared passionately, however, about legal methodology—means of factfinding, use of juries, the proper role of judges and arbitrators, the proper sources of law, and the proper vehicles for administering justice—and about the actual effect of the legal process, including precedent justice, on commerce and international affairs. On these subjects they differed dramatically with the sixteenth and early seventeenth-century common lawyers; the two groups were locked in serious ideological conflict, waging both intellectual

the King's central courts," particularly through its use of the King's special writ or commission secundum legem mercatoriam. Id. at 300. The key distinction remains, however, as to source. The law merchant "is understood to come out of the market[place]" and reflects, in its process, the custom, not just of that particular place, but of such places. See Teetor, supra, at 182-205. Thus, when mercantile courts wrote between each other to obtain "an exchange" of information, the formula invoked was, "Quod de jure et secundum legem et consuetudinem mercatoriam fuerit faciendum" ("what of right and according to mercantile law and custom ought to have been done") or "Quod secundum legem mercatoriam in hac parte fuerit faciendum" ("what according to the law merchant ought to be done on our part") or "extitit secundum legem et consuetudinem mercatoriam" ("according to mercantile law and custom"). Id. at 208, 209, 207 (translating LITTLE RED BOOK, at 83, 85, 82). Further, the sample exchanges of letters using these formulas included not only an exchange between London and York, but between London and Paris! Id. at 206-10 (translating LITTLE RED BOOK, at 81-85).
battles in print and political battles in the Privy Council and in the Parliament. Each side sought to defend and expand its jurisdictions and influence. Ultimately the English civilians lost this unequal trial of strength. But, as with many historic struggles, their common law adversaries were imprinted with the ideological characteristics of their enemies. It is through this most peculiar process of "incorporation," an incorporation of legal methodology and attitudes about the legal process, that the generations of English civilians left their permanent mark on the Anglo-American law.

II. Interregnum—The Ideology Asserted: 1650-1656

From the establishment of Doctors' Commons in 1511 to its extinction in 1858, there were four intellectual "generations" of civilian jurists. The "first generation," including Thomas Smith (1513-1577), Alberico Gentili (1552-1608), William Fulbecke (1560-1603), and John Cowell (1554-1611), was the focus of the first section of this study. These intellectual pioneers in the scientific, comparative study of law were imbued with an optimism born of Tudor patronage of the civilian cause, the 1575 Agreement protecting the Admiralty, and the emergence of Doctors' Commons as a genuine professional institution in London.25

A "second generation" of civilians, led by Sir Thomas Ridley (1549-1628), faced a very different environment—a deteriorating political situation and a resurgent common law bench, led by Sir Edward Coke. From 1601 on, the 1575 Agreement was systematically violated, and a war of pamphlets and writs of prohibition was underway, with the worst prohibition challenges occurring from 1610-1620, and a second pamphlet war raging from 1631-1641. The civilian intellectual efforts of this period, exemplified by Ridley's 1607 book, A View of the Civil and Ecclesiastical Law, were increasingly defensive and utilitarian in outlook. They focused on the critical struggles to control jurisdiction, particularly the commercial jurisdictions.26 It was this "second generation" that was the focus of the second installment in this study.

We now rejoin this struggle at a critical moment—the Interregnum. In some ways, things looked very black indeed for the civilians at this time. Despite severe common law pressure in the 1630's, royal preferment had kept Doctors' Commons relatively busy and prosperous—although at a cost in political popularity.27 Now, the civilians were paying some of that political price. Parliament directed its wrath at a number of leading civilians, particularly those associated with Archbishop William Laud. Eleven civilians were impeached from 1640-1641, and others lost key positions or had to com-

25 See Coquillette, supra note 3, at 49-87.
26 See Coquillette, supra note 9, at 320-46; Steckley, Merchants and the Admiralty Court During the English Revolution, 22 AM. J. LEGAL HIST. 137, 141-48 (1978).
27 See Levack, supra note 12, at 121.
pound for their estates. The Puritan pamphleteers were elated, and "A Funerall Elegie . . . upon the fall or death of Doctors Commons" was solemnly announced.

But the English civilians were nothing if not survivors. Even in their darkest hour, 1656, a nucleus of eighteen civilians was professionally active in London. Even more astonishing, the civilians managed to take the political and intellectual offensive, and on both counts achieved substantial success, even as they busily adjusted their political sails to the new winds. Perhaps their most impressive feat was their defense of the Admiralty jurisdiction.

Every major common law attack on this key civilian jurisdiction had led to councilar arbitrations, starting under Elizabeth I, and followed by one in each successive reign. The last was the settlement of 1633, which barred prohibitions "upon contracts made or other things personally done beyond or on the seas," and also protected bottomry suits for freight, charterparties, mariners' wages, and other key maritime practices.

This settlement, under the auspices of James I, was not surprising, nor was it surprising that the common lawyers again began to ignore its provisions. What was significant was what happened when the Crown and Council—which was to give the settlement efficacy—simply disappeared in the Civil War. The Office of the Lord High Admiral was transferred to a Council of State, and it might have been confidently predicted that the Admiralty Court itself would be castrated, or eliminated altogether, or at least delivered over to the control of the common lawyers. Indeed, in 1646 the House of Commons ordered the seal of the Admiralty Court broken.

But the Admiralty Court did not disappear. Rather, in 1648 the Long Parliament passed an ordinance that was sustained by later periodic measures throughout the Commonwealth. As D.E.C. Yale has emphasized:

This legislation was in certain respects surprisingly liberal. It assured to the [Admiralty] Court its jurisdiction in rem in respect of maintenance and supply of ships, bottomry hypothecations, and even foreign contracts concerning shipping and navigation. It secured to the Court cases of charterparties, or contracts for freight, bills of lading, mariners' wages, damage to cargo, collisions and damage caused by anchors and buoys dangerously placed. Litigation on bills of exchange and mercantile accounts was expressly excepted. Moreover, the legislation expressly affirmed the civilian procedure and the Court's authority to execute its decrees and sentences.

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28 B. Levack, supra note 20, at 195.
29 Id. at 195 n.3.
30 Id. at 199.
31 Yale, supra note 13, at 87, 90.
32 See id. at 90-91: Steckley, supra note 26, at 146-47.
33 Steckley, supra note 26, at 157.
34 Yale, supra note 13, at 90-91.
There were some differences. The Ordinance of 1648 was temporary and renewable, and the Admiralty Court was staffed by three judges, not one. But among these judges were staunch civilians, like John Godolphin and John Exton. How did the civilians do it?

The Ordinance of 1648 "effectively protected the civil law jurisdiction," at least until the Restoration. Its enactment demonstrated surprising political adaptability by the civilians, who received extensive support from London merchants, many of whom were good Parliament men with influential political friends. It also demonstrated a willingness to abandon politically unpopular ideological positions while emphasizing the practical utility of the Admiralty process, thus validating the conclusions of Professor Levack's research on the political allegiance of the civilians from 1603-1641. Levack has shown that many civilians were not royalist zealots, and that some civilians—including Issac Dorislaus, the regicide, Walter Walker, the advocate for Parliament's fleet, and Calibute Downing, the chaplain for Essex's army—actually supported, actively or passively, the cause of the Parliament. Others, such as John Godolphin and John Exton, earned the trust of the Commonwealth by their political services.

Their political balance and ultimate pragmatism made the English civilians politically tough, but this was not their only weapon in this battle for survival. Their leaders never stopped thinking and writing, and their legal process and methodology proved to have a value that, when vigorously asserted, could carry the day against heavy odds of both professional jealousy and political prejudice. It is to this story, the struggle of the "third

35 Steckley, supra note 26, at 138.
36 Id. at 157-59.
37 B. LEVACK, supra note 20, at 196.
38 See infra text accompanying notes 148-83.
39 Levack's invaluable demographic, biographical, and political research has isolated four "crisis points" in the history of Doctors' Commons. See Levack, supra note 12, at 109 tab. 5.1. These periods are: 1) the rocky beginnings in roughly 1535; 2) the period commencing around 1607—what I call the "second generation" period and have described earlier in Coquillite, supra note 9; 3) the period of the 1640's and 1650's, which we are discussing now; and 4) what I believe to have been the civilians' ultimate crisis—the Restoration crisis of 1660 and 1670. See id. at 121. What is so interesting is how each of these crises of professional standing—as reflected in demographics and other empirical evidence—resulted in a creative outpouring of English civilian writing and in new theories of how the civilian experience could be best incorporated into the English legal system as a whole. These civilians were not just politically adaptable, they were ideologically adaptable and assertive.

Dr. C.P. Rodgers, who has been most helpful to this writer, has described and criticized the first two installments of this study as arguing that "the literary efforts of the English civilians were aimed at incorporating civilian legal theory (especially in connection with the law merchant, procedure, and codification) into the developing common law." Rodgers, Legal Humanism and English Law—The Contribution of the English Civilians, 19 THE IRISH JURIST 115, 124 n.32 (1984). Dr. Rodgers
A. The "Feathers of Doctor Duck": Arthur Duck, D.C.L. (1580-1648) and his De Usu (Published 1653)

In 1641, the following jingle was published:

Then there is also one Doctor Duck
The proverb says, What's worse
ill luck
We hope the Parliament his feathers
will pluck
For being so busy, Doctor Duck.  

There is no question why Duck was so unpopular. He had been active in Parliament and fiercely loyal to Charles I. He donated 6,000 pounds outright to the King. When Charles was held on the Isle of Wight in 1648, he asked if Duck could negotiate on his behalf.


40 From the Puritan pamphlet *The Organs Echo*, stanza 8 (London 1641). See B. Levack, *supra* note 20, at 195. For a typical civilian reaction see W. Clerke, *An Epitome of Certaine Late Aspersions Cast at Civilians ... Wherein The Authors Thereof are Refuted and Repelled* (Dublin 1631).

Even worse, for some common lawyers, was that Duck rose to power and wealth due, in large part, to the unpopular Archbishop Laud. He advised Laud in important cases, and "pleaded on behalf of Laud" in the explosive matter of the communion table of St. Gregory, at nearby Paul’s Wharf. No wonder he was sent for as a delinquent by Parliament in 1642, and that his estate at Chiswick was almost pillaged by Parliament’s troops. On his sudden death in 1648, his property was sequestrated.

At first glance, his career would seem to vindicate orthodox Whig history about the civilians and their politics—and leave little or no explanation for their survival during the Interregnum. And, as a matter of strict politics, Duck was definitely just a liability to the civilian cause. But his juristic writing, in particular his book, De Usu et Authoritate Juris Civilis Romanorum Per Dominia Principum Christianorum, published posthumously in London in 1653, developed an historical and practical case for the role the new generation of English civilians wished to play.

Duck wrote only two books, and they are both most unusual. The first did not concern law, but was a religious biography of Archbishop Henry Chichele. What is surprising about the Chichele biography is that it was hotly anti-Papist and glowed with enthusiasm about Chichele’s defense of the national "liberties of the Church." Most important, the book evinced a thinly veiled skepticism about the validity of Roman-based canon law. But this should surprise us only if we believe Coke’s propaganda about the suspect patriotism and religious loyalty of Doctors’ Commons. The biography of Chichele was written by an earnest historian who was also a fierce nationalist.

It was Duck’s little legal book, De Usu, however, that was the real shocker, because it directly undercut the authority of the Crown. More than half of this book was dedicated to showing that there was a good deal of

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Oxford Companion to Law 380 (1980). Francis Gregor offers some interesting notes about Duck, including that Duck achieved his success despite a speech impediment, or "disadvantage of utterance. . . . He [Duck] was one of most smooth Language, but rough Speech." Gregor, Preface to J. Fortescue, De Laudibus Legum Angliae xvi (London 1737).

A. Duck, De Usu et Authoritate Juris Civilis Romanorum Per Domina Principum Christianorum (2d ed. London 1679) (1st ed. London 1658). For a partial English translation (of those sections relating to the Kingdom of England only) see M. de Ferrier, The History of the Roman or Civil Law (London 1724) (the translation, by one Dr. J. Beaver, was attached to the book).

A. Duck, Vita H. Chichele Archeepiscopi Cantuarensis Sub Regibus Henric V et VI (Oxford 1617). The book was reprinted in 1681, and translated anonymously into English in 1699. See 1 D.N.B., supra note 41, at 580; B. Levack, supra note 20, at 181.

For extensive citations to Coke’s anti-civilian invective see Coquillette, supra note 3, at 84-86.
“might makes right” in the early English monarchy, including a rather questionable legitimacy of succession, and that major institutional dislocations dated back to the “harsh... Yoke” of the Conquest itself. While to our callous modern ears this just sounds like accurate history, it was unsafe to publish such facts prior to Cromwell’s victory whether you were a good royalist or not, as Cowell had discovered to his great pain. Indeed, Duck’s emphasis on the need for the “consent” in government of those who are “still free” could have been badly misunderstood by any Stuart monarch, regardless of the historical context. Duck did not risk the consequences of such a misunderstanding, leaving his book to be published after his death.

Another important theme of the book was Duck’s emphasis on the early subordination of the English church and the canon law to the Crown. He stressed that it was the Conqueror himself who had established the English church courts. He admired Becket, and identified him as a student of civil law. Becket was perceived not as an agent of Rome, but as a representative of English national church interests in the Papal Court. There was something decidedly secular and nationalist about both Duck’s religious and political history, with an emphasis on change and discontinuity—what he called “those several Changes and Revolutions”—rather than on legitimacy and continuity.

This was true even of Duck’s description of the historical influence of civil law on England. While Duck emphasized the Roman occupation of Britain, he made no real case for the survival of Roman law—although he did insist that it was the Romans who “deserted” the “miserable” Britons, not the other way around. Instead, he candidly acknowledged the discontinuity, and emphasized instead Selden’s research on early civil law teaching in the English universities, and the usefulness (de usu) of this tradition to the English state.

Not only was the first section of Duck’s De Usu slanted against Puritan bete noires of Roman popery and the divine right of kings, it actually rated

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46 See A. Duck, Of the Use and Authority of the Civil Law in the Kingdom of England vii-viii, xvi (Dr. J. Beaver trans. 1724) [hereinafter De Usu]. I am using the English version for the convenience of readers, but it can vary from the original Latin text in important ways. See, e.g., infra note 70. It also omits Duck’s work on the civil law in other European countries, as well as his entire section on the custom and authority of the Roman civil law in Ireland, De Usu & Authoritate Juris Civilis Romanorum in Regno Hibernae. See A. Duck, supra note 43. On “Yoke” symbolism see J.G.A. Pocock, The Ancient Constitution and the Feudal Law (1957).

47 See Coquillette, supra note 3, at 76-82.

48 De Usu, supra note 46, at xvi.

49 Id. at xvii.

50 Id. at xix.

51 Id. at viii.

52 Id. at ii-iv.

53 Id. at v.

54 Id. at xviii-xxiv.
custom as a better source of law than prescript. Thus, as to the "Conqueror's Laws," Duck observed:

[F]or the force of a received custom, is very great in all Places; and therefore, a Law is compared to a Tyrant, but a Custom to a good King: And Laws which are given by a Prescript, have a kind of Servitude in them; whereas Customs receiv'd by Consent, govern those that are still free.\(^{55}\)

Where were the civilian traditions of Quod principi placuit and ratio scripta? They did not appear in De Usu.\(^{56}\)

This gets us to the "business end" of the book, where Duck attempted to "shew, of what Use and Authority [the civil law] is in the Courts of Justice."\(^{57}\) Duck had three points. First, the civil law was important because so many great common lawyers drew on its teaching for inspiration. "All these Common Lawyers, were excellently well versed in the Civil Law, from whence they have borrow'd great deal, both to explain and to illustrate the Law of England."\(^{58}\) Second, from the earliest time, and particularly in the equitable and specialty jurisdictions, "there are many Things that agree with the Civil Law."\(^{59}\) It was not that the Chancery or the Requests was governed by civil law, but rather that civil law precepts were consistent with much of the practice of these Courts and were thus useful there, as evidenced by the regular employment of civilians as Masters in Chancery or in the Requests.\(^{60}\)

This was particularly true of jurisdictions, such as that of the Constable and Marshal, where foreign law or foreign affairs were likely to be involved. In Duck's view, it was not a question of inflexible mandate, but of simple utility.\(^{61}\)

The common lawyers, Duck emphasized, had agreed that the civil law be used exclusively in those specific jurisdictions where it was the most useful, namely the Constable and Marshal, the Admiralty, and the Ecclesiastical Courts. "Now the Use and Authority of the Civil Law in this Court, is allow'd by all our Common Lawyers; and therein is termed the Law of the Kingdom, the King's Law, and the Law of the Land."\(^{62}\) This was not the application of a foreign system of law, but the use of appropriate legal procedures and doctrines—by the consent of history, custom, and even the common lawyers—where they made sense, even though some were of civil law origin. After all, as Duck had demonstrated in the first part of the book,

\(^{55}\) Id. at xvi.
\(^{56}\) See Coquillette, supra note 3, at 27, 29.
\(^{57}\) De Usu, supra note 46, at xxiv.
\(^{58}\) Id. at xxviii.
\(^{59}\) Id. at xxix.
\(^{60}\) See Coquillette, supra note 3, at 19-20 & n.62.
\(^{61}\) De Usu, supra note 46, at xxix-xxxi.
\(^{62}\) Id. at xxxiii.
practically all English law arrived from foreign parts originally.63 Did not that make it all "foreign"?

Finally, Duck made a special case that the principles and procedures of the civil law were innately superior in certain specialized matters.64 Duck subscribed to the common view that different jurisdictions reflected more a different process than a different doctrine, a fairly typical attitude. As Baker explains, "When medieval lawyers distinguished systems of 'law' they usually had procedure in mind . . . in the mortal world the quality of justice depended on the available mechanisms."65 Thus, Duck emphasized the process: "the Form prescribed by the Civil Law, that is, by Libel or Petition, Witness secretly examin'd, Exceptions, Replications, and all other Things, done according to the Rules of the Civil Law; Sentences and Appeals put into Writing . . . ."66

One of the jurisdictions historically "acknowledged" by the common lawyers was the Admiralty, and here, in Duck's view, the civil law process was eminently practical. Not only were foreigners and foreign laws frequently encountered—where civil law acted as a kind of common denominator—but "under this Court may be reckoned the Court-Merchant; in which all controversies about Contracts between Merchants, are determined in Equity and good conscience, according to the rules of the Civil Law."67

Duck emphasized that unlike the canon law—in which "there has been some Difficulty, ever since the Reign of Henry VIII"—the civil law "has been receiv'd by the Counsel of all" and, in its specialized jurisdictions, "is called the Law of the Land."68 But he did not conclude on this optimistic note. Rather, he made a sad prophecy. The forces of discontinuity and change he had chronicled earlier in the book were still at work. Now they were systematically excluding civilians and civil law "both from Publick and Private Business . . . Forcatulus and Chopinus were true Prophets, in foretelling, that one time or other, the Civil Law would be no longer in use in this Kingdom."69

The tragedy, in Duck's view, was that this was simply self-inflicted injury. True, as one who was suffering directly for his own royalist allegiance, he was directly experiencing the political forces moving against Doctors' Commons. But De Usu's bold point was that the civil law was neither a political doctrine nor a religious philosophy. It was once no more "foreign" than the rest of the English legal heritage, but it was now becoming so. "Let

63 Id. at v-xvii.
64 Id. at xxxiv-xxxvii.
65 Baker, supra note 8, at 300.
66 De Usu, supra note 46, at xxxiv; see also id. at xxxvii.
67 Id. at xxxv.
68 Id. at xxxv.
69 Id. at xxxviii.
us therefore warn the young men of our university to leave the study of civil law to foreign nations, and devote themselves to the study of the laws of their own country, from whence they can obtain riches and honours. For me, it is sufficient to have shown that the study of civil law was once held in high esteem . . . .

70 Lost would be a valuable source of legal ideas to solve legal problems. Its justification, beginning and end, was its utility, its "use." Thus, the book's title, De Usu.

Published in the crucial year 1653, De Usu contradicted the absolutist and religious propaganda of the common lawyers. It was as anti-absolutist, anti-papist, and as nationalist as any writing by Edward Coke.71 Yet it was written by the very civilian lawyer that Charles I had chosen to negotiate for him while a prisoner on the Isle of Wight.

B. Sir Robert Wiseman, D.C.L. (1613-1684) and his The Law of Lawes (1656)

We do not know much about Sir Robert Wiseman, except that he was a true "survivor." He entered Doctors' Commons in 1640, the beginning of its worst period, and died forty-four years later with a personal worth of 20,000 pounds.72 He wrote a single book, The Law of Lawes.73 That he was strongly influenced by Arthur Duck and, like Duck, by John Selden, there can be no doubt. There were many citations to both in his book.74

Wiseman is known today as "the first civil lawyer to recommend what amounted to a reception."75 But, as we will see, this perception is simply not true. On the other hand, Wiseman was very definitely something Duck was not, a true jurisprudent. And unlike De Usu, The Law of Lawes is a book about jurisprudence.

The book was, nonetheless, obviously inspired by De Usu (and by its publication in 1653). Even the subtitle reads, "Shewing of how great Use and Necessity the Civil Law is to this Nation."76 But Wiseman could not have been happy with De Usu, for it gave an empirical, dispassionate history

70 A. DUCK, supra note 43, at 350-51 (1678); see 5 W. HOLDSWORTH, supra note 41, at 25 (providing a better translation than the 1724 version, which omitted the warning to the students). De Usu, supra note 46, at xxxviii.
71 See Coquillette, supra note 3, at 84-86.
72 There is not even a D.N.B. entry for Wiseman. The best accounts are in 12 W. HOLDSWORTH, supra note 41, at 640; B. LEVACK, supra note 20, at 279; D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 109-10 (1970).
74 See id. at 196, 227-35 (citations to Duck and Selden, respectively).
75 See B. LEVACK, supra note 20, at 126 n.2; D. VEALL, supra note 72, at 109-10.
76 R. WISEMAN, supra note 73, at the title page (unpaginated) (emphasis supplied).
of English law, showing how it almost all came from somewhere else, and how everything that looked fixed forever was actually the product of "Change and Revolution" and would change again. In Duck's fatalistic view, the civil law came into England over time, and now, alas, it was going out. This was unfortunate because civil law was useful, but it was dying out nonetheless.

By 1656, Duck was dead; Wiseman, on the other hand, had a full career ahead of him. His generation of civilians needed more than historical dispersion and fatalism. The exclusion of the civil law from England could not be inevitable because it "[were great stupidity]." Someone had to show that the civil law was more than just useful, that it was better.

It was not that Wiseman was under any illusion about the actual state of affairs.

We see, that now the causes [of the Civil Law] are canonized, and like a spoil divided; some carried to the Courts of Common-Law, some to the Court of Equity, others sent into the Countrey, some left without any rule or regulation at all, and nothing left entire to the Civil Law; and when the solid reason of that Law is crowded out by vulgar reason, the professours thereof scattered, the study thereof discontinued, the very Law books for want of use here, all transported beyond Sea to other Nations, and all coercion taken away; It is so much worth the enquiring what the ground of this great change should be, that to be silent thereat were great stupidity.77

But like all jurisprudents, Wiseman had faith that lawyers could be shown, by intellectual demonstration, the errors of their ways, or that at least they might listen, despite their economic and professional prejudice.

The Law of Lawes was divided into two books. The first was a demonstration that not all laws are alike. Some were better because they were "agreeable to true Reason."79 The things that law is designed to protect, "be it Life, Property, Good name, Liberty, right of Contracts, or whatsoever else is flying to the sanctuary of the Law," these are real things.80 They have great value, and it is demonstrable that some legal processes protect them better

77 Id. at preface, Epistle to the Reader (unpaginated). Wiseman thought this exclusion particularly outrageous:

[W]hen it is considered, what an account it has been in amongst us for many hundred years together; how many causes, Civil, Ecclesiastical, Maritime and Military, it dealt in; how the jurisdiction thereof ran through the whole Nation; how very little it was beneath the profession of the Common-Law it self; how many professours and practisers it maintained, and how much it did enrich them; what a number of Students it encouraged; what coercive power it was intrusted withall, and the many Courts the employment thereof lay in . . . .

Id.

78 Id.

79 Id. at 1.

80 Id. at 24.
than others. As a matter of reason, those laws that best satisfy the ends of the system are better laws.\textsuperscript{81}

In Wiseman's view, the civil law was often superior to the common law because it was a more exact, more scientific process.

And herein the Roman Civil Law has been more exact and careful than some other Laws of the world have been; for there is nothing, of what nature soever it be, but the Civil Law has ordained a means to bring it to a discussion and trial, either by giving a special Action in the case, or a general one, relieving by ordinary remedies; or if those fail, by such as are extraordinary, helping men \textit{jure actionis} or \textit{officio judicis}, that is by way of complaining in their own name, or borrowing the name of the Magistrate to make their complaints more effectual, so that one way or other a remedy may be had, whatsoever the evil be; nor does it suffer any just complaint to go away unremedied.\textsuperscript{82}

To prove his point, Wiseman exhaustively catalogued the virtues of the civil law evidentiary system and its standards of review.\textsuperscript{83} The civil law provided fuller interrogation of witnesses, did not limit itself to direct and positive proofs only, did not require that all the parties be present, did not make any judgment to be so "absolutely conclusive and final" as to prevent timely appeal, and so forth.\textsuperscript{84}

\textsuperscript{81} Id. at 24-25.
\textsuperscript{82} Id. at 25 (Typically, Wiseman was not just referring to classical Roman \textit{iudex}).
\textsuperscript{83} Id. at 25-29.
\textsuperscript{84} Id. at 30; see also R. Wiseman, supra note 73, at 29-30, 38-46, 72-75. One of the curious facts about Wiseman was his justification of torture. In all other matters, he anticipated modern reforms, including his opposition to primogeniture, his advocacy of the opportunity to confront accusers in criminal prosecutions, his belief in due notice before criminal trial, and his aversion to capital sentence on the testimony of a single witness—as opposed to the Roman law rule of two witnesses. But Wiseman "...differed from all other reformers... on the matter of torture... He thought that the use of the rack was justified in extracting a confession; torture inflicted under the strict rules of the civil law was an essential element in the administration of justice." D. Veall, supra note 72, at 110; see R. Wiseman, supra note 73, at 122. Wiseman saw the process as providing evidence subject to independent collaboration, and was opposed to conviction based on a confession under torture which was not reaffirmed after torture. D. Veall, supra note 72, at 110. His conviction was based on the need to obtain truthful evidence and to prevent criminals escaping just conviction, but this enthusiasm for "truth-finding" at the expense of human dignity was shared by no other English civilians of the day. As to the use of torture in England, see 5 W. Holdsworth, supra note 41, at 184-87. Lord Denning claims that the "last instance of torture in England" was that of Edmund Peacham in 1614 in the presence of Francis Bacon, then Attorney General. A. Denning, Landmarks in the Law 39 (1984); 2 Howell's State Trials 869 (T. Howell ed. London 1810) (The Case of Edmund Peacham for Treason). Torture was not ultimately prohibited in England until 1707, and was probably practiced—despite Lord Denning's assertions—by order of the Council until about 1640. See 5 W. Holdsworth, supra note 41, at 185
To Wiseman, the biggest advantage of the civil law was not any particular doctrine, but the process. It was also in the way the law was developed—in the sources of the law. Suppose, Wiseman argued, there was a case for which there was neither a relevant promulgated law, nor an applicable custom. Suppose further that there had been a judgment in a similar case—a "case in point." Any system that would bind the later tribunal to act according to the prior case was a system "which certainly cannot be defended by any right reason or good judgment." Suppose the prior decision was erroneous, then "both may be erroneous and mistaken." Two wrongs do not make a right. Why should an earlier judge have more authority than a later one of equal position? The later judge may be wiser, more intelligent, or may have learned from the passage of time. The earlier case may have had "the most and best advocates" on the wrong side, or extra-judicial pressures now impossible to detect. Why should its influence permanently corrupt the system? Finally, Wiseman argued, for precedent to be binding, "it is absolutely necessary that the cases agree punctually in all such circumstances," But this requires perfect reporting systems, and honesty on the part of judges, who could always find some distinguishing point if they wished to manipulate the system. Why not decide each case on its merits?

Wiseman's argument against precedent justice demonstrated an understanding of the Roman iudex system, in which the value of a prior case was in its inherent demonstration of the just or unjust application of the praetor's instructions, based on the jurist's advice. Scholars such as the late John P. Dawson have explained how this system was closely concerned with both case law and custom, without being a slave to precedent. Wiseman saw this as a demonstrably more rational process—a view widely shared among certain modern jurists.

The second part of Wiseman's book addressed "foreign" law. Here he relied heavily on Duck and Selden. England did not exist in a void, and the nations with which it interacted all used the civil law, as well as their own national ordinances. The national ordinances might differ, but all looked to the civil law for ideas about legal process and fairness when there was no adequate national ordinance. No municipal law was "sufficient to meet with

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85 R. Wiseman, supra note 73, at 63.
86 Id.
87 Id. at 64.
88 Id. at 65-66.
89 Id. at 69-70.
90 See id.
91 See generally J. Dawson, The Oracles of the Law 100-47 (1968); R. Cross, Precedent in English Law 3-34, 146-222 (1968); Winder, Precedent in Equity, 57 Law Q. Rev. 245 (1941).
92 R. Wiseman, supra note 73, at 214.
the multitude and variety of Cases and Questions that will happen at Land, at Sea, and in Foreign parts.”93 When municipal law was inadequate, particularly when dealing with foreigners of foreign lands, why not look to the civil law?

Wiseman, like Duck, referred frequently to John Selden. The reason was clear. Selden was no civilian, but a staunch common lawyer, yet he was not only “a Graduate in the Common-Law, but a great student in all learning.”94 Would it not be most convincing if Selden’s learning supported Wiseman’s position? In Selden’s discourse upon Fleta, with which Wiseman was very familiar, Selden emphasized that the Roman heritage in Europe was not primarily observed as a “positive commanding Law,” but as a great source of insight and learning.95 In Wiseman’s view, this was all the English civilians were asking for:

From what has been cited out of Mr. Selden, it does appear, that there is as much granted by Mr. Selden to the Civil Law, as ever was challenged by any Civilian, or ever ascribed to it by any, or that any can wish to be granted to that profession in any Nation.

He in effect acknowledgeth, that when the use thereof came to be renewed in Europe with other learning, it was found to be so rich a Treasury of reason, judgment, and true natural equity; and so usefull for all matters that respected Civil society and government, that by the knowledge and direction of the Civil Law, and the rules and principles thereof they knew how to supply with resolution such cases, as their National Laws had not made any provision at all in; or if they had, but were dark or intricate, this would help to explain and illustrate them; which neither common reason nor any other humane learning would enable them to do. The Universities have therefore since made it their common study, and commonly given degrees in it, and have sent forth the professours thereof into all Tribunals to be the Ministers of right and justice there, till now at last it is grown to be a common profession throughout Europe.

And though the original authority which it had in the Roman State, is quite worn out, no State being now subject to the Roman Sovereignty; yet Mr. Selden does admit it to be entertained for a binding Law by Ordinance in some places that stamp that authority upon it which of it self it hath not; in others usually observed as Law by custome and practice; but where it passes not for Law neither way, there the reason and wisedom thereof prevails, and every man suffers himself to be convinced thereby, non vi necessitatis sed vi rationis, not forcing the

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93 Id. at 241.
94 Id. at 227. Wiseman also invoked the memory of Francis Bacon, another common lawyer of substantial civilian learning. Id. at 226; see also Coquillette, supra note 3, at 9 n.16. In addition, he invoked the memories of common lawyers Lord Ellesmere, William Hakewill, and Sir John Fortescue, and civilians William Fulbecke and Sir Thomas Smith. Id. at 226-27, 267-69.
95 Id. at 229.
will, as a Law does, but as by reason powerfully working upon, and at last controlling the understanding.\(^{96}\)

Wiseman concluded, "'Thus far goes Mr. Selden himself; and by no civilian has a greater latitude than this been ever given to the Civil Law.'"\(^{97}\)

From this example of the Romans, who admitted so freely other Laws besides their own, and would rather send about to borrow Laws from others, than want such as were necessary and convenient for themselves, we may learn to esteem it neither shamefully nor inconvenient for the people of this Nation, to give such an admittance to the Roman Civil Law here, as the Romans did in their State to the Laws of other Nations; For it must needs draw after it much benefit, and no prejudice, if it be done with these cautions.\(^{98}\)

Wiseman also carefully limited the "incorporation" he had in mind by six principles:

First, that it be a free and a voluntary act of our own, and not imposed upon us by a foreign power.

Secondly, that it be admitted merely to supply the defects of our own Laws, and to have a resolving power in such cases onely, where our own Laws have made no determination at all.

Thirdly, so little to be made use of in opposition to our own municipal Law, as not so much as to be compared with it.

Fourthly, that it be of greatest force in all cases where there is greatest need of equity and a good conscience, whereof there is more to be found in that Law than in any other Law of Man.

Fifthly, that it may order and determine all matters transacted and arising upon the Sea, or contracted and done in foreign parts, to which the Laws of the Land are most incongruous, and less satisfactory to those whom they concern, being chiefly strangers and of another Nation.

Lastly, that if at any time the use and exercise thereof should be stretch'd beyond the bounds that are allowed it, it should be penal; but be check'd by such equal and indifferent Umpires; as are parties in neither of both professions: For where an incroachment is pretended to be made by either Law upon the other, neither seems to be competent enough to judge the difference, or to condemn the other.\(^{99}\)

\(^{96}\) Id. at 233-34.

\(^{97}\) Id. at 234.

\(^{98}\) Id. at 182.

\(^{99}\) Id. at 182-83. Wiseman added:

Under these cautions, to admit the use of the Civil Law into this Nation, that in the doing of justice, where our own Laws fail, we may be sure to be supplied by another, is no more than what the Romans themselves, a renowned and wise people, did by the Laws of other Nations, and what other Nations do at this day by the Civil Law it self, which they do practise and use as frequently as they do their own.

\(^{99}\) Id. at 183.
The last principle was particularly striking. Why need there be such professional competition between the common lawyers and the civilians? The selective use of civil law rules could help all, and "equal and indifferent Umpires" could ensure that the public good, not professional greed, was served. Wiseman did not seek to displace the common law with the civil law. Only in cases of omission or particular need would one look to the civil law heritage, and then only for its greater utility, certainly not as a statement about the political superiority of continental monarchies or the Catholic religion of Rome. To Wiseman, the common lawyers' adamant refusal to learn from the rich heritage of the civil law simply did not make sense.

As to the "equal and indifferent Umpire," was Wiseman thinking of the merchant class? There is an excellent reason to think not. Near the end of his book he turned to the law merchant. Certain merchants, he observed, believed that they could do better than any Court. So why not have a "court of Merchants"? As to the "equal and indifferent Umpire," was Wiseman thinking of the merchant class? There is an excellent reason to think not. Near the end of his book he turned to the law merchant. Certain merchants, he observed, believed that they could do better than any Court. So why not have a "court of Merchants"?100

And yet there has been a strong conceit, taken up but lately, but yet very hotly pursued, to have the same take effect, by soliciting the state to make a Law to that purpose; that a certain number of old experienced Merchants are much fitter and better enabled to sit upon the tryal and examination of matters of foreign trade and negotiation, and of business arising upon or beyond the Sea, than any students, graduats, or practisers in the Civil Law whatsoever: supposing, that if the Court of Admiralty were turned into a court of Merchants, both subjects and strangers would be better satisfied, and trade go on and thrive much better.101

But Wiseman thought this a bad idea. First, he noted, merchants have varied interests, and "a spirit of opposition reigns between the Merchant and the Mariner."102 More important, law was a science. Merchants should "keep within their own sphere, and not aspire to such a function, which neither their breeding, capacity or parts does enable them unto . . . ."103 Let those who "have made it their whole study and employment" do what they have

100 Which project some Merchants have been the more emboldened to set on foot, because they once prevailed so far, as to get an Act of Parliament to be made in the forty third year of Queen Elizabeth, whereby all controversies that should from thenceforth arise upon any assurances made of any goods, merchandizes, ships, and things adventured, are committed to the hearing and tryal of so many Judges, whereof the Civilians are fewest, and the Merchants make the greatest number. They would have it conceived, that none has understanding or skill enough to judge of the mystery of their employment but themselves onely; and that it is equity and a good conscience, in a most summary and compendious way, and not the intricate and long Maeanders of the Law, that is the fittest to arbitrate and decide their differences; crying out for a quick dispatch, that their voyages to Sea may not be obstructed.

Id. at 249.

101 Id. at 248-49.

102 Id. at 251.

103 Id. at 253.
been trained to do, resolve disputes by applying the "custome and knowledge" they have learned.\textsuperscript{104} In Wiseman's view, the law merchant was merely a series of commercial practices. It was not a legal system, and merchants were not lawyers. On the other hand, knowledge of universal civil law would inherently assist in solving any problem of foreign trade more fairly, for what other legal system had a claim to such universality?\textsuperscript{105}

Was Wiseman seeking a "reception" of the civil law? I will let him speak in his own defense:

All which, and whatsoever else we shall say hereafter to the same purpose, we would have understood as humble proposals onely, to be considered of in order to a future settlement, which we hope and long for. But if the Authority of this Nation (who best can judge what is fittest for the people, and what suits best with the present Government) shall in the end commit and dispose of those Trials which formerly did belong to the profession of the \textit{Civil Law}, into the hands of others, that do not partake of that excellent knowledge; it does behave all pesons to sit down satisfied therewith, and to submit unto it, without any murmuring or disputing . . . .\textsuperscript{106}

Wiseman was pleading with the common law bar of the Commonwealth. He did not seek to receive a "foreign" body of law, but to permit the long-standing civilian specialties to survive because of their expertise and perspectives.\textsuperscript{107} This law was really no more "foreign" than the ancient university curriculum or the universal principles of history and science.

\textsuperscript{104} \textit{Id.} at 253-54.

And indeed though it be nothing else but reason, that does render a man capable and fitting to discuss and pronounce upon such questions, yet it is not the vulgar and common reason that nature does bestow upon every man; but it is that reason which is gotten by art and study of the Law and of the rules and principles of justice, and which is improved and inlightned by a continual use, and a long experience, and which in truth is to be found no where but in Students, Practisers and Judges of the \textit{Civil Law} onely.

\textit{Id.} at 248.

\textsuperscript{105} \textit{Id.} at 255. The same analysis in the context of diplomatic law made Wiseman a pioneer in public international law, and \textit{The Law of Lawes} has been described as "[t]he best English statement of the relations between the public and private law of nations at the time." Sutherland, \textit{The Law Merchant in England in the Seventeenth and Eighteenth Centuries}, 17 TRANSACTIONS ROYAL HIST. SOC'Y 149, 159 (1934). There is no doubt that Wiseman promoted the important new theory of \textit{ius gentium} that did not derogate from national sovereignty. See \textit{id.} at 158-59.

\textsuperscript{106} R. WISEMAN, \textit{supra} note 73, at 256.

\textsuperscript{107} \textit{Id.} at 304-05 (footnotes omitted).

It is of as little force and moment, and ought to hinder no more, which is objected, That the \textit{Civil Law} is a foreign Law, not ordained by the Legislative power and authority of this Nation; and therefore very inconvenient it may seem, that matters arising here should be ordered by any other Law, than which is of our own making, or that we should be made to submit to any other. Besides, to have two Laws tolerated in one State, may cause great distraction and
The **Civil Law** is nothing more than certain dictates or principles declared by the ancient Lawyers (undoubtedly meaning Papinian, Ulpian, Scaevola, Africanus, Pomponius, Neratius, Celsus, Marcianus and the rest, whose names are prefixed before their several Laws in the Digest) which being put into good order, do instruct others in the ways of administering right and justice. And hence it is, that in all the Universities throughout the World, I will not except **England**, the Law that is studied, the Law that is publickly read and taught in their Schools, the Law wherein degrees are taken, is the **Civil Law**.\(^{108}\)

The **Civil Law** comes to help and assist, and not to infringe or take away from the Municipal Law at all: If we shall now abandon it, and cast it out of our coasts, or which is all one, if we shall reward and encourage it so slenderly, that no man will either think it worth his pains to study, or his cost to take any degree in it (to which pass it is most visibly come already) I say, if we shall still thus neglect or despise it either way; we shall not onely set light by the Policy and Wisdom of the **Romans**, which all other people are studious to imitate and come as near as possibly they can; but we shall also deprive our selves of one excellent means to improve our knowledge and reason by; our justice without it, being guided by illiterate and irrational principles, will be less satisfactory to the people; our skill in the discipline of War, and in the Laws of Arms will be very defective; the very harmony of learning, that has so long flourished amongst us, will be dissolved, when so considerable a part as the **Civil Law** is broken off from it; other Nations will grow too wise and subtle for us, and will turn and wind us as they list; and our uncertainty amongst the people, who may under several pretences be troubled and convened under both for one and the same thing. Farther, the entertaining of the **Civil Law**, may, in time be a means to supplant and undermine the Municipal Law and Customs of this Nation.

For as to its being a foreign Law, what is it more in that, than the Laws of the Saxons, Danes, and Normans; of the which our English Aniqnaries \[sic\], Cambden, Spelman, Cowell and Selden, all take notice, that the Laws of this Nation are but a mixture and composition? And yet it is not such a stranger amongst us neither, as may be conceived; for not onely Antiquity will tell us, that when the **Romans** were possessed of this Nation, and during the continuance of their government and power here (which was no less than 500 years) all the affairs of this Nation were ordered and carried on by the **Roman Civil Law**; and had no Law to assist, much less to check it in all that time.

But also if we look no farther back than twenty years ago, we shall remember the **Civil Law** did so far spread it self up and down this Nation, that there was not any one County, which had not some part of the government thereof managed and exercised by one or more of that profession, besides the great employment and practice it had in the Courts in London. So that it being thus incorporated, and, as I may say, naturalized by our selves into this Common-wealth, it ought not to be reputed or look'd upon by us a stranger any longer.

Besides, right reason from what hand soever it comes presented, ought to be embraced by us; and is authority enough to it self, to carry the understanding, judgment, will and affections of all man, though it be not put into a Law."

\(^{108}\) Id. at 291.
justice at home will be lamed, not being competent enough for the
matters we deal in. The consequence of all which will be, mischief at
home, and dishonour abroad, which all good Patriots and Lovers of
their countrey will lament to see.\textsuperscript{109}

Would not the great Selden approve? Wiseman's \textit{The Law of Lawes} was a
great affirmative case for maintaining expertise in comparative law and for
testing all legal process against the standards set by Roman legal science. He
referred to "our Adversaries the Anticivilians,"\textsuperscript{110} and later described how
they tried to protect insularity and the status quo as a value in itself, either
through fear or greed. Let the Commonwealth decide what was best for the
state. The choice was between our "humble proposal onely" for the survival
of civilian expertise, and the extinction prophesied by Dr. Duck. The former
option threatened only narrow interests. But if Dr. Duck's prophecy came to
pass, the English legal system would lose part of its heritage forever, and
with it a valuable vehicle for evolving to meet the challenges of the future.

C. Richard Zouche, D.C.L. (1590-1662): The Civilian "Dove" and his
System

Richard Zouche was described by that sharp-shooting observer Anthony
Wood as "an exact artist, a subtle logician . . . and for the knowledge in,
and practice of, the civil law, the chief person of his time . . . . The truth is
there was nothing wanting but a froward spirit for his advancement . . . ."
\textsuperscript{111} Zouche was not, in today's parlance, sufficiently "assertive." On the other
hand, as Wood thoughtfully added, "the interruption of the times, which
silenc'd his profession, would have given a stop to his rise had he been of
another disposition."\textsuperscript{112} Zouche was a dedicated civilian, and for most of his
life he pursued a policy that could be termed today "passive-agressive": he

\textsuperscript{109} \textit{Id.} at 318-19.

\textsuperscript{110} \textit{Id.} at 292. Wiseman goes on to invoke the aid of Sir John Davies:
Sir John Davis in his Preface to the Irish Reports, does not stick to acknowl-
edge this to be most true in the Municipal Law of England, though in his praises
of it he sets it above all the laws of the World besides. For, saith he, if the Rules
and Maximes of the Law were a thousand times as many as they be indeed, yet
would they carry no proportion with the infinite diversity of mens actions, and of
other accidents, which make the cases that are to be decided by the Law. How
great need is there therefore to keep the \textit{Civil Law in England} still, that out of
its store and plenty of it may be instrumental to resolve those doubts and
questions of right, which as yet have no special Law of the Nation made for
them?

\textit{Id.}

\textsuperscript{111} 2 D.N.B., \textit{supra} note 41, at 2357. This account of Zouche's life by Thomas
Erskine Holland remains the best. The short sketch in B. Levack, \textit{supra} note 20, at
282, is also particularly useful. \textit{See also} 5 W. Holdsworth, \textit{supra} note 41, at 14-20,
58-60; D. Walker, \textit{supra} note 41, at 1315; A. NuSSBAum, A \textit{Concise History of
the Law of Nations} 118-22 (1947).

\textsuperscript{112} 2 D.N.B., \textit{supra} note 41, at 2357.
"systematized" his opponents to death. Yet, just like Duck, Zouche left a most assertive book to be published after his death, the aptly titled *Jurisdiction of the Admiralty of England Asserted*.\(^{113}\)

Zouche was a model of discretion, but he was also a direct part of the civilian tradition. Like Duck, Zouche was a pupil of John Budden, who was successor to the great Alberico Gentili as Regius Professor of Civil Law at Oxford.\(^{114}\) Zouche himself succeeded Budden as Regius Professor in 1620. Zouche's politics were discreetly royalist—he negotiated on behalf of the royalist forces in Oxford on their surrender in 1646. He was not discreet enough to avoid the compounding of his estate, but he did hold certain key appointments during the Commonwealth, including the special commission to resolve the spectacular murder of Don Pantaleone Sa, the brother of the Portuguese ambassador.\(^{115}\)

Zouche was appointed judge of the Admiralty Court in 1641. He lost the post during the Commonwealth, but was reappointed in 1661, just before his death. The Admiralty, and his grand "system" for legal knowledge, were the passions of his life.

It is difficult to evaluate Zouche as an intellectual. His first published work was a silly poem called *The Dove, or Passages of Cosmography, descriptive of Europe and Asia, and Africa, after the manner of the 'Periegesis' of 'Dionysius'*.\(^{116}\) He was so timid in his inquiries that he adopted what he called a "Socratic style," in which he would set out all the settled facts about a subject under one heading, and then the controversial issues under another. When compiling the latter, he "refrained from deciding any point according to his own opinion, thinking it wiser to follow the practices of the Socratic Academy, which, after adducing cases and principles, and expounding the arguments on one side and the other, left the judgement of the heavens free and unfettered."\(^{117}\) This kind of writing is, in a word, boring. As Arthur Nussbaum charitably observed, it is "surprising" that Zouche could achieve what he did "despite his manifest deficiency in theoretical, if not in sustained, thinking."\(^{118}\)

But Zouche was certainly capable of patient, systematic analysis. Writing in the third person, he described his scheme as follows:

[T]o show the foundations of Law and Procedure in accordance with the

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\(^{113}\) Originally published in London in 1663, the book was reprinted in 1686, and was almost always bound with G. Malynes, *Consueltudo vel, Lex Mercatoria: Or, the Ancient Law-Merchant* (3d ed. London 1686), a striking combination! See id. at 79.

\(^{114}\) 2 D.N.B., *supra* note 41, at 2357.

\(^{115}\) *Id.*

\(^{116}\) *Id.*

\(^{117}\) R. Zouche, *Iuris et Iudicij Felialis, sive Iuris inter Gentes, et Quaestionum de Eodem Explicatio* viii (Oxford 1650). Imagine this "Socratic" approach used in today's law schools!

\(^{118}\) A. Nussbaum, *supra* note 111, at 122.
principle of human community, laid down first the general principles of
Law and Procedure for a community in general: secondly the rules of
Private and Public Law and Procedure for the communities which
subsist between one private person and another, and between private
persons and princes. He afterwards composed descriptions of the Law
and Procedure of special communities; the Sacred, which is concerned
with religion and pious causes; the Military, with military service in war
and peace; and the Feudal, with fealty and peace. In the three former he
confined himself to the authorities of the Civil Law; for the last, the
Feudal Community, he availed himself of the Milanese and Norman
bodies of Customary Law. At length, being about to proceed to the
explanation of those matters which relate to the community which
exists between different princes or peoples, he found it necessary to
consult other authors learned in historical law.\footnote{\ref{footnote}
R. Zouche, \textit{Supra} note 117, at vii.}

He achieved this scheme in a series of books, commencing with \textit{Elementa
Jurisprudentiae} in 1629, which set out the project. It was not concluded until
1650, with a final installment on the law relating “to the Community which
exists between different princes or peoples,” which constituted \textit{Iuris et
Iudicii fecialis, sive Iuris inter gentes}. It was a sustained, twenty-one year
effort, as a result of which he produced eight books, all while trying not to
make a controversial assertion.\footnote{\ref{footnote} See R. Zouche, \textit{Elementa
Jurisprudentiae, Definitionibus Regulis et Sententis Selectioribus Iuris
Civilis Illustrata} (Oxford 1629; Oxford 1636; Leyden, Amsterdam 1652; Leyden 1653; The Hague 1665); R. Zouche, \textit{Descriptio Iuris et Iudicii
Feudalis, Secundum Consuetudines Mediolani & Normanniae, pro
Introductione ad Studium Iurisprudentiae Anglicanae} (Oxford 1634); R. Zouche, \textit{Descriptio Iuris & Iudicii Temporalis Secundum
Consuetudines Feudales & Normannicas} (Oxford 1636); R. Zouche, \textit{Descriptio Iuris & Iudicii Ecclesiasticorum Secundum Canones &
Constitutiones Anglicanae} (Oxford 1636), \textit{appended to R. Mocket, Tractatus de
Politia Ecclesiastica Anglicanae} (London 1683); R. Zouche, \textit{Descriptio Iuris et
Iudicii Sacri, ad quam leges quae religionem et piem causam respiciunt
referuntur} (Oxford 1640; Leyden, Amsterdam 1652); R. Zouche, \textit{Descriptio
Iuris et Iudicii Militaris, ad quam leges quae rem militarem et ordinem
personarum respiciunt referuntur} (Oxford 1640; Leyden, Amsterdam 1652)
(the second part of this work is on nobility); R. Zouche, \textit{Descriptio Iuris & Iudicii
Maritimi, ad quam quae navigationem et negotiationem maritimam
respiciunt referuntur} (Oxford 1640; Leyden, Amsterdam 1652); R. Zouche, \textit{Iuris
et Iudicij Feclialis, sive Iuris inter gentes, et quaestionum de eodem
Explicatio} (Oxford 1650; Leyden 1651; The Hague 1659; Mayence 1661) (translated
by Gottfried Vogel as \textit{Allgemeines Volkerrecht, wie auch allgemeines
Urtheil und Anspruche aller Volker}, Frankfort 1666). See 2 D.N.B., \textit{Supra}
ote 41, at 2357.}
classifications of law: 1) the law of general legal communities; 2) the law of communities that are set up between individuals and between individuals and states, such as a modern corporation; 3) the law of communities that exist between nations—in modern parlance, "international law;" and 4) the law of "special communities," namely, the law of religious or "sacred" communities, military law, feudal law, and maritime law. Today Zouche is considered a pioneer in describing the law between nations in empirical and positivistic terms, free of natural law theory or religion. But it was his notion of a law for "special communities" that had the greatest impact on the civilian controversies. For Zouche was not only the first empirical English theorist of the public international law, he was also the first empirical theorist of the private international law of ships and merchants.

Perhaps not surprisingly, given his uncontroversial "Socratic" method, the volume in his series on "special" maritime law, Descriptio Iuris & Iudicii Maritimi, added little to the works of earlier mercantile writers, such as Mallynes, or to the works of earlier "sea writers," such as Welwood. But then there was the posthumous bombshell, the Jurisdiction of the Admiralty of England Asserted. Indeed, this book was so unlike anything Zouche had written before, at least in tone, that to resolve anticipated doubts as to its authenticity, a printer's certificate was inserted after the title that the book "was delivered into my Hands by the AUTHOR Himself to be printed."

The book was a step-by-step refutation of the attack on the Admiralty that Coke had mounted in his Fourth Part of the Institutes of the Laws of England. It simply sizzled with fight. Drawing heavily on Selden (again),

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121 A. Nussbaum, supra note 111, at 122: In addition to his merits as the author of the first systematic and strictly juridical treatise on international law and the valuable features of his organization of material, his elaboration of a positivist method, which practically parted with the law of nature, marked the dawn, then almost imperceptible, of a new era of the science of international law.

Professor William R. Trimble has kindly informed me that he has prepared a translation of the Elementa Juristicntiae, supra note 120, as part of his study of the development of international law in Stuart England. This important project should further establish the extent of Zouche's contribution. Letter from William R. Trimble to Daniel R. Coquillette (March 20, 1983).

122 See generally Coquillette, supra note 9, at 346-63 (discussing early law merchant literature).


124 Id. at 81 (preface entitled To the Reader).

125 See E. Coke, The Fourth Part of the Institutes of the Laws of England 134-47 (London 1644). This, Coke's famous Chapter XXII, or The Court of the Admiralty proceeding according to the Civil Law, was often reproduced at the beginning of R. Zouche, supra note 123, at 83-86.
Malynes, and Prynne. Zouche launched a scholarly attack against Coke's (clearly suspect) view of the 1576 settlement and against Coke's use of common law prohibitions to deprive the Admiralty of suits concerning overseas mercantile contracts. But the most illuminating sections were on commercial law and the law merchant.

First, Zouche attacked the notion that a special law for merchants derogated from the common law.

It hath been formerly observed, That for the encouragement of those who maintain Trade by Sea, in all Nations and States there have been special Judges appointed to hear and determine causes concerning Trade and affairs of the Sea; and it may be further noted, that such Judges have been directed to proceed at such times, and such manner, as might best consist, with the opportunities of Trade, and least hinder or detain Men from their Imployments.

This same point was recently made by J.H. Baker, who argued that writs secundum legem mercatoriam were well known to the medieval common law. Further, Zouche's great scheme was predicated on his observation that different spheres of law co-exist, each serving its own function. The law between princes inter gentes, did not derogate from the law of the community; it simply served a different set of needs.

This was Zouche's major point: the Admiralty served mercantile needs that could not be met as easily by the common law. It was not that the common law could not "incorporate" mercantile doctrines—it could and did. Rather, Zouche believed the merchants should have a choice of forum and process as well:

It is not hereby intended that the Courts of Common Law cannot or do not take notice of the Law-Merchant, in Merchants Cases, but that other things likewise considered, it might be thought reasonable, if they so desire, to allow them the choice of that Court, where the Law-Merchant is more respected, than to confine them to other Courts, where another Law is more predominant. Besides, there may be danger of doubt thereof, because those things are not approved for proofs at the

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120 For background on William Prynne, the bizarre Puritan radical and common lawyer, see Coquillette, supra note 9, at 326 n.57, 330 n.72. Prynne's devastating scholarly attack on Coke appears to have been motivated by a love of an accurate historical record, rather than from any political or ideological love of civilians. W. PRYNNE, BRIEF ANIMADVERSIONS ON, AMENDMENTS OF, & ADDITIONAL EXPLANATORY RECORDS TO, THE FOURTH PART OF THE INSTITUTES OF THE LAWES OF ENGLAND; CONCERNING THE JURISDICTION OF COURTS (London 1669). As Prynne's title page continued, "WHEREIN The Misquotations, Mistakes of Records, Antiquities cited in them, are rectified some doubtful passages explained; many defective Omissions of Usefull Records supplied . . . ." Id.
127 See Coquillette, supra note 3, at 85-86.
128 R. ZOUCHE, supra note 123, at 127.
129 See Baker, supra note 8, at 300-01.
Common Law, which are held sufficient in the Admiralty amongst the Merchants; for as Sir John Davies further observes, At the Common Law no mans Writing can be pleaded against him, as his Act, and Deed, unless the same be sealed, and delivered: But in Sutes between Merchants, Bills of Lading, and Bills of Exchange, being but Tickets, without Seals, Letters of advice, and Credence, Policies of assurance, Assignations of Debts, all which are of no force at the Common Law, are of good credit and force by the Law-Merchant. To which may be added, what Malines observes, That the bearer of such Bills, by the course amongst Merchants, shall be admitted to demand, and recover the Contracts, without Letters of Attorney, which is not admitted in the Common Law. 130

Zouche also emphasized the special Admiralty rules of joinder, which were so convenient for “assurance” and wage disputes, 131 and the flexible rule of proof and admission of evidence by deposition, which was crucial when witnesses were likely to be far away, 132 and the security of trying freight and wages cases together. 133

Was this forum and process part of the national law? Ultimately, Zouche concluded that while the law merchant might not be a legal system like the civil or common law systems, it was more than just specially adopted procedures. Its purported universality set it apart from pure national law, as the common lawyers and Selden conceded. 134 Like his ius inter gentes,

130 R. Zouche, supra note 123, at 128.
131 Id. at 129; see Yale, supra note 13, at 93-95.
132 R. Zouche, supra note 123, at 129.
133 Zouche was a close and sympathetic reader of the treatises written by merchants, like Malynes’s Lex Mercatoria, and used the merchants’ difficulties to support his case for a special law. For example, Zouche states the following case: Malines relates an instance of a Merchant-stranger, who having sold Commodities to three several Merchants of London, took one Bond of them all for the payment of 300 pounds and one of them breaking, and being Imprisoned, he was contented to Compound with him for the fifth part of his Debt, or for 20 [pounds] in lieu of a 100 [pound] conceiving him as a third party to be liable for no more; and having received that sum, gave him a Release, and afterwards the two other parties neglecting to pay him their parts he was advised to Sue them at the Common Law, where he was given to understand That if a man Release one of his Debtors, who is bound with others, by way of acquittance, they are all Released and acquitted thereby, which was contrary to the Rule of Equity, and that simplicity and just dealing which is expected amongst Merchants, which do not admit that a mans action should operate beyond his intention, and that a favour yeilded to one in necessity, should not extend further to his prejudice, in respect of those which were in better condition.

Id. at 118.
134 As Zouche put it:
The Law-Merchant is likewise mentioned, and allowed by Sir Edward Coke, in his Comment upon Littleton, as a Law distinct from the Common Law of England. And so doth Mr. Selden mention it, in his Notes upon Fortescue. And Sir John Davis more fully owns it in a Manuscript-Tract touching Impositions;
which Zouche defined as a law "which has been accepted by customs conforming to reason among most nations," *lex mercatoria* was a law "which has been accepted by customs conforming to reason among most merchants."  

We shall return to this view of *lex mercatoria* when we examine the impact of civilian jurisprudence on the actual operations of the "law merchant," focusing specifically on bills of exchange. But Zouche, the civilian "dove," like Duck and Wiseman, had left his rival common lawyers with something to consider. It was one thing to incorporate doctrine, but what about process? And once one incorporates process, as one must to meet the special needs of commerce, were not Duck and Wiseman clearly right that the survival of civilian learning preserves valuable options for ultimate legal development, even for the common lawyers?  

Thus, we see three men with distinct perspectives and approaches: Duck, the ideological historian; Wiseman, the passionate jurist; and Zouche, the systematic, detailed empiricist. Together they were the ideological advocates for the English civilians in their darkest hour of need.

### III. RESTORATION—THE JURISDICTION ASSERTED: 1661-1670

The Restoration brought new hope to the embattled civilian enclaves. Would not a return of royal government mean compensation to the civilians for the past loyalty of the Ducks and Zouches, or at least the appointment of Wiseman's "equal and indifferent Umpire" to hear the civilian case and decide it solely on the best interest of the state? Early indications gave hope: the aged Zouche was symbolically restored as Judge of the Admiralty, only

where he affirms, *That both the Common Law and Statute-Laws of England take notice of the Law-Merchant, and do leave the Causes of Merchants to be decided by the Rules of that Law: Which Law-Merchant, he saith, as it is part of the Law of Nature and Nations, is universal, and one and the same in all Countries of the World: For, as Cicero saith of the Law, Non erit alia lex Romae, alia Athenis, alia nunc, alia post haec, sed & omnes gentes, & omni tempore una eademque lex obtinebit. Whereby it is manifest, that the Causes concerning Merchants are not now to be decided by the peculiar and ordinary Laws of every Country, but by the general Laws of Nature and Nations. He saith further, That until he understood the difference betwixt the Law-Merchant and the Common Law of England, he did not a little marvel, that England, entertaining Traffick with all Nations of the World, having so many Ports, and so much good shipping, the King of England also being Lord of the Sea, what should be the cause that, in the Books of the common Law of England, there are to be found so few Cases concerning Merchants or Ships: But now the reason thereof was apparent, for that the Common Law of the Land did leave those Cases to be ruled by another Law; namely, the Law-Merchant; which is a branch of the Law of Nations.*

*Id.* at 89; *see also* R. Zouche, *supra* note 117, at 103.

135 *A. Nussbaum, supra* note 111, at 121.

136 *See* Coquillette, *supra* note 21, at text accompanying notes 210-51.
to die one month later, and Wiseman’s career began a slow rise that culminated in his appointment as Dean of Arches. A surge of new admissions to the court of the Arches and Doctors’ Commons—twenty-three from 1660-1669 against only seven from 1650-1659—evidenced the new spirit of optimism. Many civilian books, even those written by the “first” and “second” generation civilian writers, were reprinted, often in new editions, and Wiseman’s and Zouche’s works were reissued, at home as well as abroad. The law book shops were full of names like Cowell, Gentilis, and Ridley—echos of the old days before the worst of the “interruption.”

But there was a terrible irony in all of this, for the civilians’ worst battle lay just ahead, and, perversely, it was caused by the Restoration itself. The Restoration nullified the hard-won, and never fully effective, Ordinance of 1648. Moreover, the Admiralty jurisdiction was again under heavy attack. As early as Sir Thomas Ridley in 1607, leading civilians had become aware that the future vitality, and even survival, of Doctors’ Commons could not be ensured by ecclesiastical or testamentary work. Only the Admiralty, with its hope of attracting the great legal affairs of trade and commerce in what was now the world’s greatest maritime nation, could promise a truly central role for civilian influence in England. But many prohibitions were issuing, and the jurisdiction was in serious jeopardy.

The civilians lost no time in seeking political support. The Lord High Admiral was now the King’s brother, James, who had married the daughter of the powerful Clarendon, now the Lord Chancellor. The initial strategy was to use Clarendon’s influence to obtain a new Admiralty bill by commencing with the House of Lords. The first plans were laid as early as 1660, and the first attempt was made in 1662 in the Lords, followed in 1663 by an attempt in the House of Commons. Nothing was being left to chance. The bills themselves asked for nothing new: they were based on the Settlement of 1633 and the Ordinance of 1648. Surely, the cause would prevail.

137 See 2 D.N.B., supra note 41, at 2357.
138 Levack, supra note 12, at 108-09.
139 See supra notes 73 & 120.
140 Steckley has demonstrated that the Ordinance of 1648, which offered neither court exclusive jurisdiction, was ineffective. “[T]he record indicates only that the struggle for jurisdiction continued undiminished.” Steckley, supra note 26, at 167. But cf. S. PRALL, THE AGITATION FOR LAW REFORM DURING THE PURITAN REVOLUTION 34 (1966) (stating that the jurisdiction of the Court of Admiralty “was relatively unscathed by the Revolution”). Admitting concurrent jurisdiction was a major retreat from the earliest Admiralty claims, in the halcyon days of Henry VIII, that if “civil law”—meaning law merchant or law maritime should apply—the Admiralty jurisdiction should be exclusive. See Marsden, Introduction to 2 SELECT PLEAS IN THE COURT OF THE ADMIRALTY xliii (Selden Soc’y Pub. No. 11, R. Marsden ed. 1897).
141 See Yale, supra note 13, at 91-92.
Hundreds of supporting petitions from merchants and shop owners were presented.\textsuperscript{142}

The failure of both bills shocked the civilians. The common lawyers launched a powerful counterattack, led by Sir Heneage Finch, the able Solicitor-General. Neither the King nor the powerful Clarendon and James came to the civilians' aid, and the Privy Council, source of the pre-Interregnum settlements, now appeared relatively impotent.\textsuperscript{143}

Did the civilians, as Yale suggests, fail "because they had placed too much trust in princes and Lord Chancellors?"\textsuperscript{144} How could they regain "at least a limited measure of success [as] under the Commonwealth regime?"\textsuperscript{145} Their next strategy was to go back to the plan that worked before. They would attempt to build a broad basis of mercantile and mariner support for the jurisdiction, while jettisoning as much outdated ideological baggage as possible. To have relied on past royal connection was an error. The Restoration may have restored the Stuarts, but times had changed in the City; the civilians would have to fend for themselves.\textsuperscript{146}

\textsuperscript{142} In 1660, a petition to the King from 99 Londoners, including prominent merchants, congratulated him on his "glorious restoration" and asked for his help on protecting the Admiralty. See The Humble Petition of Several Merchants, Owners, and Masters of Ships, Victuallers, and Material-Men, belonging to the City and Port of London, reprinted in C. Hedges, Reasons for Settling Admiralty Jurisdiction 19 (London 1690). The Ordinance of 1648 had not eliminated jurisdictional struggle, and the king was reminded of his father's attempt to resolve the problem by the Settlement of 1633. See id. According to the merchants, prohibitions had been issued "in causes of Charter-Parties, Repairing and Building of Ships, [and] Mariner Wages." Id. at 20. There was a special concern that, without resolving the jurisdictional issues, "material men will not trust upon the credit of the ship," a matter we will return to below. See Steckley, supra note 26, at 166.

\textsuperscript{143} Yale, supra note 13, at 92. One possible explanation for the lack of active support from Charles II is a dispute he was having with James, Duke of York, about certain droits. There is certainly no question but that the prize and instant jurisdiction of the Admiralty were divided at this time, perhaps for the same reason. See Marsden, supra note 140, at lxxix.

Marsden also ventures the argument that the resumed attack of the common lawyers in 1660 may have been encouraged "by the disfavour which then attached to all doings of the Commonwealth, including the recent settlement of the Admiralty jurisdiction." Id.

\textsuperscript{144} Yale, supra note 13, at 92.

\textsuperscript{145} Id.

\textsuperscript{146} The jurisdictional defeats were followed by the great plague of London in 1665, and the Fire of London in 1666, which utterly destroyed Doctors' Commons. The only bright side of these calamities was that the Admiralty Court had already moved from London to the Hall of Jesus College, Oxford, to avoid the plague. (Leoline Jenkins, the sitting Admiralty Judge, was also Principal of Jesus College.) Thus the civilians were safely out of town when the great fire destroyed Mountjoy House. See F. Wiswall, Jr., The Development of Admiralty Jurisdiction and Practice Since 1800, at 79-78 (1970); infra note 185 and accompanying text.
The crisis of 1660-1662 brought forward three civilian leaders. Two of them, ironically, were hardly royalists. John Exton and John Godolphin had strong Commonwealth and Parliamentary connections, which were much needed now that Clarendon and James had failed the civilians. The third leader was perhaps the greatest Restoration civilian of all, Sir Leoline Jenkins.

A. Zouche's Disciple: John Exton, LL.D. (1600-1668)

The publication of Richard Zouche's candid *The Jurisdiction of the Admiralty of England Asserted* in 1663, two years after Zouche's death, had eerie similarities to the publication of *De Usu* just after Duck's death. Both authors seem to have understood that the institutions they had served might not long survive them, and that radical new strategies were required, but their candid pleas to the younger generation were made only after the authors were gone. In Zouche's case it was John Exton, his successor as Judge of the Admiralty, who responded with particular fervor.¹⁴⁷

When Zouche's royalist sympathies had become too obvious, and he had left for Oxford without paying a Parliamentary assessment, the furniture in his London chambers was seized. He was in clear danger of losing his position if Parliament prevailed. Indeed, in 1649 he was duly removed, but—very significantly—he was not replaced by common lawyers. Rather, two civilians, John Exton and William Clerke, got the joint nod, very possibly with Zouche's blessing.

There could be no doubt about Exton's professional loyalties. He was a true civilian, educated at the civilian stronghold of Trinity Hall, Cambridge, with an LL.D. in 1634, and full admission to Doctors' Commons in 1638.¹⁴⁸ But Exton was also a survivor. He was reappointed Judge of the Admiralty at the Restoration, again succeeding Zouche, and again probably with Zouche's blessing. Now any person who pleased both Oliver Cromwell and James, the Duke of York, must have been a skilled diplomat, and Exton was determined to use all his skills to save the Admiralty for the civil law. His vehicle, clearly inspired by Zouche's *Jurisdiction of the Admiralty of En-

¹⁴⁷ Zouche was removed as Judge of the Admiralty effective 1649. See 2 D.N.B., supra note 41, at 2357. In the preface to *Iuris et Judicii Fecialis*, Zouche spoke of writing the book "during a period of leisure not otherwise happy." R. ZOUCHE, supra note 117, at viii.

¹⁴⁸ See 1 D.N.B., supra note 41, at 652; B. LEVACK, supra note 20, at 229. Indeed, Clerke was loyal, too, and also a Trinity Hall graduate, where he had been a fellow from 1609-1634. Did the Cambridge connection help these civilians with the Puritans? In all events, Clerke proved his loyalty by publishing *An Epitome of Certine Late Aspersions Cast at Civilians . . . .* (Dublin 1631). See W. CLERKE, supra note 40; B. LEVACK, supra note 20, at 219.
gland Asserted, was published just one year later—*The Maritime Dicaeologie, or Sea-Jurisdiction of England*.149

*Maritime Dicaeologie* was published shortly after the civilians suffered the disastrous defeats in Parliament in 1661-1662.150 Tactfully dedicated to James in his capacity as Lord High Admiral—despite his failure to support the civilians in the Parliament—it also gushed gratitude to James for “having been graciously pleased to constitute me Judge . . . of the High Court of Admiralty.” Exton also denies how the research was completed in “those sad and distracted times,” but does not mention that he was also Judge of the Admiralty.151 But when the mandated flattery was over, it was clear that Exton had another, very specific audience in mind: persons concerned with “Commerce and Navigation.”152

Exton’s thesis was simple. The way things were going, following the failure of a legislative settlement, another jurisdiction war was inevitable, and that was going to cause more dislocation and interruption to the affairs of merchants and mariners—a very poor national policy. Further, Exton could see that the Admiralty would inevitably lose this battle—as the one thing more important to business and commerce than a convenient, sensitive process was a final judgment, and, thanks to prohibitions, only the common law could offer that.153 In making this argument, Exton drew heavily on Zouche’s *Jurisdiction of the Admiralty of England Asserted*, and its careful catalogue of procedural horrors under common law process.154

Like his thesis, Exton’s solution was simple, and was influenced by Zouche and Wiseman: let the consumer choose.

In all which I have endeavonred [sic] neither to eclipse the honour, power, or the least right of the Municipall Laws of this Kingdome, nor in any sort to detract from the renown of the Reverend and Learned Professors thereof, but hope I have manifested that the upholding of both Jurisdictions, and restraining each of them to its proper limits and confines, will be more advantageous to this Kingdome and the Inhabitants thereof, then the suffering either of them to swallow up or devour the other.155


150 Were these parliamentary defeats the reason Zouche’s *Jurisdiction of the Admiralty of England Asserted* was posthumously published in 1663? Of course, Dr. Baldwyn’s preface attests that the treatise was “delivered into my Hands by the AUTHOR Himself, to be Printed,” which would have had to have been before March 1, 1661. See R. Zouche, *supra* note 123, at 81.


152 *Id.*

153 *Id.* at *Introduction* (unpaginated).

154 *Id.* at 180-88.

155 *Id.* at preface, *Epistle Dedicatory* (unpaginated).
Not surprisingly, Exton's key focus was on marine contracts and contracts concerning overseas commerce. Although he makes an elaborate historical argument, his final emphasis was on the first three sections of the Settlement of 1633, which did not give the Admiralty exclusive jurisdiction, but barred prohibition for "contracts made . . . beyond or upon the Seas," and most important marine contracts, including bottomry. This strategy had three major advantages. First, unlike the Ordinance of 1648, the Settlement was not wiped out by the Restoration. Second, although Exton did not emphasize this, the Ordinance of 1648 specifically barred Admiralty litigation on bills of exchange and mercantile accounts. As we will see in my next article, this was a damaging blow because many strictly marine transactions, including insurance, were done in the form of bills of exchange. Finally, the men who signed the Settlement included the leaders of the common law profession. Surely their judgment was not now to be impugned, particularly by a profession which made so much of judicial precedent!

It's true, I have heard that some of the Puisne Lawyers, and young men of that Profession (sitting in the Long Parliament) would have attempted such an undiscreet, and unparalleld act; but by the gravity and wisdome of others more learned in that Profession then themselves, were disswaded from it. Yet if they had, I doubt not but he that reads this Treatise, will find sufficient reasons to justify their assent to that agreement, and that it contained nothing but what they might and ought to do, notwithstanding the Judgements of their Predecessours or Successours.

156 Id. at 180.
157 These passages were set out in full by Exton, together with the signatures of the common law judges:

1. If Suit shall be Commenced in the Court of Admiralty upon Contracts made, or other things personally done beyond or upon the Seas, no Prohibition is to be awarded.

2. If Suit be before the Admiral for freight or mariners wages, or for the breach of Charter-parties for Voyages to be made beyond the Seas, though the Charter-parties happen to be made within the Realm; and though the money be payable within the Realm, so as the penalty be not demanded, a Prohibition is not to be granted; but if Suits be for the penalty, or if the question be made whether the Charter-party were made or not, or whether the Plaintiff did, release, or otherwise discharge the same within the Realm, that is to be tryed in the Kings Court at Westminster, and not in the Kings Court of Admiralty, so that first it be denyed upon oath, that Charter-party was made, or a denyall upon oath tendred.

3. If Suit shall be in the Court of Admiralty for building, amending, saving, or necessary victualling of a Ship, against the Ship it self, and not against any party by name, but such as for his interest makes himself a party, no Prohibition shall be granted, though this be done within the Realm.

Id. at 262-63.
158 See Yale, supra note 13, at 91.
159 J. Exton, supra note 149, at 261. As to the notion that the Settlement of 1633
Exton was a skilled advocate, and his "let the consumer choose" challenge to the common law was well calculated to win needed friends in Parliament. But did he add to the fundamental theoretical debate about incorporation? Exton certainly did continue to develop Zouche's theory of systems of overlapping law, systems which did not derogate from each other because they were based on implicit, or explicit, mutual consents. These consents were not deduced from any grand theory that might be construed to challenge sovereignty, but rather from the simple empirical utilitarianism which was Zouche's primary contribution to jurisprudence.

Thus, according to Exton, the special customs of merchants and of navigation were different from the municipal law. The former were universal and had developed under different conditions for different purposes. Further, "[f]rom the common Acceptance of the Sea-laws in other Nations is inferred the Acceptance of them in England," not by invasion or "reception," but by implicit consent or, as in the case of the Settlement of 1633, by explicit consent. This implicit or explicit consent was reciprocal with foreign admiralty courts. "Nor let it for shame be said that our Admiralty ... shall not afford unto Forreigners the same Justice other foreign Admiralties afford unto this Nation." Their purpose was not to displace the common law in any way, but to serve the specialized purposes of those specialized classes that needed such universal laws—namely mariners and merchants in foreign trade. The two critical ingredients to the formula were the universal trade custom and civilian procedure, although Exton, focusing particularly on Peckius's work, added that some classical civilian doctrines were superior to common law doctrine in resolving maritime disputes.

This latter analysis, had it been systematically attempted, would have distinguished Exton's book from Zouche's and from those that followed.

should not be accorded precedential value because it was an "extrajudicial" act, Exton had nothing but scorn.

Others do not forbear or stick to say this Subscription to this Agreement was an extrajudicalll act, and so takes not the effect of a Law either to bind them or their Successours, as though the place and formality of sitting upon the Bench were of the essence of a true and just opinion; and the Judges being called and convened by special summons before his Majesty, that their Judgements and Opinions there delivered in matters propounded, debated, and argued, were of less force and validity, and more extraneous to reason, then if they were judicially sitting.

Id. at 261.

160 See supra text accompanying notes 121-36.
161 J. Exton, supra note 149, at 41-44.
162 Id. at 34.
163 Id. at 157.
164 Id. at 135-37.
165 Id. at 142-57. A popular commentator was that by Vinnius on Peckius. A. Vinnius, V. Cl. Petri Peckii In Titt. Dig. Et Cod. Ad Rem Nauticam Pertinentes Commentarii (Rotterdam 1647). See Sutherland, supra note 105, at 161.
Now concerning this matter I may rather referre the Reader unto Peckius himself, Vinius, and other Authors writing thereon, then to spend any great labour about it: but whilst he hath this book in his hand, let him cast his eye upon some few of a great number of such Contracts made at land, concerning businesses to be done at sea, which are exactly determined by these Laws, and are used and held absolutely necessary in all foreign Maritime Judicatories, (and not by any of the rules of their Municipal Laws) which as they are little or nothing different in their proceedings from the proceedings of Civil Law, so are they farre less different in their determinations from the determinations of that Law, then our Municipal Laws be.166

Regrettably, the analysis was meagre, and consisted of little more than setting out "the titles selected out of the body of the Civil Law by Peckius . . . [that] do set forth most exactly the determination of controversies, which may and do daily arise from Contracts made at land concerning matters to be done at sea."167 It was probably better that Exton left this job undone for, as we will see, the differences between civilian and common law doctrines regarding commerce and navigation were closing up rapidly, even as Exton wrote. His "choice of legal process" and knowledgeable venue arguments were far sounder than arguments about the superiority of civil law in resolving maritime disputes.

B. John Godolphin, D.C.L. (1617-1678)—A Puritan Civilian

John Godolphin, like the regicide civilian Isaac Dorislaus,168 was the type of individual who eludes historical generalization. Fully qualified as a civilian, he was from the beginning devoted to the Puritan cause, and was duly rewarded, along with William Clerke and Charles Cock, by Interregnum appointment as judge of the Admiralty in 1653, and by subsequent reappointment with Cock until the Restoration.169 Unlike Exton, who was more conservative, Godolphin did not hold judicial office during the Restoration, although he "survived" to practice law successfully until his death in 1678.

It is certainly impressive that a devoted Parliamentarian like Godolphin joined Zouche and Exton to defend the Admiralty. Compared to their ef-

166 J. Exton, supra note 149, at 256.
167 Id.; see also id. at 147-57 (chapter entitled "Several of the Laws of the Titles selected out of the body of the Civil Law by Peckius").
168 As to Dorislaus, a member of Doctors' Commons who served as co-judge of the Admiralty in 1648 before preparing charges of treason against Charles I, and his assassination by Royalists while envoy to the Hague in 1649, see 1 D.N.B., supra note 41, at 555; B. Levack, supra note 20, at 224. He left no publications.
169 As to Godolphin's life and work, see 1 D.N.B., supra note 41, at 794; C. Coote, Sketches of the Lives and Characters of Eminent English Civilians 81 (London 1804); 5 W. Holdsworth, supra note 41, at 12, 15.
forts, though, Godolphin's *A View of the Admiral Jurisdiction* was hardly jurisprudence. It was more a charming hodgepodge of authority, uncritically selected and casually organized. His lengthy "Introduction . . . containing A Short View of the Civil Law, relating to Merchants, Owners of Ships, Part-Owners, Masters of Ships and Common Mariners; Together with, Freight, Piracy, Ejectment, Contribution, Wrecks, and Reprizall" sounds rewarding, but like Exton's reflections on Peckius and Vinius, there was no scientific jurisprudence here, only a collection of maxims covering everything from the near mythical Rhodian law to some serious observations by Selden. Godolphin had a table of sources that ran from "Aeschilus" to "Zonarus," but had none of Duck's sense of history or chronology. Only Godolphin's own concluding words can provide a sense of this work, as he moved from the allegedly doctrinal introduction to the question of jurisdiction:

Having glanced at some general Heads of the Law of the Admiralty *quasi in transitu* by way of Introduction (the least whereof in its due Latitude requiring more Volumes then are Pages in this) and therin the Custom paid, with other ordinary Portcharges usual in such cases, It may now be free to sayl from the Law to the *Jurisdiction* of the Admiralty, being the Port of Discharge in the Design of this Adventure: The Wind seems Fair, the Seas well purged of Rovers, and *Nereus* reinvested with his Trident; The *Ensurance* therefore need run but Low, the Danger is not great now that we have Peace with all Our selves; yea, the Less is but small though the Ship miscarry, so the Cargo be preserved, for that's of value, indeed a *Jewell*, without which the whole World would soon be *Bankrupt*; So that if it escape the private Arrest of some Fained or *Fictitious Action*, there is no fear of a General Em-bargo.

What an historical wonder—a bona fide Puritan who was positively in love with the Admiralty and Admiralty lore!

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172 *Id.*

173 *Id.*
The serious thrust of Godolphin’s book was very much like Exton’s. The
civilian jurisdiction was in deep trouble, and that, in turn, was trouble for
special classes of Englishmen, particularly merchants, mariners, and dip-
lomats. The Admiralty was more than a separate court, it applied a process
that was more universal and therefore more appropriate to the needs of
these special classes. In his usual florid style, Godolphin appealed particu-
larly to the merchants:

It was most true, what Seneca once said of them, _Mercator Urbibus
prodest, Medicus aegrotis_; without whom a Community or Civil soci-
ety of Men can scarce plentifully or honourably subsist. It was a saying
with Baldus, that famous Civilian, _That the World could not live without
Merchants_. Whence it may be rationally inferred, That that Nation is
nigh drowning, whose Merchants are under Water . . . .

The villains, of course, were the common lawyers whose private greed was
bringing this about:

As Reason is the soul of the Law, so Jurisdictions may be styled the
faculties of that soul, being reduced to act or exercise as they are
accommodated to this or that object: Consequently therefore to con-
found Jurisdictions, is to obliquitate the Rule of all Humane actions,
specially if any thing less then _Bonum Publicum_, under a vizior be the
Author of that confusion. _Mine_ and _Thine_ divide the world betwixt
them; in Private transactions they are unhappy Monosyllables, but in
Publick affairs they may be of most dangerous Consequence . . . .

For merchants, whose trade in itself was so hazardous, “to be left _sub
incerto_, where or in what tribunal to find that Rule under such a quality of
Juridical competency, as not to run hazards by Land as well as by Sea,” was
simply not good public policy.

Godolphin was no genius, but he was a good, stalwart civilian. He would
hardly espouse popery or absolutism, but this was a separate issue. To
Godolphin, two principles justified the Admiralty jurisdiction and its mix of
mercantile custom and civilian legal process: “universal concurrency” and
“a kind of _Necessity_,” which required all nations to observe “certain
_Rules_ or _Law_” so that their citizens may “have mutual Commerce with each
other.” His only juristic idea, shared by civilians since the Agreement of
1575, was that jurisdiction over a contract should depend on what it is _about_
rather than the accident of where it was made—particularly if it was a marine
or mercantile speciality. To have a system governed by the place of
_contract_ and to tolerate common law fictions about “Bordeaux in Cheap-

174 _Id._ at preface, _To the Reader_ (unpaginated).
175 _Id._ at _Introduction_ (unpaginated).
176 _Id._
177 _Id._ at 103.
178 _Id._ at 53.
179 _See id._ at 100-03.
side’ was absurd. As Godolphin explained, ‘‘The Law in all Jurisdictions is but Reason Regulated; No wonder therefore if sometimes a Cause as to the Merits of it meet with a right Decision in a wrong Jurisdiction, but less wonder if it oftener happeneth otherwise.’’

Further, Godolphin was positively optimistic, quite unlike Wiseman and Duck. Addressing Sir Thomas Ridley’s dour prediction that the greed and prohibitions of the common lawyers might overcome all, Godolphin remained hopeful:

Though this was the Observation, and those the very words of Sir Thomas Ridley upon this Subject in his time, yet we may not thence infer, that so it is also now in our time, specially now that Justice runs again in its proper channel, and her ballance equally poized; It was too true that in late years of unhappy memory the said words and observation of that Civilian were too sadly verified; which now no doubt will in some short time (as is already in a good degree) be completely rectified.

Unlike Zouche, who died in 1662, and Exton, who died in 1668, loyal Godolphin would live to see the beginning of the penultimate struggle, which lasted from 1670 to 1685. By then, the civilians would have but one great champion—Sir Leoline Jenkins. The results would confirm the little slogan that Godolphin put in the margin of his book: ‘‘Though by Warrant from the Proverb, Losers have leave to speak; yet in case of Interest, such as cannot hold their own, may hold their pease.’’

C. The Final Champion: Sir Leoline Jenkins (1623-1685)

Tradition has it that the Welsh have always loved the underdog, the noble lost cause. Leoline Jenkins lived that tradition. A brave royalist, he left Oxford and served in the royalist army in Wales. In 1648, he joined the ejected former head of his College, Dr. Mansell of Jesus College, in exile at Llantrithy, only to be indicted by the Commonwealth for running ‘‘a serninary of rebellion and sedition.’’ It was not until after the Restoration that

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180 See generally id. at 82-91.
181 Id. at 95.
182 Id. at 79. As to Sir Thomas Ridley, see generally Coquillette, supra note 9, at 336-46 (discussing Ridley and his book, A View of the Civile and Ecclesiastical Law).
183 J. GODOLPHIN, A VIEW, supra note 170, at 79.
184 Jenkins’s extraordinary life is chronicled in a massive work by William Wynne, The Life of Sir Leoline Jenkins . . . and a Compleat Series of Letters . . . Together with Many valuable Papers and Original LETTERS . . . And the Resolution of many difficult and curious Points in the COMMON and CIVIL LAW, LAWS of MERCHANTS and of NATIONS . . . (London 1724). The biography itself constitutes the first section of the first volume. 1 id. at i; see also 12 W. HOLDSWORTH, supra note 41, at 647-60 (2d ed. 1938); id. at 660 (‘‘Jenkins was easily the greatest of the civilians of his day.’’); 1 D.N.B., supra note 41, at 1073 (account by James McMullen Rigg).
Jenkins was allowed to return to Oxford. There he soon succeeded Mansell as head of Jesus College, a Welsh stronghold.\textsuperscript{185}

In 1664, Jenkins joined Doctors' Commons and entered the College of Advocates. Shortly thereafter, in 1665, he was appointed assistant to John Exton as Judge of the Admiralty. When Exton died later that year, Jenkins succeeded him. Thus the Admiralty Court was held at Jesus College, Oxford during the plague of 1665-1666, incidentally ensuring the safety of the civilians when the Great Fire of London demolished Montjoy House in 1666.\textsuperscript{186}

By 1668, Jenkins had also become a special representative of the Crown in a number of particularly sensitive and important foreign matters. In 1670, he was knighted for recovering the disputed succession of the estate of Henrietta Maria for Charles II, and was also appointed in 1670 as one of the Commissioners to negotiate union with Scotland.\textsuperscript{187} Dozens of highly confidential tasks followed, including assignments to the Congress of Cologne (1673), the Congress of Nymwegen (1676), and treaty negotiations with

\textsuperscript{185} 1 D.N.B., supra note 41, at 1073. Jesus College remains a kind of Welsh citadel today, with "15 to 20 per cent of undergraduates . . . from Welsh schools."  A. WOOLLEY, THE CLARENDON GUIDE TO OXFORD 97 (5th ed. 1983). At his death, Jenkins "left all his estates to the College, thus qualifying for the description of second Founder [after 'Elizabeth I at the instance of Dr. Hugh Price']. . . . They were worth about 700 pounds a year and some of the property in London became immensely valuable later on."  Id. at 97. The "loyalty of the College" is still "adduced by the portraits of Charles I . . . and Charles II . . . in the hall."  Id.

\textsuperscript{186} See supra note 146.

\textsuperscript{187} The negotiations, which took place in the autumn of 1670, failed. It was not clear if Jenkins really wanted them to succeed.  See G. MACKENZIE, MEMOIRS OF THE AFFAIRS OF SCOTLAND, FROM THE RESTORATION OF KING CHARLES II 203 (Edinburgh 1821); 1 D.N.B., supra note 41, at 1073. Francis Bacon had looked to legal union with Scotland as an important incentive for reforming the English law, and perhaps including more civilian concepts.  See F. BACON, Preparation for the Union of Laws, in 7 THE WORKS OF FRANCIS BACON 727-43 (reprint ed. 1963) (1st ed. London 1861); see also Coquillette, supra note 9, at 351-55 (discussing the contrasts between common lawyers' views and those of the civilian Sir Thomas Ridley).

Legal union with Scotland was never completely achieved.  See generally Lovat-Fraser, Some Points of Difference Between English and Scotch Law, 40 LAW Q. REV. 340 (1984).
Holland, Spain, France, Sweden, and the Austrian Empire (1678-1679). On February 11, 1679, Sir Leoline Jenkins received his ultimate regard from a grateful state, and was sworn of the Privy Council. Little more than two months later, he became Secretary of State.

Thus it was no mean champion who, in 1669, assumed leadership of a fifteen-year campaign to secure the Admiralty for the civilians. In a sense, Jenkins was the living embodiment of the arguments of Sir Thomas Ridley, Duck, and Wiseman about the value to the state of civilian training, particularly in foreign diplomacy. And the times seemed particularly auspicious, as the civilians prepared to move back into their new rebuilt quarters after the Fire of London. In light of his tremendous successes as a foreign diplomat, and his great political skills and influence, Jenkins's utter failure to negotiate any accord with the common lawyers speaks to the complete tenacity and growing power of his opponents.

Although Jenkins published no books himself, his speeches, opinions, dispatches, and many letters have been collected, most notably by William Wynne, a barrister of Middle Temple. Wynne was to Jenkins as Boswell was to Johnson, and Wynne's literally gigantic two-volume biography, The Life of Sir Leoline Jenkins . . . and a Compleat Series of Letters includes a fair amount of Jenkins's juristic writing, and much on the civilian problems of the era.

Jenkins's brilliant advocacy for the Admiralty jurisdiction was illustrated by Wynne's printing of Dr. Jenkins's Argument [1670], in Behalf of a Bill to ascertain the Jurisdiction of the Admiralty, in the House of Lords. By then, the civilian attempt to recoup the losses of 1662-1663 had become

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1 If Jenkins had any weakness it was, at least according to Wynne, his total seriousness: "He was a Man of little Leisure, and of no Sort of Pleasure, even to a voluntary Abstinence from innocent and agreeable Diversions; and in many Things of Life exceeded the most rigid Stoick." 1 W. WYNNE, supra note 184, at liv. But Jenkins was in excellent physical shape: "To this [lack of pleasure] he probably owed his great Strength of Body . . . ." Id.

10 See supra note 146.

19 In 1681 there appeared, under Jenkins's name, a book entitled An Exact Collection of the most considerable Debates in the honourable House of Commons at the Parliament held at Westminster, 21 Oct. 1680. Riggs believes it not to be Jenkins's doing. "[I]t does not seem to have been disowned; but, as he [Jenkins] was notoriously opposed to the publication of the transactions of the house, it is probably not authentic." 1 D.N.B., supra note 41, at 1074.

191 Wynne may have been the son of Dr. Owen Wynne, LL.D., who prepared the index of the manuscripts left by Jenkins to All Souls College, Oxford. Id. at 1073. Although Wynne was surely a barrister and common lawyer, eventually to become a sergeant in 1736, his professional allegiances could easily have been offset by pride in the achievements of another Welsh lawyer, even if a civilian. Wynne's son, Edward, was a distinguished jurist and legal historian. See 12 W. HOLDSWORTH, supra note 41, at 421-22 (2d ed. 1938); J. BAKER, THE ORDER OF SERGEANTS AT LAW 546 (1984).

192 See 1 W. WYNNE, supra note 184, at lxxvi-lxxxv.
critical. Prohibitions were issuing regularly to halt a wide range of charter-party, contract, and wages cases.\textsuperscript{193} Two draft bills were prepared, one by Jenkins and one by the King’s Proctor and King’s Advocate, the latter with a formidable schedule of prohibitions issued since the defeats of ten years before. After some discussion, it was decided to proceed with Jenkins’s bill, which was very much like the bill of 1662.\textsuperscript{194}

This raised an obvious concern: how could they answer the common law arguments and strategy that had buried the earlier bill? In 1662, the leader of the common lawyers was Heneage Finch, later Lord Chancellor and Earl of Nottingham. Finch’s central attack was that the Admiralty bill, “seconded by a multitude of petitions, some from the Trinity House, some from seamen, some from merchants etc..,” was in fact a vehicle by “the civilians and some few merchants” to “subvert the fundamental laws.”\textsuperscript{195} The petitions represented no real consensus, but were orchestrated, perhaps “penned by some civilian.”\textsuperscript{196}

Jenkins’s counter-strategy was brilliant. The issue had to be redefined from an unequal fight between two self-interested professional groups into what it really was: a struggle for the power to create law between the common lawyers and the Parliament itself. Here, Jenkins could reap from the seeds sown by Duck, Wiseman, Zouche, and Exton. The issue was solely a matter of the utility of the competing legal doctrines, and had to be cut free from old disputes over absolutism and foreign influence. There remained only a dispute over who should decide this issue of utility: the vested, prejudicial professional interests, or the Parliament and the clients themselves? The civilians, after all, sought only freedom from prohibitions; the common lawyers, on the other hand, wanted exclusive monopolies for their doctrines and for their profession.\textsuperscript{197}

The crucial bill was introduced to the Lords in 1670 and committed to Committee. Important common law judges and civilians were ordered to attend. In this setting, Jenkins gave his great speech, “the most powerful argument on the Admiralty side ever delivered, and in many respects ... the \textit{locus classicus} for the civilians’ case.”\textsuperscript{198}

Jenkins’s initial premise reflected Godolphin’s words: issues of jurisdiction ought to be “but Reason Regulated.”\textsuperscript{199} As expected, the common law champion—this time Lord Chief Justice Vaughan—had followed Finch’s

\textsuperscript{193} See Steckley, \textit{supra} note 26, at 167.
\textsuperscript{194} See Yale, \textit{supra} note 13, at 93.
\textsuperscript{195} Steckley, \textit{supra} note 26, at 167-68.
\textsuperscript{196} Id. at 168.
\textsuperscript{197} Yale, with great insight, notes the similarity of this argument to Coke’s case against the common injunctions out of Chancery. Yale, \textit{supra} note 13, at 95.
\textsuperscript{198} Id. at 93. Drafts of Jenkins’s bill and many of his papers are in Harl., Miscell. 29, 243, 371, etc. See Marsden, \textit{supra} note 140, at lxxix n.2.
\textsuperscript{199} See J. Godolphin, A View, \textit{supra} note 170, at 95.
previously successful line of attack, arguing that the bill was "against the Common Law, and a flat Contradiction to several Statutes," namely the medieval statutes of which Coke had made so much.200 But Jenkins made a bold, disarming move. He would not rely on the civil law—"I am to expect no aids from the Civil Law"—rather, his case would be solely based on English law, "the peculiar Law and Practice of this Kingdom."201 Following the lead of Duck, Wiseman, and Exton, he would base his argument on English nationalism and the national interest.

His first argument was historical and, again following Duck and Zouche, Jenkins turned to the scholarship of Selden.202 The jurisdiction of the Admiral was an ancient English court. Early statutes limiting its jurisdiction should be construed so as to "preserve to the Common Law all its just Pretensions, and yet leave the Admiral in Possession of all these Causes which are properly his."203

This went directly to the key issue: What was "properly" the Admiral's? There were but two legitimate tests—reason and utility. The test of reason demanded that the same criteria of jurisdiction for common law causes be applied to the Admiralty: look not to the location of an actionable event, but to its nature.204

Jenkins took marine contracts as an example. To argue whether a contract was made in a tidal river, or on a beach, or in Lisbon, had nothing to do with what law ought to apply as a matter of reason; it simply encouraged outrageous fictions. Would the sealing of a bond on a lease on the high seas make it an Admiralty matter? Of course not. So why should the sealing of a marine charterparty on land, even foreign land, make it exclusive to the common law? It was against reason to suggest it should.205

It was also against economic and public utility. "[T]here is no [other] Country whatever that denies that Cognisance of the causes now in Question" to their Admiralty courts.206 This was simply because the specialized law of the Admiralty promoted trade. This was no derogation of a foreign nation's sovereignty, nor would it be of England's, for this specialized law drew its legitimacy from "universal Acceptance of the Civil Law" and from the national law as well.207

As to the national law in England, that was well settled "as the Result of many solemn Debates" by the universal consent of common lawyers, civil-

200 W. WYNNE, supra note 184, at lxxvi.
201 Id.
202 Id. at lxxvii.
203 Id.
204 "I hope, My Lords, I may take Leave to measure maritime Causes by the same Rules of Reasons that we do other distinct Classes and Species of Causes; the meer Locality does not make a Cause maritime . . . ." Id.
205 Id.
206 Id. at lxxviii.
207 Id.
ians, and all the judges in a solemn settlement, "subscribed by the Twelve judges and the Attorney General, in the Presence of the King, his Majesty's Father." It was hard to imagine what more "consent" could be required.\textsuperscript{208}

Now Jenkins made a truly brilliant attack. The Settlement of 1633 was made ineffective by the shameful Interregnum "[a]nd it was punctually observed as to the granting and denying of Prohibitions, till the late disorderly Times."\textsuperscript{209} But even "the Usurping Powers found it necessary, for the Encouragement of Trade and Navigation," to protect much of the Admiralty jurisdiction.\textsuperscript{210} So much for insinuations of absolutism and foreign popery.

The Commonwealth had acted solely for reasons of public utility, and utility was the key issue now. Although he left it unsaid, Jenkins absolutely implied that the only beneficiary of a vacuum of responsible state power was the powerful private vested interests of the common law bar.

According to Jenkins, protecting the civilian Admiralty jurisdiction served the public utility in two ways: (1) by eliminating "Uncertainty of Jurisdiction," with its disastrous effect on the certainty of commercial relations, and (2) by providing a legal process for competent "relief or execution in maritime Causes."\textsuperscript{211} Jenkins then proceeded to list specific examples of the severe costs of prohibitions and the corresponding advantages of Admiralty procedures and doctrine. As to the latter, methods of proof, joinder, and, most particularly, execution were emphasized.\textsuperscript{212} Yet prohibition could defeat all this:

But the greatest Discouragement of all is, that of material Men; such as furnish Tackle, Furniture, or Provisions, for the repairing of Ships, or setting of them out to Sea: When they are not paid at the Time appointed, they arrest the Ship; which will bring all the Part Owners to answer for it; but if, when they declare in the Admiralty, a Prohibition be granted, the Remedy will be against the Master alone, who, tho' he bespoke the Materials, is commonly not worth the 20th Part of the Action. And these material Men have often offer'd to make it demonstrable before his Royal Highness, that if the Ship shall be subject to their Arrest, without Danger of a Prohibition,\textit{(because the Contract was upon the Land)} an 100 Sail of Ships shall be furnished, and set out with more Ease, and less Time, than 5 now can bee, as the Practice of prohibiting hath lately been. For there is not any Master but may command 1000/ worth of Goods upon his Ticket in a Morning, when the material Men do know, that they may arrest a Ship with Effect, in case he and his Owners don't come, and give each material Man such Money or Security as will content him. Whereas if they be forced for their Remedy to Common Law against the Master, and his Part Owners,

\begin{itemize}
  \item \textsuperscript{208} \textit{Id.} at lxxxii.
  \item \textsuperscript{209} \textit{Id.}
  \item \textsuperscript{210} \textit{Id.} (emphasis added).
  \item \textsuperscript{211} \textit{Id.}
  \item \textsuperscript{212} \textit{Id.} at lxxxii-lxxxiii.
\end{itemize}
(who are most commonly Persons unknown, and at a Distance) they had better keep their Wares in their Shops, than pursue so many, upon such unequal Terms.213

Jenkins now unleashed his most devastating argument: how could the common lawyers offer this kind of convenient process? Only by copying the doctrines and procedures of the Admiralty. Now who would be subverting the old order by introducing, even incorporating, new law?

And as for that, that the Courts of Common Law are willing to judge marine Causes by the marine Law; I will not take upon me to say, how far they may recede from their own Law in those Cases, wherein theirs and ours do differ; but I think they may as well ask the whole spiritual Jurisdiction, and say, they will govern their Judgments according to the Ecclesiastical Law, and the Canons of the Church.214

In concluding, Jenkins enumerated the examples of “the greatest convenience.” There were the foreigners who expected protection and reciprocal treatment as offered in all other lands. There were the mariners whose peculiar transitory life—and ultimate reliance on the security of the ship—required special collective procedures and proofs. There were the special needs of owners who “shall recover their Freight, and Merchants their Damages, When they happen, in One and the same Judgement.” And there were the part-owners, who needed initial resolution of disputes about removing a Master or changing a voyage.215

But the greatest Convenience of all, will be the Encouragement to material Men; if they be but secure of their Action against the Ship, there is nothing in their Warehouse, but will be forthwith furnished upon the Credit of the Ship. And if we may believe Men of Experience, this will contribute more effectually than any Thing to his Majesty’s Designs, for the Encrease of Shipping, and the Encouragement of Navigation. And the Bill before your Lordships will naturally produce these Effects, as it certainly will, I need not enlarge upon any other Conveniencies.216

But Jenkins was still not through. There was one last plea, and he offered his own career of public service as its justification:

Yet one more I cannot forbear to mention; the Encouragement of a Profession, not only as it is a Profession or Body of Men devoted to such a Study, but as it may prove, and has been reputed in some

213 Id. at lxxxiii. Jenkins particularly emphasized bottomry, largely because he understood the importance of available credit to trade. This will be discussed further in a purely doctrinal context. See Coquillette, supra note 21, at text accompanying notes 104-05.

214 1 W. WYNNE, supra note 184, at lxxxiv.

215 Id. D.E.C. Yale would very much agree with Jenkins as to the general point. See Yale, supra note 13, at 107-08.

216 1 W. WYNNE, supra note 184, at lxxxiv.
Measure useful to the Publick; and I hope it will not be thought invidious, if I choose the Words of a great and wise Prince, his Majesty's Royal Grandfather.

I do greatly esteem (says he) the Civil Law; the Profession thereof serving more for general Learning, and being most necessary for Matters of Treaty with foreign Nations. And I think that if it should be taken away, it would make an Entry to Barbarism, and blemish the Honour of this Kingdom. For it is in a Manner *Lex Gentium*, and maintaineth Intercourse with all foreign Nations. My meaning is not, to prefer the Civil Law before the Common Law, but only that it should not be extinguished, and yet so bounded (I mean to such Courts and Causes as have been in ancient Use) as the Ecclesiastical, Court of Admiralty, Court of Request, etc.\(^\text{217}\)

This great English national heritage could yet be saved, and the sole price was not an exclusive, enforced monopoly, but merely allowing a suitor the freedom to choose when appropriate.

But whether this of encouraging so many young Students, of satisfying Foreign Traders, of giving Dispatch to Mariners, and to material Men the Security which they like best, shall be esteemed real Conveniences or not; yet I hope, My Lords, to conclude with something that will give all Parties content, and must be understood a Conveniency; it is, that we of the Admiralty are content, that Suitors may have their Option of the Court they would sue in: If Mariners will go for their Wages, Owners for their Freight, Merchants for their Damages, Material Men for their Money, to the Common Law, we shall not in the least regret it: But if they choose rather to come to the Admiralty, (as certainly they will not, unless they find the Dispatch quicker, the Proceedings less chargeable, and the Methods of Judgment and Execution more suitable to their Business) we desire leave to receive them, and to do them Justice, without the Danger of a penal Statute, and without the Interruption of Prohibitions when once we are possessed of the Cause. And this is all we desire.\(^\text{218}\)

Subsumed in this argument were all of the insights of those civilians who had fought the good fight. Duck, Wiseman, Zouche, Exton, Godolphin, and Ridley were all present in spirit that day. It was a great argument. It would also prove to be the last great moment of the English civilians, for Jenkins failed.

We still do not know exactly why the civilians lost. The common lawyers, ably led by Chief Justice Vaughan, were well organized, united, obdurate against compromise, and politically tough.\(^\text{219}\) And, despite Professor

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\(^{217}\) *Id.*

\(^{218}\) *Id.* at lxxxv.

\(^{219}\) See Yale, *supra* note 13, at 93-95; Steckley, *supra* note 26, at 167-71. Vaughan apparently drew heavily on arguments Heneage Finch advanced in opposition to the 1663 bill. Finch had warned the lawyers of the Commons that civilian jurisdiction of
Steckley’s innovative research, we do not know how much genuine mercantile and mariner support the civilians could muster. For whatever reason, the "bill failed to make progress and this second initiative came to nothing."

foreign contracts would "at one blow gotten the Barbadoes, Jamaica, the American Islands, Virginia, New England, and . . . have planted the civil law there . . . ." Id. at 170.

The civilians were not entirely without common law allies during these struggles. For example, there was a common lawyer named Charles George Locke, who had been a judge in the Admiralty Court. See C. Locke, England’s Compleat Law Judge and Lawyer (London 1656). He wanted a "special appeal court" of civil law doctors and common law judges that would help to reconcile common law and civil law, and to make up deficiencies of the common law by looking to civil law sources. "He was not advocating the replacement of the common law by the civil law but that the best of both systems should be utilized." See D. Veall, supra note 72, at 111.

Yale, supra note 13, at 95; see Steckley, supra note 26 at 167-71. We do not know how useful the civilians really were to the commercial interests. Marsden, for example, argued that "insurance law alone owes little to Admiralty judges. The Court of Admiralty does not seem to have given satisfaction to underwriters or merchants." Marsden, supra note 140, at lxxx. On the other hand, the Commissioners of Assurance established in 1601 were also not busy. Most insurance cases went to arbitration, or were referred by the Council of the Admiralty to special ad hoc commissioners. Id.

In lesser matters, Jenkins and the civilians could certainly flex political muscle. As Wynne emphasized:

Many other real and valuable Services Sir Leoline performed in Behalf of the society at Doctors Commons; as in the Year 1673, in procuring their Freedom and Exemption from several Taxes and Assessments unduly laid on them by the Court of Alderman; and afterwards in the Year 1682, when he was Secretary of State, in procuring their Exemption from all Ward and Parish Offices, in the same Manner as Serjeants, Council, and Attorneys of the King’s Temporal Courts. To this might be added, his Project of a Bill to settle and ascertain the Jurisdiction of the Court of Admiralty, and the many Arguments he had in Defence of it; but of this something has been said before. And when the Judgment above-mentioned was given against the City of London, and a new Charter was proposed to be passed, a Liberty was offer’d to Sir Leoline, of inserting any Clauses he thought proper, for securing the jurisdiction of the Admiralty and Ecclesiastical Courts from Interruptions, by Prohibitions grounded on the Customs of the City; and that the Judges of the said Courts for the time being, might be Justices of the Peace for the City, as well as the Senior Aldermen, and some other Privileges; but as he had early declared against those Proceedings, he was resolved not to derive any Advantages from them to himself, or to the Society.

W. Wynne, supra note 184, at liii. Jenkins also lost some lesser political causes that could have benefited civilians:

Not to mention several other Matters which he had prepared, but proved abortive, as a Bill to prevent clandestine Marriages; and another to revive the ancient Authority of Rural Deans, as a Design, he thought, of great Concern to the Discipline and Polity of the Church, and for the better preventing of Vice and Immorality. He had two considerable Designs in View: the one was, a Bill to unite and subject Peculiars and exempt Jurisdictions, to the respective Dioces-
We do, however, know the consequences of the civilian defeat: it turned out to be their last real chance. In 1673, James was evicted as Admiral by the Test Act. When he acceded as King in 1685, the civilians tried one last time, focusing again on mariners' wages, freight and charter party cases, in rem claims against the ship, the non-possessory liens of bottomry, collision cases, and transmarine contracts.\(^2\) Jenkins, however, was now near death. He could not appear, although he wrote many letters, including one to the famous diarist and civil servant, Samuel Pepys. He urged that someone reach the King, and that the bill be entrusted to "some noble hand that will have a care of it and affection for it."\(^2\) But, according to Yale, the bill may never have even been introduced. Then came the Revolution. The ancient office of the Lord High Admiral was abolished into a commission, and the civilians "tacitly conceded failure."\(^2\) Jenkins never saw the new order. He died in 1685.

The consequences of the defeat of the Restoration civilians were profound. There would be new generations of civilian theorists and new civilian juristic scholarship, and these would retain some influence. But never again would civilian political action or theoretical writing actually challenge the dominion of common lawyers over the future of English law.\(^4\)

IV. THE POST-REVOLUTION RETREAT INTO SPECIALTY AND SCHOLARSHIP (1688-1735)

The tremendous importance to the civilians of the developing commercial law can best be appreciated by what happened when they lost it. One result was the totally distinct nature of the "fourth generation" civilian jurists. Largely academics, these civilians retreated into the study of civilian doctrine for its own sake, or into technical monographs designed for the narrow, if at times lucrative, surviving civilian monopolies, such as prize law. Paradoxically, it was the scholarly, and not the technical, civilian writing that kept the civilian ideology alive and influential, if only ultimately for the use of others, such as Lord Mansfield.

\(es\) where\(in\) they lay; and to vest the whole Power of proceeding and determining, as well in Causes of Instance, as of Office, in the respective Bishops. But this Design he soon laid aside, for Fear the Abolition of those little Jurisdictions, like that of the smaller Religious House in Hen. VIII. Time, might usher in the Downfal of the greater.

\(^{221}\) Id. at liii.

\(^{222}\) Yale, supra note 13, at 96.

\(^{223}\) Id. (MS 2872 available at Pepys Library, Magdalen College, Cambridge).

\(^{224}\) Josiah Child's *Discourse About Trade* (London 1690) and *Reasons for Settling Admiralty Jurisdiction* (London 1690), however, continued the shouting long after the war was over. Both of these, though, shed light on Justice Holt. See Coquillette, supra note 21, at text accompanying notes 364-441; see also Steckley, supra note 26, at 172 n.108, 175 n.115.
The most important of these writers were Blackstone's prototype, Thomas Wood, D.C.L.; the great translator, William Strahan, LL.D.; and that bizarre Fellow of New College, Oxford, John Ayliffe. They were a rather "rag-tag" army compared to the Restoration civilians, and not a little eccentric, but they kept the flame alight.

A. A New Institute: Thomas Wood, D.C.L. (1661-1722)

A most revealing fact about the "fourth generation" English civilians was what they did not try to do. Thomas Wood was typical. Although he was the next major civilian jurist after Exton and Godolphin, he was not seeking a special jurisdiction for either the civil law or the lex mercatoria. That battle had been fought and lost. Nor was he promoting the civilians professionally. Despite his D.C.L., Wood had almost no sustained interest in Doctors' Commons. Indeed, in 1692 he was called to the common law bar by Gray's Inn ex gratia at the insistence of a most interesting, closely related kinsman, Chief Justice John Holt. As it turned out, Wood's fiercest battle would not be with common lawyers, but with the university enemies of his famous uncle, Anthony Wood.225

Wood's interest in civil law was almost entirely academic. It was almost as if the clock had been turned back a century to Alberico Gentili.226 He was not interested in how adapted civil law procedure assisted ship owners, factors, mariners, or repairmen. And if Wood had any sustained institutional loyalty it was to his beloved Oxford, where, at the age of eighteen, he became a Fellow of New College, a traditional civil law stronghold. The civilians were dropping back into their last bastions, the ancient universities,

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225 There is no scholarly biography of Wood. See 12 W. Holdsworth, supra note 41, at 418-20, 425-28 (2d ed. 1938); Watson, supra note 12, at 185-86 (1983); 2 D.N.B., supra note 41, at 2317 (biographical sketch of Wood by Edward Carlyle).

The battle of Wood's life occurred when he came to the defense of his uncle, Anthony Wood (1632-1695). The latter was sued in the Oxford Vice-Chancellor's Court by the second Earl of Carendon, Henry Hyde, for libeling the Earl's famous father, the first Earl, in Anthony Wood's Historia et Antiquitates Universitatis Oxonienisis, published in 1674. Thomas acted as Anthony's proctor in the Vice-Chancellor's Council in 1692-1693, and also wrote hard-hitting, anonymous pamphlets in his uncle's defense. See A Vindication of the Historiographer of the University of Oxford . . . from the Reproaches of the Bishop of Salisbury (London 1693); An Appendix to the Life of Seth Ward (London 1697), cited in D.N.B., supra note 41, at 2317 (attacking those who Thomas felt had taken liberties with his uncle's reputation). For further details of the libel action see 11 C. Mallet, A History University of Oxford 459-60 (1924), and the records of the Vice-Chancellor's Court in the University Archives, cited in id. at 460 n.1.

226 See Coquillette, supra note 3, at 54-63.
whence they had bravely sallied forth two hundred years before into the
professional world of London. 227

Wood’s most important work was not about civil law at all. An Institute of
the Laws of England: or the Laws of England in their Natural Order,
according to Common Use, published in 1720, was a book about the com-
mon law, organized and approached by one with a civilian training. This
vividly demonstrated just how much times had changed in just one civilian
generation. Wood’s Institute went through ten editions by 1772 and “re-
mained the leading work on English law until superseded by Blackstone’s
Commentaries in 1769.” 228 Indeed, Wood was very much Blackstone’s
prototype. 229

227 The only judicial position Wood ever held was in one of the truly romantic,
vestigial civil law jurisdictions as Assessor of the Vice-Chancellor’s Court of the
University of Oxford. As to the bizarre Vice-Chancellor’s Court, see Coquillette,
supra note 9, at 369 n.310; J. Morris, Oxford 73-74, 195 (1965); J. Williams, The
Law of the Universities 90 (1910). The Court of Chivalry, another romantic
anachronism, was revived in 1954 after a sleep of nearly two centuries. See Manches-
ter Corp. v. Manchester Place of Varieties, Ltd., [1955] P. 133, 135-37 (1954); F. Squibb, The High Court of Chivalry 123-37 (1959); Coquillette, supra note 9, at
369 n.310. No wonder certain old law dons, doubtless dreaming of the days of Wood
and Ayliffe, told the author in 1967, then—as now—a gullible American, that a case
would be brought in the Vice-Chancellor’s Court in the near future “to protect the
jurisdiction.” Instead, the Vice-Chancellor’s Court was officially abolished in 1977.
19th century the court was confined entirely to civil actions, mostly of debt, and by
the mid-20th century it was hardly used.” C. Day, supra, at 247; see also J.
Williams, supra, at 90.

Of course, in Wood’s day, very serious matters could still find their way to the
Vice-Chancellor’s Court, including that bitter libel action brought by the second Earl
of Clarendon against Wood’s uncle, Anthony Wood. See supra note 225.

228 2 D.N.B., supra note 41, at 2317. There were editions in 1720, 1722, 1724, 1728,
1734, 1738, 1745, 1754, 1762, 1772. See 1 J. Worral, Bibliotheca Legum
Angliae 84 (London 1788); 12 W. Holdsworth, supra note 41, at 419 (2d ed.
1938). It was a very popular export to American eighteenth-century libraries. See H.
Johnson, Imported Eighteenth-Century Law Treatises in American Li-

229 The influence of Justinian’s Institutes on the structure of both John Cowell’s
Institutiones Iuris Anglicani (Cambridge 1605) and Thomas Wood’s An Insti-
tute of the Laws of England (London 1720) was marked. See A. Watson,
supra note 12, at 181-84. According to Watson, William Blackstone criticized Cow-
ell’s structure as “forced and defective” and “lame and defective” in his preface to
Analysis of the Laws of England (London 1756), id. at 184, but the idea of a
systematic exposition of the whole corpus of the law was, as Watson argues, cer-
tainly owed to the civilian heritage and Justinian’s model. As to Blackstone, see
Cairns, Blackstone, the Ancient Constitution and the Feudal Law, 28 Hist. J. 711
But Wood was not Blackstone's equal as a common law jurist. There were even those, like Thomas Hearne, who had a lower opinion: "those who are the best judges were of opinion that he [Wood] is but as 'twere a dabbler." This may have been reinforced by Wood's retirement from the legal profession in 1704 to clerical orders and a quiet country rectory in Buckinghamshire, where he continued to write and study law many miles from London.

In my opinion, however, Wood's most interesting book was not his *Institute of the Laws of England*, but the book he finished just before "retiring" to the benefice, *A New Institute of Imperial or Civil Law*. This book demonstrated that Wood really did have some original ideas, ideas relevant to the future of the civil law influence in England. *A New Institute* was first published in 1704 and then republished in 1712 along with Wood's crude translation from the French of Domat's preliminary *A Treatise of Laws* and Title I, Sections I and II of Domat's *Les Loix Civiles*. Wood had first published this translation in 1705, and again in 1708, under the title of *A Treatise of the First Principles of Laws in General*, which, curiously, did not contain any acknowledgement of Domat. Wood added a revealing preface to the piece, in which he contended that all legal systems, including the Roman, represent "borrowed . . . knowledge." What was "borrowed," concluded Wood, was neither theories of sovereignty nor specific legal institutions, but "Rules of reasoning."

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230 2 D.N.B., supra note 41, at 2317.
232 See T. Wood, supra note 231, at i (2d ed. 1712). Wood contined this theme later:

Upon a Review, I think it may be maintain'd, that a great part of the Civil Law, is part of the Law of England, and interwoven with it throughout. I hope therefore that the study of it may be encouraged amongst us as in other Nations; not only to support the Professors of it, but for the better understanding of the Common Law of England; and that the Laws of other Kingdoms may be known to us; or that those Rules of Argument (on which at least the private Affairs of Property depend) may farther instruct our Gentry to serve the Publick in Foreign Negotiations as well as in Council at home.

Id. at viii. As to the Domat translation, see infra note 243.
233 T. Wood, supra note 231, at 1. Wood's view was anticipated by Scottish
Wood was not arguing for a past or future "reception." He stated that "we reject the Civil and Canon Law when it contradicts the Ius Coronae, the Common Law, or our Acts of Parliament."234 Nor was he crusading for any particular "incorporation." His point was simply that some English customary law reflected civil and canon law debts, and that this was the unintended result of a kind of doctrinal osmosis—lawyers "borrowed" from those parallel legal systems as they tried to resolve current problems. Wood also observed that even some English statutes were "drawn upon a platform borrowed from both those laws to regulate inconvenient usage or other defects."235 Indeed, he praised the common law for setting "prudent bounds to the power of our Princes, and secur[ing] a proper liberty for the subject."236 He even praised precedent justice: "They [our laws] are very particular and certain. Presidents and adjudged Cases have been preserv’d for many ages to direct in the determination of most Points; so that an Arbitrary Judge has less room to exert himself here, than in any other law."237 The implication was that the civilian system encouraged arbitrary discretion—a proposition that would have had Arthur Duck or Robert Wiseman spinning in his grave!

Yet Wood also asked English legal nationalists, particularly common lawyers, to face an important historical fact, a fact he illustrated with the metaphor of mixed inheritance and the symbol of a rebuilt ship, both ideas borrowed from John Selden:

Even the Civil and Canon laws do not agree in every instance of Practice, or in their Rules, Decisions and Decrees in every point. But though all the Lineaments or Features are not the same, yet there is such a composition in the Canon Law which gives it almost one and the same Complexion with the Roman Law, and the same Blood runs in both their Veins, that at least you may know them to be near of Kin.

jurists. See, e.g., T. CRAIG, DE UNIONE REGNORUM BRITANNIAE TRACTATUS (C. Terry ed. 1909, written c. 1605). As Levack has emphasized,

In discussing the influence of the civil law on the development of English law, Craig challenged the prevailing English conception of a totally indigenous common law. Having demonstrated that William the Conqueror had actually imported a European feudal code to England in the eleventh century, Craig claimed that English judges had through subsequent decisions brought about a reception of the civil law.

Levack, supra note 187, at 109. Levack correctly points out that Craig's attempt to demonstrate a "reception" through the likes of Dyer and Plowden are hardly satisfactory, but "[[like many Continental humanists and a number of English civil lawyers, he equated the civil law with the basic principles of justice, equity, reason, the natural law, and Ius gentium. Once this definition of civil law is posited, then numerous statements of seventeenth-century English lawyers can be adduced to support Craig's contention." Id. at 109-10.

234 T. WOOD, supra note 231, at iv.
235 Id.
236 Id.
237 Id.
True it is that the Common and Civil Laws had not the same Root or Stock: yet by Inoculating and Grafting, the Body and Branches do seem at this day to be almost of a piece. For the English law has receiv’d great alteratons, and is very much unlike it self; or (as Mr. Selden expresses it) In regard of its first Being it is like the Ship, that by often mending hath no piece of the first Materials.\textsuperscript{238}

Wood’s \textit{A New Institute} was designed for students in the universities. As Wood explained, “To encourage Young Scholars to spend some few hours in the study of the Civil Law, I have endeavored to make the Institutes more useful than those after Justinian or the common Systems.”\textsuperscript{239} Justinian may have done a better job, but Wood’s book had another important feature:

By the way I have added Notes, and therein observ’d the chief differences of the Laws of England, as also the Principal differences in the Laws and Practice of other Nations from it, and what Conformity or Disagreement there is in the Law Divine; what alterations have been made in the Canon Law, that our young Gentlemen may be let to compare the Equity and Polity of each, and be able hereafter to judge what ought amongst our selves to be Confirm’d or Reform’d.\textsuperscript{240}

Wood hoped that the process of comparing and contrasting civil and common law would encourage the inevitable “incorporation” by osmosis that occurs whenever well-educated lawyers try to address legal problems. This “incorporation” did not require protecting any distinct jurisdictions, such as the Admiralty, with separate legal process. It simply required good legal education, which included the study of comparative law.

For this insight, Wood was indebted to Cowell, who wrote four civilian generations earlier. He acknowledged this debt candidly:

Now this Performance in respect only of the Civil Law and the Laws of England, is a work of a different nature from that compos’d in Latin by the learned Dr. Cowell. His chief design was to give an Institute of the Laws of England, according to the method of the Imperial Institutes: My intent is to compile an Institute of the Imperial Laws in a less obscure, and in a more comprehensive way than that collected by Tribonian, etc. Dr. Cowell shews some Differences and Agreements in the Civil Law by an Institute of the Laws of England in Justinian’s Method; I have shewn some Disagreements in the Laws of England by way of Notes added to a New System of the Civil Law. His Institute is founded much upon the old Law of Wards and Liveries, Tenures in Capite and Knight Service, since taken away and destroyed, and upon other Laws since thrown off; whereas my endeavor had been to adapt my Observations on the Laws of England to the present Establishment. But I follow him when I maintain that the Laws of England are a

\textsuperscript{238} Id. at vii.
\textsuperscript{239} Id. at viii.
\textsuperscript{240} Id. at ix.
composition of the Civil, Canon and Feudal Laws, and that there is a
greater Affinity or Union between them than the Professors of the Civil
and Common Laws do generally apprehend.\textsuperscript{241}

In an obvious final plea for tolerance and open-mindedness, Wood closed by
paraphrasing, of all people, Edward Coke: "That during my Study of the
Laws of this Realm (the Common, Civil, and Canon Laws) the Courts of
Justice were furnished with Men of excellent Judgment, Gravity, and Wis-
dom . . . ." As a textbook, \textit{A New Institute} was not a bad piece of work. As
propaganda for a lost cause, it was even better. If the professional and
jurisdictional battles were over, there remained the struggle for the hearts
and minds of law students, who would almost certainly become common
lawyers, not professional civilians.

B. \textit{Domat Imported: William Strahan, LL.D.'s Great Translation (1722)}

During the debates over the Admiralty, English civilian writers recoiled
from relying on continental authority. Much ink was spilled over how "na-
tional" Doctors' Commons really was, and how "nationalistic" it could
become. Thus, when a civilian like William Strahan devoted much of his life
to translating the great French civilian Jean Domat's \textit{Les loix civiles dans
leur ordre naturel, Suives du Droit Public}, it was certainly a change in
emphasis.\textsuperscript{242} Of course, Thomas Wood had tested these waters in his earlier
and cruder translation of Domat's introductory \textit{A Treatise of Laws} and Title
I, Sections I and II of \textit{Les Loix Civiles}, which Wood called \textit{A Treatise of the

\textsuperscript{241} Id. at x-xi.

\textsuperscript{242} William Strahan, LL.D. was a member of Doctors' Commons and a King's
Advocate. See 12 \textit{W. Holdsworth}, supra note 41, at 427 n.3, 428, 642 (2d ed. 1938).
His greatest achievement was his translation of Domat's \textit{Les Loix Civiles dans leur
Ordre Naturel, Suives du Droit Public} [hereinafter \textit{Les Loix Civiles}]. \textit{W. Strahan,
The Civil Law in its Natural Order Together with the Publick Law . . . Written in French by Monsieur Domat . . . And Translated into En-
GLISH by WILLIAM STRAHAN LL.D. . . . With Additional REMARKS on
some Material Difference between the CIVIL LAW and the LAW OF

Jean Domat (1625-1696) has been fairly called "a great French jurist . . . a sys-
tematizer," and his \textit{Les Loix Civiles}, "a great work combining in one system the
materials of Roman law and French legislation and decisions." \textit{D. Walker}, supra
note 41, at 372. The single most important characteristic of Domat's juristic thought
was his drive to justify all laws by ethical principles—and the inherent struggle to
systemize and structure legal rules was his life's foremost challenge.

Domat was the close friend and literary executor of Pascal. \textit{Les Loix Civiles},
published in two volumes between 1689 and 1697, was designed to provide Domat's
children with a scheme to understand the civil law. Domat's book was so successful
that he has been called the "founder of the science of public law in France." \textit{5
Encyclopaedia of the Social Sciences} 194 (entry on Jean Domat written by M.
Radin) (1931). The book was republished throughout Europe.
First Principles of Laws in General, and never attributed, at least in print, to its rightful author. But Strahan's Domat was actually more than a simple translation.

First, it was a vehicle for a powerful "Translator's Preface," which was certainly the best civilian writing since Wiseman, and the best civilian advocacy since Jenkins. Second, it was annotated by Strahan to illustrate important differences between the continental civil law and English national law, including the English law of the Admiralty, the Court of the Arches, and the common law. Finally, Strahan, like Domat, wrote to demonstrate the value of civil law to politicians, a totally new "consumer" group. In so doing, Strahan focused on the political order of the British colonies, where his translation of Domat would have consequences that neither he nor Domat could foresee.

Strahan was also thinking of merchants. In his dedication to James, Duke of Chandos, he stated:

But, My Lord, it is not only as Your Grace is a Patron of Learning, that this Book implores on another Score, and that is, as You are the

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243 See supra note 232 and accompanying text. This translation was usually bound with A New Institute, T. Wood, supra note 231, and was called A Treatise of the First Principles of LAWS in GENERAL: of their Nature and Design and of the Interpretation of Them—Translated out of French—Being a proper Introduction to the New Institute of the Imperial or Civil Law, with Notes, etc. lately Published. It was distinctly inferior to Strahan's translation, quite apart from its failure to properly credit or even mention Domat. As Holdsworth put it, "Strahan's translation of Domat is a very much more considerable book, both as a book on Roman law, and, by reason of the translator's notes, as a book on comparative law." 12 W. Holdsworth, supra note 41, at 428 (2d ed. 1938).

244 For example, Strahan's Domat was a favorite of the most important American revolutionaries and early American jurists, including Thomas Jefferson, John Jay, Ralph Assheton, the distinguished Pennsylvanian jurist and judge of the Pennsylvania Court of Chancery (1730-1735) and then the Pennsylvania Court of Common Pleas (1738-1746), and Jasper Yeates, Associate Justice of the Supreme Court of Pennsylvania (1791-1817). See H. Johnson, supra note 228, at xxxix-xl, xlvi, 18-19 (1978). John Adams owned a French edition, and used it, along with Wood's A New Institute, in his Admiralty practice. See Coquillette, supra note 13, at 359, 388-89, 392. Before Domat was at hand, Adams lamented its absence: "Borrowed Ayliff, but there is no Table and could find nothing about the Subject. Domat I could not find." Id. at 395.

245 Strahan regarded the practice of civil law courts in England as distinct from the general civil law system, and gave many examples through his annotations. "I have therefore thought it most advisable, to confine the Remarks which I have added, to the most material Differences that occur between the Civil Law and ours, and more particularly, in the Matters which come under the Cognizance of our Courts in England, which have the Civil and Canon Law for their Rule and Guide." W. Strahan, supra note 242, at xxi.

246 See supra note 244.
Promoter and Protector of Trade. For although it is a Book of Law, yet as it contains all the Fundamental Rules of Justice in Matters of Trade and Commerce, it may be reckoned as very useful and subservient to Trade, for establishing it on a sure and lasting foundation. It not only describes the Nature and Obligation of all manner of private Contracts, and the reciprocal Duties of those who are Parties to them; but it likewise lays down many useful Rules for the Government of Public Companies, and for carrying on Trade and Commerce with Foreign Nations in the most beneficial Manner.247

Yet Strahan’s purpose was not to restore the Admiralty. Rather, like Wood, he sought to make civilian doctrines accessible in a palatable form. Unlike Wood, however, his efforts were directed at policymakers, not students. Domat’s work was an ideal vehicle for this purpose. Les Loix Civiles reproduced the entire civil law system and organized it under modern topic headings. Domat collected Roman law and early civilian commentaries from their many Digest headings and entered them under these topics, together with his comments on the state of the law in contemporary France. To this Strahan added a relatively sparse but informative set of annotations on contemporary English law. Some of Domat’s topic headings, such as “Of Bills of Exchange,” owed far more to the titles of the French Ordonnance of 1675 than to any classical law, which had consequences on certain doctrinal developments.

Strahan commences his “preface” by making some very Duck-like sounds about “use” and utility:

And this is the only Use that is made of the Civil Law in most Countries at this Day; not that they receive it by Virtue of any Power or Authority that the Roman Emperors had to impose their Laws upon other Nations, which Pretence now must be looked upon as very frivolous ever since the Declension of the Roman Empire; but they receive it only as containing the most compleat, if not the only Collection of Rules of Natural Reason and Equity, which may come in Aid of their own Municipal Laws, and serve as a Rule for deciding all Cases wherein their own Laws and Customs are silent.

And in this they do but imitate the Romans themselves, who were not ashamed to take all the Helps and Assistances they could have from

247 W. STRAHAN, supra note 242, at 2-3. There is also a specific mention of Chandos’s role in the so-called “South Sea Bubble” affair.

The indefatigable Pains which Your GRACE has taken to retrieve one of the most profitable Branches of the Trade of this Kingdom, which was in a manner totally lost to the Nation, thro’ the Negligence or rather Treachery, of former Managers, as it is matter of Wonder and Admiration to those who see it more nearly, so it has procured You the universal Love and Esteem of all Your Countrymen.

Id. at 3. For more on Chandos see 1 D.N.B., supra note 41, at 244 (under Brydges, Grey).
other Nations, to render their own Body of Laws the more perfect and compleat.\textsuperscript{248}

But unlike Duck's other successors, Strahan had little interest in civilian jurisdictions.\textsuperscript{249} Rather, Strahan was interested in those English courts in which civil law "has not the force and Authority of Law,"\textsuperscript{250} particularly the equity jurisdiction and forums possessing both legislative and judicial capacity, such as the House of Lords.

I must beg leave to consider how far the Reason and Equity thereof may be of Service in other Courts where it has not the Force and Authority of Law. And I cannot but think that in all Courts of Equity, where the Rigour of the Common Law is to be mitigated by the Rules of Equity, the Knowledge of the Civil Law must be of great Service. For, as I have already observed, it is there, and no where else, that we have the fullest and most perfect Collection of the general Rules of Natural Reason and Equity, applied to all the various Transactions and Intercourses between Man and Man.

And if this Knowledge of the Rules of Reason and Equity can be of Service in the inferior Courts of Equity, it cannot be less useful and necessary in the Supreme Court of Equity of the Kingdom, which is that of the Lords assembled in Parliament. It is to that high Tribunal that the Subjects have Recourse, in order to obtain an equitable Redress of the Grievances which they pretend to have had done them by the Inferior Courts.

And if we consider the said body in their Legislative Capacity, as having under their Direction the arduous matters of State, and especially such as regard the Intercourse between us and other Nations; the Knowledge of the Law of Nations, which is built upon the Civil Law, is absolutely necessary in Deliberations of this Kind, that no Resolutions may be taken in such Matters but what are agreeable to the Principles of the Law of all Nations.\textsuperscript{251}

Strahan also mentioned the Privy Council and emphasized its appellate role for "the English Plantations in America" at the "Isles of Jersey and Guernsey."\textsuperscript{252} The latter, governed by the customs of Normandy, had much use for civil law, and as to the former:

\begin{footnotes}
\footnotetext{248}{W. Strahan, supra note 242, at xii. In company with Duck, Wiseman, Exton, Jenkins and Wood, Strahan also invoked the magic name of John Selden and Selden's \textit{Ad Fletam Dissertatio} (London 1647) to show the age of the civil law influence in England. \textit{Id.} at xiii. For a more extensive discussion of Selden's important role see Coquillette, supra note 21, at text accompanying notes 283-316.}
\footnotetext{249}{See W. Strahan, supra note 242, at xiii.}
\footnotetext{250}{\textit{Id.} at xiv.}
\footnotetext{251}{\textit{Id.} at xiv-xv.}
\footnotetext{252}{\textit{Id.} at xvi.}
\end{footnotes}
Among other Advantages which may be reaped from the Study of the Civil Law, I must not omit to take notice how serviceable it may be in the Government of the English Plantations. For if we consider them with Respect to the Trade and Commerce which they drive in Negroes, the Civil Law furnishes them with an ample Detail of Rules for regulating that Commerce, both as to the buying and selling of Slaves, as a Merchandize, the Property which their Masters have in them, and the Redress which the Slaves ought to have in Case of any cruel or barbarous Usage from their Masters. If we view the said Colonies with regard to their own government within themselves; the Civil Law supplies us with many Precedents of excellent Laws made by the Roman Emperors, for securing the Inhabitants of their Colonies against the Oppressions and Extortions of their Governors. If we consider the said Colonies with respect to their Settlements, and the Intercourses which they are obliged to have with the neighbouring Nations, it is by the Principles of the Civil Law, and the Law of Nations, that they must assert and maintain their rights and Privileges.  

How was Strahan to foresee that these very words would encourage certain colonial leaders to “assert and maintain their Rights and Privileges” against Parliament!

Strahan also discussed the alleged “danger” of civilian learning to “our own Municipal Laws.” He argued that while France and other civilian countries were also jealous of their independent municipal laws, they reaped great advantages from the civil system without jeopardizing their national law. Strahan, like Wood, was not urging any particular doctrinal “reception” or “incorporation,” but rather a form of legal education. As he observed:

253 Id. at xvii. Strahan continued:

And I must observe here in relation to the English colonies upon the Continent of America, that there is a very great Affinity between them and the Colonies of the Spaniards, and other Nations, who have made Settlements among the Indians in those Parts. For the Grants made by our Kings of Tracts of Land in that Country, for the planting of Colonies, and making Settlements therein, appear to have been made in Imitation of the Grants made by the Kings of Spain, to the Proprietors of Lands in the Spanish Colonies, upon the very same conditions, and in consideration of the same Services to be performed by the Grantees. So that the Government of the Spanish Colonies, and the Rights of the Proprietors of Lands therein, depending chiefly on the Rules of the Civil and Feudal Law; as may be seen by the learned Treatise of SOLORZANUS, De Indiarum Jure, the Knowledge of the said Laws must be of service likewise for determining any Controversies that may arise touching the Duties, or Forfeitures, of the Proprietors of Lands in our English Colonies.

Id. at xviii-xix.

254 Id. at xix.
255 Id.
256 As Strahan said:

I have made these few Remarks, only to shew in what Particulars, the Civil Law is, and may be, of use here in England, and how we may reap the same
I was surprized to find, in a Country where all Arts and Sciences do flourish and meet with the greatest Encouragement, that one of the noblest of the human Sciences, and which contributes the most to cultivate the Mind, and improve the Reason of Man, as that of the Civil Law does, should lie so much disregarded, and meet with so little Encouragement.\textsuperscript{257}

The tragedy was that, because of persistent prejudice due to old political and religious fears, this education was becoming isolated in a small group of specialists. Yet it could be useful to all as a resource of legal ideas, ideas that were no more "foreign" than Norman feudalism.

And I observed, that the little Regard which has of late Years been shewn in this Kingdom to the Study thereof, has been in a great measure owing to the Want of a due Knowledge of it, and to the being altogether unacquainted with the Beauties and Excellencies thereof; which are only known to a few Gentlemen who have devoted themselves to that Profession; others who are perfect Strangers to that Law being under a false Persuasion, that it contains nothing but what is foreign to our Laws and Customs. Whereas when they come to know, that the body of the Civil Law, besides the Laws peculiar to the Commonwealth of Rome which are there collected, contains likewise the general Principles of Natural Reason and Equity, which are the Fundamental Rules of Justice in all Engagements and Transactions between Man and Man, and which are to be found no where else in such a large Extent as in the Body of the Civil Law, they will soon be sensible of the infinite Value of so great a Treasure.\textsuperscript{258}

Finally, Strahan noted that his Domat was not for narrow civilian specialists. They would do better to consult original sources. Rather, it was for "[p]ersons who have neither Opportunity nor leisure, to read over the whole Body of the civil law, [but who] may find here the Marrow and substance of it, which will be sufficient for the Generality of Readers."\textsuperscript{259} He explained that his book should be used for comparative purposes and he emphasized the particular value of examining those laws that were clearly not English:

And even as to those Rules of the Civil Law which do not exactly tally

\begin{footnotes}
Advantages from it which other Nations do, without any Danger to our own Municipal Laws. Our Ancestors were so sensible of the great Importance thereof, both in private and public Affairs, that, besides the public Professors established in the Universities for teaching this Science, and who have Salaries allotted them by the Beneficence of our Princes, many of the private Founders of Colleges have in their Endowments set apart particular Fellowships, as an Encouragement to Persons to study it.

\textit{Id.}\textsuperscript{257}  \textit{Id.}\textsuperscript{258}  \textit{Id.} at xix-xx.  \textit{Id.} at xx.
\end{footnotes}
with the Laws and Usage of this Country; altho’ they are not to be looked upon as Law with us, yet it may be of Service to us to know what were the Sentiments of the greatest Lawyers that flourished under the Roman Empire in such Matters wherein we happen to differ from them; because it is chiefly from the Knowledge to the Laws of other States that we can learn to supply what is wanting, or reform what is amiss in our own.\footnote{256}{\textit{Id.} at xx-xxi.}

Strahan’s Domat had a tremendous influence. It addressed Wood’s thesis that the true “incorporation” occurred in the minds of educated lawyers, and it provided a practical vehicle for busy common lawyers, politicians, statesmen, and merchants to learn, not only about Roman law, but about the latest French doctrines, including those of the Ordonnance of 1675 and of continental bills of exchange. It also provided a source of parallel English rules from both the common law and civilian courts.\footnote{256}{Strahan’s English law annotations alone would make a complete study. Particularly interesting are his annotations on civilian process, bankruptcy, and succession. See W. \textsc{Strahan}, \textit{supra} note 242, at 439, 499, 531, 698. We will later specifically examine Strahan’s annotations on commercial contracts, secured transactions, and hypothecation. See \textsc{Coquillette}, \textit{supra} note 21, at text accompanying notes 219-33.}

That Strahan did not direct his translation to the specialist English civilian practitioners in Doctors’ Commons reflects his sense that this audience was quickly becoming relatively unimportant. He was clearly right.\footnote{256}{This is not to denigrate what I would term the “final flowering” of civilian jurisprudence—the specialist jurisprudence of Sir William Scott, Lord Stowell (1745-1836), Arthur Browne (1756?-1805), and Stephen Lushington, D.C.L. (1782-1873). Maitland has called this the “short St. Martin’s summer” of the Admiralty. \textsc{See} F. \textsc{Maitland}, \textit{Roman Canon Law in the Church of England 97} (1898). L.S. Sutherland has called “the development of Prize Jurisdiction, the last gift of the old Civil Law to the legal organization of England.” \textsc{Sutherland, supra} note 105, at 170. Although much of this last civilian writing was judicial opinion in prize cases, they had an important impact on what Wiswall called “The [Admiralty] Court Under Common Lawyers.” \textsc{F. Wiswall, Jr., supra} note 146, at 96-154. I hope someday to write on these last civilian jurists, but no one would argue that they attempted to influence the mainstream of English legal thought. On the contrary, their influence peaked, ironically, as their specialty jurisdiction was finally devoured forever by the common law bar. I will argue that the final expansion of the admiralty jurisdiction by statute in the nineteenth century occurred when the extinction of the civilians as a professional group became increasingly certain, and the ideological differences that made the civilian jurists interesting had vanished. See \textit{supra} note 244.}

\footnote{256}{See \textit{e.g.}, J. \textsc{Story}, \textit{Commentaries on the Law of Bills of Exchange} 3 (Boston 1843); \textit{see also} J. \textsc{Marvin}, \textit{Legal Bibliography} 271 (Philadelphia, 1847).}
mance . . . his works were the first successful attempt to reduce to order the Civil Laws of France and their authority is still invoked throughout the civilized world." 265 But Strahan’s most important admirer was William Murray, Lord Mansfield. 266 The utilitarian structure in Strahan’s Domat suited Mansfield’s jurisprudence and judicial style. Through the efforts of Mansfield, and his rather skeptical admirer, Jeremy Bentham, this utilitarian emphasis was to have a profound effect. 267

C. John Ayliffe, LL.D [Deprived] (1676-1732): The Eccentric, Pistol-Whipping, Whig Pandectist

It is oddly appropriate to end this saga of the Restoration civilians with a discussion of a man who was somewhat crazy, a kind of wild and eccentric version of Thomas Wood. John Ayliffe, like Wood, was a fellow of New College. Although his entire life centered around Oxford, it would hardly do to characterize Ayliffe as “devoted” to the university, for he was a fanatic Whig when Oxford was Tory, and a man who engaged in such violent controversy within Oxford that he was ultimately expelled and deprived of all privileges and degrees. 268

Ayliffe’s academic credentials as a civilian were excellent, although technically revoked. He had practiced as a proctor in the Chancellor’s court, a civil law jurisdiction, and he claimed that, had he not been an avowed Whig,

265 J. Marvin, supra note 264, at 271.
266 See Coquille, supra note 21, at text accompanying notes 710-73; see generally Rodgers, Continental Literature and the Development of the Common Law by the King’s Bench c. 1750-1800, in COMPARATIVE STUDIES IN ANGLO-AMERICAN LEGAL HISTORY (K. Noerr ed. 1987, forthcoming); Birks, English and Roman Learning in Moses v. Macferlan, 37 LEGAL PROBS. 1984 at 1.
267 See Coquille, supra note 21, at text accompanying notes 726-73. “We have seen that Arbitrary Laws, whether they be established by those who have the Right to make Laws, or by some Usage and Custom, are always founded upon some Usefulness, either to prevent, or put a stop to Inconveniences . . . .” W. Strahan, supra note 242, at lxxv.
268 The best account of Ayliffe’s scholarly achievements is George P. Macdonell’s extensive note in 1 D.N.B., supra note 41, at 63. Of course, as to the full flavor of his academic controversies, the best sources are Ayliffe’s own polemic publications. See THE CASE OF DR. AYLIFFE AT OXFORD (London 1716), reprinted in 1716 GENTLEMAN’S MAGAZINE 646; THE ANCIENT AND PRESENT STATE OF THE UNIVERSITY OF OXFORD (London 1714); see also 12 W. Holdsworth, supra note 41, at 610-12, 641-42 (2d ed. 1938); 15 id. at 324 (4th ed. 1965).

The similarities with Thomas Wood actually include a proclivity for becoming engaged in university controversy. In Wood’s case, it was his defense of his famous uncle, Anthony Wood, who was accused of libeling the Earl of Clarendon in 1692. See supra note 225.
he would have achieved regular church preferment "succeeding to some chancellorship or other." But in 1714 he published a literary bombshell, *The Ancient and Present State of the University of Oxford*, in which he accused both the present and former Vice-Chancellors of misappropriating the funds of the Clarendon printing house, sparking immediate outrage. Ayliffe would not withdraw the charges, and when hauled before the university court, he expressed only his regret that the accusations had not been made more directly.

The book was an unabashed Whig attack. In it, Ayliffe criticized almost every element of what he regarded as a corrupt and prejudiced institution. He found that the quality of the students at his own college had degenerated "through the supine negligence of a late warden, and the discouragements arising from domestick quarrels, and forgetfulness of such as owe some gratitude to the memory of a munificent founder." Ayliffe's charges were, in large part, true: Oxford was in a serious state of decline. He did, however, acknowledge that his threat to "pistol" the Warden, a threat he did not regret, was a legitimate cause for discipline. He scornfully reasserted all the other charges in a 1716 pamphlet called *The Case of Dr. Ayliffe at Oxford*, which still makes great reading.

Ayliffe was hardly a champion of the civil law on a par with Sir Leoline Jenkins, Secretary of State, Member of Parliament, and Principal of Jesus College. Yet while poor Ayliffe could barely stay out of jail, he nevertheless wrote what is still "the most elaborate treatise on modern Roman law written in English," the *New Pandect of the Civil Law*. The book was never finished, and was only published two years after Ayliffe's death in 1732. In his own words, this was a project of "upwards of Thirty Years Study, and a painful Industry," and it has not always been praised. Arthur Browne, in his *Compendious View of the Civil Law*, observed that "Ayliffe's work, though learned, is dull and tedious, and stuffed with superfluous matter, delivered in a most confused manner." But I respectfully disagree.

Browne sought to create successor volumes to Wood's treatise on civil

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269 1 D.N.B., *supra* note 41, at 63.

270 It was republished in 1723.

271 *The Ancient and Present State* was actually, in large part, an abridgement of Anthony Wood's *The History and Antiquities of the University of Oxford*, the same book that Thomas Wood had so enthusiastically defended. See *supra* notes 225, 227 & 268. Oxford civilians just could not stay away from university fights!

272 1 D.N.B., *supra* note 41, at 63.

273 J. AYLIFE, *NEW PANDECT OF THE CIVIL LAW* (London 1734). Ayliffe died before he could begin a planned second volume or even an index to the first volume. The lack of an index concerned, among others, John Adams: "Borrowd Ayliff, but there is no Table and could find nothing about the subject." Coquillette, *supra* note 13, at 395.


law, and to the works of Exton, Zouche, and Godolphin on the Admiralty.\textsuperscript{276} Ayliffe, however, was unlike any of these civilian forebears. He was a true scholar, a student of the civil law as a legal system entirely for academic purposes. He was the precursor of the distinguished, classical Rome law studies of the modern English universities, and his work has rightly been described as “comprehensive and scholarly,” “of high authority,” “designed as much for the politician and the diplomat as for the lawyer,” and “[b]y far the most learned of [eighteenth-century] works on Roman law.”\textsuperscript{277}

Ayliffe himself made this academic emphasis clear. In his “Preliminary Discourse touching the Rise and Progress of the Roman Civil Law,” which introduced the \textit{New Pandect}, he made only a few obligatory gestures toward the universal and continuing importance of the “Law of Laws,” paraphrasing Wiseman and Wood:\textsuperscript{278} He certainly was puzzled by the fate of the civil law in England:

But here in \textit{England} (I know not for what Reasons) great discouragement has been given to the procession hereof, for almost an hundred and fifty Years together, (I mean, from the latter End of Queen Elizabeth’s Reign down to the present Age we now live in); which has made it not only the wonder of all our Neighbours, how this Nation has been able to support itself in that Grandeur it has appear’d during this Period of Time but it has more than a little surpriz’d some of them to see it subsist at all under any Figure and Dominion abroad, in point of National Interest, being overmatch’d in Dexterity of Wit and Cunning by some of them, in the Art of forming Leagues and Alliances; in the deep Skill and Knowledge of foreign Traffick by others, whilst we would settle Tariffs, and other Parts of Commerce with them; and, lastly, (what is a sad Truth to own) excelled in human Wisdom and Policy by all with whom we have had to do in the laborious and mystical Part of negotiating Treaties of Peace, and concluding other differences (upon Arbitration) referred to us, between Nation and Nation, concerning the Right to Kingdoms and Principalities, transferred either by Donation, Succession, or Last Will and Testament, Etc.\textsuperscript{279}

\textsuperscript{276} 1 \textit{id.} at ii; 2 \textit{id.} at v.  
\textsuperscript{277} See 15 W. \textit{Holdsworth, supra} note 41, at 324 (3d ed. 1965); 12 \textit{id.} at 611-12, 641-42 (2d ed. 1938); D. \textit{Walker, supra} note 41, at 103. As Holdsworth put it, “But though Ayliffe was a hot-tempered man and destitute of tact, he was very learned.” 12 W. \textit{Holdsworth, supra} at 611. As to the \textit{New Pandect}, “no other book of equal learning or comprehensiveness was published by an English writer in this century.” \textit{Id.} at 642. In addition to the \textit{New Pandect}, Ayliffe wrote a treatise on canon law, apparently for his own use while a practitioner in the ecclesiastical courts. \textit{Parergon Juris Canonici Anglicani} (London 1726). It “has always been regarded as a book of great authority” and was reprinted in a second edition in 1734. 12 W. \textit{Holdsworth, supra} at 611-12.  
\textsuperscript{278} J. \textit{Ayliffe, supra} note 273, at i-ii (entitled “A Preliminary Discourse Touching the Rise and Progress of the Roman Civil Law”).  
\textsuperscript{279} \textit{Id.} at ii.
Ayliffe also made a sympathetic gesture toward the merchants, whom he believed were "wretchedly deceiv'd and at a Loss by all their foreign dealings and Transactions." There was no evidence, however, that he knew, or even cared to know, the slightest thing about contemporary commerce.

Ostensibly, the New Pandect was for students, the same students about whom Ayliffe had expressed such grave misgivings in his The Ancient and Present State of the University of Oxford. It is clear, however, that Ayliffe's misgivings about this audience were not entirely from his mind:

For my full Aim has been in the compiling this Work to deliver Things in a plain and easy Manner, without the Disguise of Terms and hard Words, with which our Books of the Common Law are largely filled, to the great Discouragement of young Students: And this I have done, that I may induce the young Nobility and Gentry of this Kingdom, for whose Service and Entertainment these Sheets are chiefly written, to take a Delight in regarding the same, whereby they may qualify themselves for the highest matters in Civil Government, and improve those Hours, which are too often, in this Age, consum'd in Riots and vain Pleasures.

As a students' text, this immense tome was a disaster. Two concise and simplistic works, Wood's A New Institute and Taylor's Elements of the Civil Law, remained the vain and riotous students' friends; Ayliffe, the eccentric recluse of New College, was never their favorite.

But Ayliffe had in mind another purpose and audience for the New Pandect. He lamented the view, which he found prevalent on the continent, that there was practically no civil law in England. The truth, as Strahan and Selden had emphasized, was far different. While it "is true, that the Common and Civil Laws had not the same root and stock; yet, by Inoculating and Grafting, the Body at Branches seem at this Day to be almost of one Piece." The problem was that England had not produced a great commentator:

And there are some French Writers of Distinction too, who aver, that the Civil Law is not in Use here in England. But this Error is easily accounted for; since they have seen no British Commentators on the Roman Law, which has been common to all other Nations; And as our Law-books are written in a Language unknown to them, they cannot learn what Use the Roman Law has among us.

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280 Id. at iii.
281 Id.
282 See infra note 291.
283 J. AYLIFFE, supra note 273, at xlvii. It was just like Selden's famous "ship" of law, with hardly any original timber left. See supra note 238; Coquillette, supra note 21, at text accompanying notes 278-316.
284 Id. at xlvi.
Ayliffe sought to become this first great British commentator.

The tragedy of the New Pandect was that it was never finished. It also lacked an index. Even John Adams lamented that!285 Still, it remains a formidable treasure trove of scholarship, accessible to those with an elementary knowledge of civil law and substantial patience. For this writer, and many others, Ayliffe has ultimately proven a true and valuable companion.286

Further, the New Pandect became a surprisingly common source of authority both inside and outside of traditional civilian jurisdictions.287 This would not have astonished Ayliffe:

If there is that wide Difference between the Common and Civil Laws, in their Forms of Pleading, and Manner of Trial, this is only the Stile, Practise, and Course of the Courts: But there is a Mixture in the Principles, Maxims, and Reasons of these two Laws; and indeed, the Laws of all Countries are mixed with the Civil Law, which have arrived to any Degree of Perfection.288

Furthermore, certain chapters, like the one entitled "Of Bankers, and the Exchange of Money," are concerned more with modern civilian doctrines than with classical ones, although all of Ayliffe's chapters are heavily annotated with Roman references.289 Ayliffe's description of the Italian develop-

285 See supra note 273; see also 2 John Adams, Diary 56 (L. Butterfield ed. 1964); 2 Legal Papers of John Adams 104 (L. Wroth & H. Zobel eds. 1965).
286 For example, Ayliffe correctly caught William West's indiscretions in the Symboleography, saving its misuse as evidence of contemporary English contract law:

But many of our Common Lawyers are apt to think that this is all their own from the Beginning, because they are in Possession of, and find it at present in their Books. But Fleta and Bracton, and the most ancient of their Writers, would look very naked, if every Roman Lawyer should pluck away his own Feathers. Of late my Lord Coke has frequently and in express Terms made use of the Maxims of the Civil and Canon Laws, and has taught the Way of Arguing from such Rules to others. But Mr. West having Occasion, in his Book of Precedents, to give a general Account of Obligations, Contracts, Offences, Etc. has unskilfully epitomized and translated the Account from Herm. Vulticius (i), and pass'd it off for the pure Common Law of England.

J. Ayliffe, supra note 273, at xlvii.

287 See Coquillette, supra note 21, at text accompanying notes 234-45. Ayliffe's treatment of bills of exchange attracted particular attention, and it was hardly a "classical subject." See id.; 12 W. Holdsworth, supra note 41, at 642 (2d ed. 1938).

"The treatise [New Pandect], is based primarily on the Code and Digest, to which full references are given; but the works of the modern civilians and classical authors are not neglected." Id.

288 J. Ayliffe, supra note 273, at xlvii.
289 Id. at 501-05.
ment of bills of exchange was written to interest a Mansfield, an Adams, or a Story, as indeed it did.289

But in the end, Ayliffe was really a symbol of a completely different development—the renaissance of true classical Roman law studies in the British universities.291 Long after Doctors’ Commons was paved under Queen Victoria Street, that civilian tradition has continued to flourish in the great works of Jolowicz, Buckland, De Zulueta and in the works of their distinguished heirs today, such as Nicholas, Stein, Watson, and Honore. Ayliffe, the pistol-whipping don of New College, could not resurrect the professional fortunes of British civilians, but he was a pioneer of serious modern Roman law studies in England. Among the students of his New Pandect would be the likes of Mansfield, Adams, and Story, true giants of Anglo-American law and government.

V. CONCLUSION: “THE FOURTH GENERATION”

Thomas Wood, William Strahan, and John Ayliffe were not, of course, the only civilian jurists of the “fourth generation,” but they were by far the most important. Wood retreated in 1704 from the professional and jurisdictional struggles of London to the traditional civilian sanctuary of university legal education. In so doing, he turned his back on the civilian specialists and strove, via his lucid and simplistic A New Institute, to influence common lawyers by education alone. Strahan’s translation of Domat continued this effort, providing a magnificent resource for English lawyers in what was clearly Europe’s best systematic statement of civil law, updated and annotated to the laws of France and England.292 That this would be a great tool for

289 See supra notes 244, 273, 285; Coquillette, supra note 21, at text accompanying notes 234-45.

291 There is really no comparison between the thoroughness and the scope of Ayliffe’s New Pandect and the abbreviated simplifications of Wood’s A New Institute or other concise works, such as S. Hallifax, Analysis of the Civil Law (London 1744), or J. Taylor, Elements of the Civil Law (London 1755). Other contemporary English civilian works, such as R. Eden, Jurisprudentia Philologica (London 1744), and the curious, anonymous A Dissertation on the Law of Nature, the Law of Nations, and the Civil Law in General (London 1723), were, like Domat’s treatise, more interested in new theoretical systems than in the detailed description of an historic system that Ayliffe achieved in the New Pandect.

292 Of course, Strahan was unable to identify every digression from civil law usages in England and those of France or of the traditional ius gentium. Strahan candidly acknowledged this:

I must here caution the English Reader, that he is not to expect to find barely in this Collection those general Rules and maxims of Natural Reason and Equity which I have before mentioned, and which are received as Law in all Countries. He will besides meet with many particular Rules of the Civil Law, which are received as Law in France, and which are different from the Law and Usage of England. For the Author of this Collection having proposed to himself to extract out of the Body of the Civil Law all the Rules thereof which were agreeable to
future jurists such as Mansfield and Story was inevitable. Strahan also
directed his work at political policy makers, including the legislators of the
English Colonies. But few could have anticipated the impact that his Domat
would have on an Adams or a Jefferson.293

Wood and Strahan saw a new way to civilian influence, by addressing their
new works to the common lawyers’ use. Thus, they turned their backs on
the surviving specialist civilian enclaves in London, and acknowledged the
dominance of the common lawyers. Ayliffe reacted to defeat in another way.
Turning away from all law practice and practical adaptation, he became a
pioneer of the great modern tradition of scholarly civilian studies within the
English universities. The new directions of these “fourth generation” civil-
ians were both wise and prophetic.294 Their juristic successes—whether
achieved by Wood’s and Strahan’s methods or by Ayliffe’s—would survive
long after the English civilians as a profession were gone, and all that
remained of Doctors’ Commons was a blue plaque on the side of London’s
central telephone exchange.295

the Law of France, or which might any way serve to illustrate the same; and my
Intention being to give the Reader a true and perfect Translation of the whole
Work, I did not think myself at Liberty, either to alter, or to leave out any Part
thereof."

... Neither is it to be expected, that in this Translation I should make so large a
Digression, as to point out all the minute Differences between the Rules of the
Civil Law collected in this Book, and the Laws and Usage in England; which
would be to exceed too far the Bounds of a Translation, and swell the Work into
too great a Bulk.

W. STRAHAN, supra note 242, at xx-xxi. This inevitable mixture of authority in
Strahan’s edition of Domat, so widely used by the likes of Adams and Mansfield,
certainly was a vehicle for the reception of ideas, deliberate or not. See supra notes
242-44 & 266.

293 See supra note 244 and text accompanying notes 263-67.

294 Indeed, one of Strahan’s goals was precisely that of modern English Roman law
courses; introducing the student and the layperson to the elegance of Roman law as
Latin prose:

In this Translation I have set down at the End of each Article the Latin Texts
of Law, in the very Words as they are transcribed out of the Books of the Civil
Law; it being no ways necessary to put them into English, because the Sub-
stance of them is contained in the English Article, to which the Latin Texts are
subjoined, as the Authorities in Law upon which the English Article is grounded.
And besides, the preserving the Latin Texts of Law in their Original, will have
this Advantage, that it will give the Reader who has not had an Opportunity of
looking into the Body of the Civil Law, a Taste of the Beauty and Elegance of the
Style of the Roman Lawyers ... .

W. STRAHAN, supra note 242, at xxi.