

## ADAM SMITH AT THE CONSTITUTIONAL CONVENTION

*Iain McLean & Scot M. Peterson\**

### **Abstract**

Adam Smith is not referred to in the records of the U.S. Constitutional Convention of 1787, but he indirectly influenced the substance of the framers' decisions on several matters, especially the Establishment and Free Exercise Clauses of the First Amendment.

We argue that good grounds exist for the founders' failure to make explicit reference to Smith during the debates in Philadelphia: he had alienated political leaders in Britain and the United States. Nevertheless, his hand is present in the instigation of the American War for Independence, whether the cause be taken as taxes or the Quebec Act 1774, and in British plans for after the war. Smith's intellectual heritage—and that of the Scottish Enlightenment—defines the positions of the leading constitutional thinkers concerning religion: James Madison and Thomas Jefferson. Madison's Memorial and Remonstrance and Jefferson's 1802 letter to the Danbury Baptist Association ("wall of separation between church and state") carry Smith's theme to its logical end, not just as political rhetoric but as a matter of principle. The invisible hand of Adam Smith did more to shape the Establishment and Free Exercise Clauses than those of, for instance, Richard Hooker, Roger Williams, or James Burgh.

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\* Iain McLean: Nuffield College, Oxford OX1 1NF, UK, iain.mclean@nuffield.ox.ac.uk. Scot M. Peterson: Balliol College, Oxford, OX1 3BJ, UK, scot.peterson@politics.ox.ac.uk. Corresponding author: IM. With thanks to attendees at the Constitutional Political Economy conference, ICER, Turin, June 2007; the American Political Science Association annual meeting 2007, the Smith in Glasgow conference and the Morrell Seminar in Political Theory, University of York, both in 2009, for comments on earlier versions of the paper; and to Martin Clagett for information on William Small and Jay Sexton on the North American colonies.

## INTRODUCTION

Adam Smith was not present at the Philadelphia convention of 1787.<sup>1</sup> No delegate there seems to have referred in the debates either to Adam Smith's *Theory of Moral Sentiments*<sup>2</sup> or to his *Wealth of Nations*,<sup>3</sup> both of which include a full discussion of United States politics, nor is he referred to in the standard selections of letters, commentaries, and speeches in state ratifying conventions. The online *Founders' Constitution*<sup>4</sup> contains one very relevant extract from *The Wealth of Nations*: Smith's argument against David Hume that liberty is best secured by religious pluralism, not by an established church.<sup>5</sup> But the editors of the *Founders' Constitution* do not trace the link from Smith to the Constitution, specifically to the Establishment and Free Exercise Clauses of the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .<sup>6</sup>

This Article aims to fill that gap,<sup>7</sup> drawing on earlier work that has attempted to restore Smith to his rightful place.<sup>8</sup> Fleischacker shows that the *Wealth of Nations* was taken up more rapidly in public policy discussions in the United States than anywhere else. McLean starts the task of enumerating the links from Smith to Madison and Jefferson, which this Article further develops.

David Hume did not fare much better at Philadelphia. Using the same sources, we have found only one citation of Hume by a Philadelphia delegate, viz., Alexander Hamilton. Hamilton's speech on the twenty-

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1. Adam Smith never traveled to America, and he was ineligible to attend the conference, not having been elected as a representative.

2. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., Clarendon Press 1982) (1759). All citations to works of Adam Smith are to the standard Glasgow edition of his works, which have been reprinted in the United States by Liberty Fund, Inc. The entire works are available online in pdf format at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Fperson=44&Itemid=28](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Fperson=44&Itemid=28).

3. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (R.H. Campbell, et al. eds., Liberty Fund, Inc. 1981) (1776) [hereinafter *WEALTH OF NATIONS*].

4. *THE FOUNDERS' CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., online ed. n.d.), <http://press-pubs.uchicago.edu/founders/> [hereinafter *FOUNDERS' CONSTITUTION*].

5. [Amendment 1 (Religion)] *FOUNDERS' CONSTITUTION*, *supra* note 4, at document 31.

6. U.S. CONST. amend. I.

7. No reference to Smith is captured in Max Farrand's indices to *The Records of the Constitutional Convention*. See generally *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1911).

8. See, e.g., IAIN MCLEAN, *ADAM SMITH, RADICAL AND EGALITARIAN: AN INTERPRETATION FOR THE TWENTY-FIRST CENTURY* (2006); SAMUEL FLEISCHACKER, *Adam Smith's Reception Among the American Founders, 1776-1790*, 59 WM. & MARY Q. 897 (2002).

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second of June was précised by two note-takers, Yates and Madison. Robert Yates' précis, the fuller of the two, has Hamilton say:

Mr. [Nathaniel] Gorham [MA]. I move that after the words, *and under the national government for one year after its expiration*, be struck out . . . . [Gorham's amendment would have permitted Congressmen to hold posts in the executive. It failed in a tied vote 4/4]

. . . .

Mr. Hamilton. In all general questions which become the subjects of discussion, there are always some truths mixed with falsehoods. I confess there is danger where men are capable of holding two offices. Take mankind in general, they are vicious—their passions may be operated upon. We have been taught to reprobate the danger of influence in the British government, without duly reflecting how far it was necessary to support a good government. . . . Hume's opinion of the British constitution confirms the remark, that there is always a body of firm patriots, who often shake a corrupt administration. Take mankind as they are, and what are they governed by? Their passions. There may be in every government a few choice spirits, who may act from more worthy motives. One great error is that we suppose mankind more honest than they are. Our prevailing passions are ambition and interest; and it will ever be the duty of a wise government to avail itself of those passions, in order to make them subservient to the public good—for these ever induce us to action. Perhaps a few men in a state, may, from patriotic motives, or to display their talents, or to reap the advantage of public applause, step forward; but if we adopt the clause we destroy the motive. I am therefore against all exclusions and refinements, except only in this case; that when a member takes his seat, he should vacate every other office.<sup>9</sup>

This may be read as an appeal to Hume's "just *political* maxim, *that every man must be supposed a knave*: Though at the same time, it appears somewhat strange, that a maxim should be true in *politics*, which is false in *fact*."<sup>10</sup> The public choice tone of Hume's maxim fits both Hamilton's and Madison's thought at the time.

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9. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 379, 381-82; *see also* [Article 1, Section 6, Clause 2] FOUNDER'S CONSTITUTION, *supra* note 4, at document 1. Gorham's amendment would have permitted Congressmen to hold posts in the executive. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 382. It failed in tied vote 4/4. *Id.*

10. DAVID HUME, *Of the Independency of Parliament*, in HUME POLITICAL ESSAYS 24 (Knud Haakonssen ed., 1994) (1741).

A single citation of Hume and zero citations of Smith seem to imply that those towering figures of the Scottish Enlightenment had little influence on moral and political debate in America between 1787 and 1791. We argue, however, for their strong indirect influence.

**‘VERY ZEALOUS IN AMERICAN AFFAIRS’: NO WONDER THEY  
DIDN’T QUOTE ADAM SMITH AT THE CONSTITUTIONAL  
CONVENTION**

Smith’s patron, the Duke of Buccleuch, told Hume that Smith was “very zealous in American affairs” in 1776; Hume promptly passed the phrase back to Smith.<sup>11</sup> Elsewhere we have presented evidence of Smith’s zealous activity as a political adviser to three British government ministers who dealt with America: Charles Townshend, Lord Shelburne (probably), and Alexander Wedderburn.<sup>12</sup> The following section summarizes this evidence and implies that politicians in both the United States and the United Kingdom were certainly familiar with Smith’s writings but that his unpopular positions on the political questions of the day made him an unlikely source of authority in constitutional debate.

**THE DUKE OF ARGYLL AND CHARLES TOWNSHEND**

The political patron of Scotland in Smith’s youth and middle age was Archibald Campbell, Lord Ilay, later third duke of Argyll (1682-1761).<sup>13</sup> Smith entered Lord Ilay’s patronage network at an early age, perhaps during a visit in 1741 to one of the Argyll family estates in Adderbury, Oxfordshire.<sup>14</sup> Argyll was also a patron of Glasgow University, and Smith, who in modern parlance might have been described as a dean or provost of Glasgow University, tried to meet him in 1751 on university business.<sup>15</sup> He visited the remote ducal seat at Inveraray, three days’ travel from Glasgow, in 1759.<sup>16</sup> After a gap, Argyll was succeeded as Scottish political manager by two men of more modest origins: Alexander Wedderburn (1733-1805),<sup>17</sup>

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11. Letter from David Hume to Adam Smith (Feb. 8, 1776), in ERNEST CAMPBELL MOSSNER & IAN SIMPSON ROSS, *THE CORRESPONDENCE OF ADAM SMITH* 185, 186 No. 149 (2d ed. 1987).

12. MCLEAN, *supra* note 8, at 18-23.

13. Alexander Murdoch, *Archibald Campbell, third duke of Argyll (1682-1761)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (online ed. Jan. 2010), <http://www.oxforddnb.com> (subscription required to view biography) (last visited March 1, 2010).

14. IAN SIMPSON ROSS, *THE LIFE OF ADAM SMITH* 74-75 (1995).

15. ROSS, *supra* note 14, at 113.

16. *Id.* at 139.

17. Alexander Murdoch, *Alexander Wedderburn, first earl of Rossllyn (1733-1805)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 13. Wedderburn was also Lord Loughborough.

and Henry Dundas (1742-1811).<sup>18</sup> Smith knew them both, the first intimately.<sup>19</sup>

Through the Argyll connection, Smith entered both political and noble circles. The politician Charles Townshend (1725-1767), who according to Hume “passe[d] for the cleverest Fellow in England,”<sup>20</sup> was married to Lady Caroline Scott, a sister of the second duke of Argyll, Ilay’s elder brother.<sup>21</sup> Lady Caroline’s previous husband, who predeceased his father, had been the heir to Scotland’s other biggest landowner, the second duke of Buccleuch.<sup>22</sup> Townshend was therefore the stepfather of the young (third) duke of Buccleuch. Smith became tutor to the third duke in 1761.<sup>23</sup> Smith remained on the Buccleuch payroll for the rest of his life,<sup>24</sup> which gave him financial independence and access to policymakers. Smith was thus a highly connected political operative in the close-knit circles of eighteenth-century Britain.

From the early 1760s, Townshend decided that the American colonists should bear a larger share of the costs of their defense.<sup>25</sup> The imperial powers—Britain and France—fought the Seven Years’ War (1756-1763) at the outer fringes of their empires—Canada and India—using, in part, proxy warriors such as Native Americans and Indian princes.<sup>26</sup> The British victories in Canada under General Wolfe in 1759 removed a French tourniquet over American colonial expansion.<sup>27</sup> Before the war, the French had laid claim to the entire territory from the Great Lakes down the Ohio, Illinois, and Mississippi valleys to New Orleans.<sup>28</sup> Their key stronghold, on

18. Michael Fry, *Henry Dundas, first viscount Melville (1742-1811)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 13.

19. Smith corresponded with Wedderburn concerning David Hume’s death in terms that can only be described as intimate. *See infra* note 130 and accompanying text.

20. Letter from David Hume to Adam Smith (Apr. 12, 1759), in MOSSNER & ROSS, *supra* note 11, at 33 No. 31.

21. Peter D.G. Thomas, *Charles Townshend (1725-1767)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 13.

22. *Id.*; *see also* Rosalind K. Marshall, *Caroline Townshend, suo jure Baroness Greenwich (1717-1794)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 13.

23. ROSS, note 14, at 195-96.

24. Letter from Adam Smith to John Craigie (June 26, 1767), in MOSSNER & ROSS, *supra* note 11, at 130 No. 106 n.2; *see also* Letter from Adam Smith to Andreas Holt (Oct. 26, 1780), in MOSSNER & ROSS, *supra* note 11, at 249-53 No. 208.

25. *See* Thomas, *supra* note 21; *see also* L. B. NAMIER & JOHN L. BROOKE, CHARLES TOWNSHEND 129 (1964).

26. ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, at 6-9 (rev. ed. 2005).

27. NORMAN SCHOFIELD, ARCHITECTS OF POLITICAL CHANGE: CONSTITUTIONAL QUANDARIES AND SOCIAL CHOICE THEORY 71-75 (2006).

28. ALAN TAYLOR, AMERICAN COLONIES: THE SETTLEMENT OF NORTH AMERICA TO 1800,

the Ohio River in modern Pennsylvania, was Fort Duquesne.<sup>29</sup> On capture by the British it was renamed Fort Pitt in honor of the wartime Prime Minister Pitt the Elder; it is now Pittsburgh.<sup>30</sup>

But the expensive campaign, led by American born British officers such as Major George Washington, was funded entirely by the British taxpayers,<sup>31</sup> who benefited only indirectly. The direct beneficiaries were the colonists; not only had the French tourniquet been removed, but British troops on the frontier protected the colonists' westward drive for new land from the Native Americans, whom they displaced.<sup>32</sup> Townshend wished to end the colonists' free ride. In July of 1766, Pitt, now the earl of Chatham, appointed Townshend Chancellor of the Exchequer.<sup>33</sup> At that time, Townshend started to use Smith as a special adviser.<sup>34</sup> They worked together on the finances of the "Sinking Fund," which was a scheme to balance the public debts incurred during wars with surpluses to be built up in times of peace.<sup>35</sup> Townshend's calculations, corrected by Smith, showed that the Sinking Fund was then building up too slowly to achieve this; therefore Townshend concluded that he needed to raise taxes and to raise the yield of existing taxes by reducing smuggling in order to increase the tax yield by a total of £400,000 per annum.<sup>36</sup> He went on, "I will add to these a *real* American Revenue."<sup>37</sup>

Townshend presented his budget in March 1767, including his proposals for a *real* American revenue.<sup>38</sup> He would get his American revenue by imposing a duty on British goods landed in the colonies, including, ominously, tea.<sup>39</sup> He took powers to impose these taxes directly on the state of New York, whose legislative assembly he suspended on the grounds that it had failed to pay its local militia costs.<sup>40</sup>

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at 364 (2001).

29. ALAN TAYLOR, AMERICAN COLONIES: THE SETTLEMENT OF NORTH AMERICA TO 1800, at 429-31 (2001).

30. MIDDLEKAUFF, *supra* note 26, at 9.

31. *Id.* at 56-57.

32. SCHOFIELD, *supra* note 27, at 76.

33. J. STEVEN WATSON, THE REIGN OF GEORGE III, 1760-1815, at 120-21 (1964).

34. ROSS, *supra* note 14, at 222.

35. See Letter from Charles Townshend to Adam Smith (1766), in MOSSNER & ROSS, *supra* note 11, at 328-34 No. 302.

36. *Id.*; see also W. R. SCOTT, *Adam Smith at Downing Street, 1766-7*, 6 ECON. HIST. REV. 79 (1935).

37. Letter from Charles Townshend to Adam Smith (1766), in MOSSNER & ROSS, *supra* note 11, at 328-34 No. 302 (emphasis added).

38. MIDDLEKAUFF, *supra* note 26, at 149-51.

39. *Id.* at 155-56.

40. *Id.*

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Townshend's duties led to the Boston Tea Party (1773) and the outbreak of war in 1775. Townshend did not live to see this, as he died suddenly in September 1767.<sup>41</sup> Adam Smith, however, did. This led C. R. Fay to comment, "[I]n the last analysis it was professional advice which lost us [the UK] the first empire."<sup>42</sup> From Smith's other writings it is amply clear that Smith shared Townshend's view that the colonists were taking a free ride on the public good of their defense and that this should stop. So Smith advised his old friend Wedderburn, when the latter was Solicitor-General, in 1778.<sup>43</sup> He also took this position in the long chapter on colonies in Book IV of *The Wealth of Nations*.<sup>44</sup>

However, the tea duties did not conform to the canons of taxation that Smith sets out in Book V of the *Wealth of Nations*.<sup>45</sup> They served Townshend's vested interest. He was a speculator on his own account in East India Company stock, even while serving as Chancellor of the Exchequer, a feat which managed to excite even contemporary commentators at a time when this sort of thing was commonplace.<sup>46</sup> The tea duties also benefited the East India Company, because they helped to protect its monopoly of tea re-exportation to America. Third, they bypassed the state legislatures, which should be responsible for funding the expenditure from which they benefit, and whose ambition should be encouraged by making them responsible for serious decisions rather than "piddling for the little prizes which are to be found in what may be called the paltry raffle of colonial faction."<sup>47</sup> Although Smith's consultations with Townshend may have contributed to the conflict that led to the Revolution, the implementation of Smith's advice failed to comply with his general theory of political economy.

**LORD SHELBURNE**

Another of Smith's British government contacts, Lord Shelburne, was an awkward fellow minister with Townshend. Smith had known Shelburne's family since 1758, when he had suggested that his younger

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41. THOMAS, *supra* note 21.

42. C. R. FAY, ADAM SMITH AND THE SCOTLAND OF HIS DAY 116 (1956).

43. See generally *Smith's Thoughts on the State of the Contest with America*, *infra* note 93; see also *infra* text accompanying notes 93-103.

44. WEALTH OF NATIONS, *supra* note 2, at book IV, ch. vii; see also *id.* at book IV.vii.71-74.

45. *Id.* at book V, ch. ii.b.3-6.

46. THOMAS, *supra* note 21.

47. WEALTH OF NATIONS, *supra* note 3, at book IV, ch. vii.c.75. In eighteenth-century English, "piddling" meant working or acting in an ineffectual or wasteful way. Piddle, OXFORD ENGLISH DICTIONARY (online ed. 2009), <http://www.oed.com/> (subscription required) (last visited March 1, 2010).

brother should go to Glasgow rather than to Oxford, and that Smith should be his tutor.<sup>48</sup> Smith took on this duty and discharged it conscientiously.<sup>49</sup> Hume later reported that Shelburne “always speaks of you with regard.”<sup>50</sup> Shelburne wrote that a journey from Edinburgh to London in Smith’s company had made “the difference between light and darkness through the best part of my life.”<sup>51</sup> In early 1767, Shelburne was the minister responsible for India and America.<sup>52</sup> At the same time he helped Townshend over tax policy, Smith sent Shelburne a letter enclosing travelers’ tales of journeys in the South Seas, together with notes on Roman colonies, later incorporated in the chapter on colonies in *The Wealth of Nations*.<sup>53</sup> Nothing came of this, but in 1768 Smith thanked Shelburne for the “kindness” he had shown him in London; in 1784 he presented him with a copy of *The Wealth of Nations*.<sup>54</sup>

Shelburne was out of government from 1768 until 1782-1783.<sup>55</sup> But while in office, he drafted what became the Quebec Act 1774.<sup>56</sup> We cannot prove that Smith wrote the Quebec Act, but the circumstantial evidence is strong, as we show in the following paragraphs. Shelburne was working on it while his links with Smith were at their strongest; it carries the mark of Smith—the balance-of-power theorist; and it is consistent with Smith’s 1778 advice to Wedderburn.<sup>57</sup>

The Quebec Act 1774 has recently emerged as one of the most

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48. Letter from Gilbert Elliot to Adam Smith (Nov. 14, 1758), in MOSSNER & ROSS, *supra* note 11, at 26-27 No. 27.

49. Letter from Adam Smith to Lord Fitzmaurice (Feb. 21, 1759), in MOSSNER & ROSS, *supra* note 11, at 28 No. 28; Letters from Adam Smith to Lord Shelburne (Mar. 10, 1759 and Apr. 4, 1759), in MOSSNER & ROSS, *supra* note 11, at 29-30 Nos. 29-30.

50. Letter from David Hume to Adam Smith (Sept. 13, 1763), in MOSSNER & ROSS, *supra* note 11, at 92-95 No. 75.

51. SAMUEL FLEISCHACKER, ON ADAM SMITH’S *WEALTH OF NATIONS*: A PHILOSOPHICAL CRITIQUE 21 (2004).

52. WATSON, *supra* note 33, at 128-30.

53. Letter from Adam Smith to Lord Shelburne (Feb. 12, 1767), in MOSSNER & ROSS, *supra* note 11, at 122 No. 101.

54. Letter from Adam Smith to Lord Shelburne (Jan. 27, 1768), in MOSSNER & ROSS, *supra* note 11, at 137 No. 113; Letter from Adam Smith to Thomas Caddell (Nov. 16, 1784), in MOSSNER & ROSS, *supra* note 11, at 279 No. 241.

55. John Cannon, *William Petty, second earl of Shelburne and first marquess of Lansdowne (1737-1805)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 13.

56. I EDMOND GEORGE PETTY-FITZMAURICE FITZMAURICE & WILLIAM PETTY LANSDOWNE, *LIFE OF WILLIAM, EARL OF SHELBURNE, AFTERWARDS FIRST MARQUESS OF LANSDOWNE: WITH EXTRACTS FROM HIS PAPERS AND CORRESPONDENCE* 474 and n.2 (2d rev. ed. 1912); Quebec Act, 1774, 14 Geo. 3, c. 83 (Gr. Brit.), reprinted in SCHOFIELD, *supra* note 27, at 85-90.

57. See *supra* note 43.

important *casus belli* of the American War of Independence.<sup>58</sup> The British victory in Canada in the Seven Years' War had brought the whole of "Quebec"—that is, the whole of the European settlements in Canada—under British control, exercised at first by direct rule and military proclamation.<sup>59</sup> The people of this greater Quebec remained mostly French-speaking and Catholic in religion.<sup>60</sup> Britain could no more govern them directly than could the United States govern Iraq directly. Therefore, the 1774 Act provided for an appointed legislature and recognized the legitimacy of Catholic religion and French civil law in the province.<sup>61</sup> It also followed a scheme proposed by Sir Guy Carleton, Governor of Canada at the time, based on conciliating the French by recognizing the role of the Church and the traditional land tenure system, partly in the hope of laying the groundwork for raising an army if a rebellion in the southern colonies arose.<sup>62</sup>

This in itself enraged some of the militant Calvinists of New England.<sup>63</sup> But it was "enlarging its boundaries" that was truly explosive. The Act defined the southern boundary of Quebec as following the present U.S.-Canadian border westwards as far as the northwest corner of Pennsylvania.<sup>64</sup> From there, the boundary of Quebec was to strike south along the Ohio River valley, passing just west of Fort Pitt (Pittsburgh) until it joined the Mississippi River and up the Mississippi until it met the southern boundary of Hudson Bay territory (then governed by a separate chartered company).<sup>65</sup>

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58. SCHOFIELD, *supra* note 27, at 76.

59. *Id.* at 74-75.

60. Quebec, with 90,000 European inhabitants out of approximately 130,000, was the most populous province. G.A. Rawlyk, *The American Revolution and Canada*, in THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 497 (1991). Almost all of Quebec's European inhabitants were Roman Catholics. MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 123 (1992).

61. Quebec Act, 1774, 14 Geo. 3, c. 83, arts. XII, IV-VII, & VIII-X (Eng.), reprinted in SCHOFIELD, *supra* note 27, at 85-90.

62. James Sturgis, *Guy Carleton, first Baron Dorchester (1724-1808)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 13; 1 FITZMAURICE & LANSDOWNE, *supra* note 56, at 474 n.2.

63. MIDDLEKAUFF, *supra* note 26, at 244 ("Popery is established," insisted Ebenezer Baldwin.); see also WATSON, *supra* note 33, at 197-99.

64. Quebec Act, art. 1, reprinted in SCHOFIELD, *supra* note 27, at 85-90.

65. The Quebec Act is one of the listed grievances against George III in the Declaration of Independence. See Address from the Continental Congress to the Inhabitants of the Province of Quebec (Oct. 26, 1774), in [Amendment 1 (Religion)] FOUNDERS' CONSTITUTION, *supra* note 4, at document 20 ("Little did we imagine that any succeeding Ministers would so audaciously and cruelly abuse the royal authority, as to with-hold from you the fruition of the irrevocable rights, to which you were thus justly entitled.").

Norman Schofield has analyzed how fundamentally this threatened the material and strategic interests of the American colonists.<sup>66</sup> The Ohio and Mississippi river valleys were the key to westward expansion of the American colonies and the main transport route for all goods—and troops—into or out of the western states.<sup>67</sup> Politicians, including George Washington, were actively speculating in “empty” land (i.e., land inhabited only by Native Americans) west of the Appalachians,<sup>68</sup> and states made sometimes conflicting claims to incorporate these western lands.<sup>69</sup> Spain still claimed, albeit feebly, to control the Mississippi River valley,<sup>70</sup> and France controlled New Orleans.<sup>71</sup> The Quebec Act therefore reinstated a tourniquet on western colonial expansion. Schofield argues that this, rather than “taxation without representation,” was the tipping point for the colonists’ resistance.<sup>72</sup>

But then, why did Smith, Carleton, Shelburne, and Prime Minister Lord North fail to anticipate that the Quebec Act would tip the colonists to the south into war? In 1774, it would have been hard for any rational observer to predict that the colonists would win a war of independence against the strongest military machine in the Western world. If they could rationally have predicted that they could not win, they would not have launched the war. So Schofield hypothesizes that the Colonists received a secret signal before July 4, 1776 of the French support that was to prove crucial for the ultimate American victory.<sup>73</sup>

#### ADAM SMITH, THE WEALTH OF NATIONS AND THE AMERICAN COLONIES

While offering this advice to British political leaders, Smith was simultaneously writing what became the chapter on colonies in *The Wealth of Nations*: Book IV, chapter vii.<sup>74</sup> He repeats his long-held view that the colonies cannot expect to take a free ride on their defense.<sup>75</sup> He argues that

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66. SCHOFIELD, *supra* note 27, at 72-90.

67. *Id.*

68. 2 CLARENCE WALWORTH ALVORD, *THE MISSISSIPPI VALLEY IN BRITISH POLITICS: A STUDY OF THE TRADE, LAND SPECULATION, AND EXPERIMENTS IN IMPERIALISM CULMINATING IN THE AMERICAN REVOLUTION* 110-111 (1917).

69. TAYLOR, *supra* note 28, at 391-92.

70. *Id.* at 432-33.

71. *Id.* at 432.

72. SCHOFIELD, *supra* note 27, at 76.

73. *Id.* at 72. *But see* IAIN MCLEAN, *In Riker's Footsteps*, 39 *BRITISH J. POL. SC.* 195, 199 (2008) (casting doubt on whether the documents support Schofield's chronology).

74. ROSS, *supra* note 14, at 223-26.

75. *WEALTH OF NATIONS*, *supra* note 3, at book IV, ch. Vii.b.20.

although the mercantilism underlying the relationship between Britain and its colonies in America (and India) is bad for everybody, it is not as bad as the regimes in the Spanish, Portuguese, and (with one exception) French colonies.<sup>76</sup> The one exception is the government of slaves.<sup>77</sup> Slaves in Haiti (then the French colony of Saint-Domingue) are treated better than those in the southern English colonies, Smith argues, because France is an autocracy, where the government does not hesitate to interfere in owners' property rights if they treat their slaves badly. He illustrates this point with an anecdote, recycled from his Glasgow lectures on jurisprudence, about the emperor Augustus who forced a cruel slave owner to free his slaves on the spot.<sup>78</sup>

Smith leaves the discussion of slaves in the air, not exploring the multiple ironies that he has (surely deliberately) introduced. He then passes on some complimentary remarks about the colonists—the colonists are more equal, both in general and in their state legislatures, than in the status-divided politics of Britain: “Their manners are more republican, and their governments, those of three of the provinces of New England in particular, have hitherto been more republican too. . . .”<sup>79</sup> He continues, “The colonies owe to the policy of Europe the education and great views of their active and enterprising founders; and some of the greatest and most important of them owe to it scarce anything else.”<sup>80</sup>

The longest part of Smith's discussion is devoted to showing that mercantilism is bad for everybody: for the colonists, for Britain, and for third countries.<sup>81</sup> British mercantilism took the form of Navigation Acts and enumerated commodities.<sup>82</sup> The Act for the Encouraging Trade and Increasing of Shipping and Navigation stipulated that only British ships might carry goods to or from the colonies.<sup>83</sup> The latter, also part of the acts, said that certain listed colonial products—including sugar, tobacco, and cotton—may only be carried to Britain, from which they could be re-exported to the rest of the world.<sup>84</sup>

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76. WEALTH OF NATIONS, *supra* note 3, at book IV, ch. vii.b.52-53.

77. *Id.* at book IV, ch. vii.b.54-56.

78. *Id.* at book IV, ch. vii.b.55. Cf. ADAM SMITH: LECTURES ON JURISPRUDENCE (A) vol. iii.92-93 (R. L. Meek et al. eds., 1978).

79. WEALTH OF NATIONS, *supra* note 3, at book IV, ch. vii.b.51.

80. *Id.* at book IV, ch. vii.b.64.

81. *Id.* at book IV, ch. vii.b.25-49.

82. Act for the Encouragement and Increasing of Shipping and Navigation, 1660, 12 Car. 2, c. 18 (Gr. Brit.); Act for the Encouragement of Trade, 1663, 15 Car. 2, c. 7 (Gr. Brit.).

83. Act for the Encouragement and Increasing of Shipping and Navigation, 1660, 12 Car. 2, c. 18 (Gr. Brit.), at Art. I.

84. Act for the Encouragement of Trade, at Art. IX.

That the Navigation Acts restrict colonial freedom is so obvious that Smith spends little time on that issue. Most of his discussion concerns the subtler losses incurred in Britain and the rest of the world. The legal monopolies of ships and trade create monopoly profits in those businesses.<sup>85</sup> Therefore, they draw excess capital to them, and starve other businesses of capital. Consumers have to bear the deadweight losses of tobacco being shipped indirectly and repackaged en route rather than being shipped directly to the country of consumption. A move to free trade would therefore make everybody better off.

Smith's most radical proposal must therefore have startled his readers.

To propose that Great Britain should voluntarily give up all authority over her colonies, and leave them to elect their own magistrates, to enact their own laws, and to make peace and war as they might think proper, would be to propose such a measure as never was, and never will be adopted, by any nation in the world. . . . If it was adopted, however, Great Britain would not only be immediately freed from the whole annual expence of the peace establishment of the colonies, but might settle with them such a treaty of commerce as would effectively secure to her a free trade, more advantageous to the great body of the people, though less so to the merchants, than the monopoly which she at present enjoys.<sup>86</sup>

His alternative proposal was scarcely less radical. He dismissed "no taxation without representation," observing that the Channel Islands of Guernsey and Jersey had lived happily with it for a long time.<sup>87</sup> But, he went on, if some of the American colonies insisted on representation in Parliament, they should be offered it, with the incentive that the more their taxes raised, the more seats in Parliament they would be offered.<sup>88</sup>

Instead of piddling for the little prizes which are to be found in what may be called the paltry raffle of colony faction; they might then hope, from the presumption which men naturally have in their own ability and good fortune, to draw some of the great prizes which sometimes come from the wheel of the great state lottery of British politicks.<sup>89</sup>

In a little understood story, Smith's friend, Sir John Sinclair, went to Smith in great alarm on hearing the news of the British defeat at the battle

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85. WEALTH OF NATIONS, *supra* note 3, at book IV, ch. vii.b.49.

86. *Id.* at book IV, ch. vii.c.66. In this passage Smith typically presents the optimal, first-best solution as impracticable and then goes on to consider alternatives. *See id.*

87. WEALTH OF NATIONS, *supra* note 3, at book IV, ch. vii.c.71.

88. *Id.* at book IV, ch. vii.c.75.

89. *Id.*

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of Saratoga in 1777.<sup>90</sup> “The British nation must be ruined,” said Sinclair.<sup>91</sup> “Be assured, my young friend,” replied the imperturbable philosopher, “there is a great deal of ruin in a nation.”<sup>92</sup> By this Smith meant, consistently with his recommendations concerning colonial policy, that the British defeat was not the end of Britain.

He exhibits the same cool detachment in his notes on America prepared for Wedderburn the following year.<sup>93</sup> He goes through the possible conclusions of the American war. Option I, the “complete submission of America,” is inconceivable even if the military tide turns in Britain’s favor, because the “ulcerated minds of the Americans are not likely to consent to any union even upon terms the most advantageous to themselves.”<sup>94</sup> Smith again puts forward the idea of American representation in Parliament, but concedes that only “a solitary philosopher like myself” can see the advantage of it.<sup>95</sup> Option II, an American victory, would bring the advantages he had spoken of in *The Wealth of Nations*,<sup>96</sup> mainly, that Britain would no longer have to pay for the defense of America. In the event of an American victory Britain could:

[R]estore Canada to France and the two Floridas<sup>97</sup> to Spain; we should render our colonies the natural enemies of those two monarchies and consequently the natural allies of Great Britain. Those splendid, but unprofitable acquisitions of the late [1756-63] war, left our colonies no other enemies to quarrel with but their mother country.<sup>98</sup>

But American victory (let alone handing back Canada and Florida) “would not, in the eyes of Europe appear honourable to Great Britain.”<sup>99</sup> Smith sees only two other options: III, the “restoration . . . of the old [i.e. 1763-76] system,” which might be tolerable if there was a secret agreement

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90. 1 JOHN SINCLAIR, MEMOIRS OF THE LIFE AND WORKS OF THE LATE RIGHT HONOURABLE SIR JOHN SINCLAIR, BART. 37 (1837).

91. *Id.*

92. *Id.*

93. *Smith's Thoughts on the State of the Contest with America, February 1778* (David Stevens ed.) [hereinafter *Smith's Thoughts on the State of the Contest with America*], in MOSSNER & ROSS, *supra* note 11, app. B., at 377-85.

94. *Id.* at 381.

95. *Smith's Thoughts on the State of the Contest with America, supra* note 93, at 382.

96. *Id.* at 382-83. *But see supra* text accompanying note 87.

97. East Florida was most of the present state of Florida. West Florida was the western Florida panhandle plus the Gulf Coast areas of Alabama and Mississippi, stretching as far as New Orleans, still under French control. *See* British North America Map, in MIDDLEKAUFF, *supra* note 26, at 37.

98. *Smith's Thoughts on the State of the Contest with America, supra* note 93, at 382-83.

99. *Id.* at 383.

between the British and American elites that it would be gradually dismantled—but it would be hard to keep such an agreement secret;<sup>100</sup> and IV, “the submission or conquest of a part, but a part only” of the rebel colonies.<sup>101</sup> He saw that as the likeliest, and worst, option, because of the military burden.<sup>102</sup> Luckily, British incompetence, the success of American citizen militias, and the French intervention on the American side, brought about Smith’s option II. He was not a British government adviser in 1783, so the clever idea of ceding Canada to France and Florida to Spain did not see the light of day until the 1930s.<sup>103</sup>

Adam Smith was closely connected to the political elite in Great Britain, and he was widely read in the colonies. He certainly advised Townshend to increase taxes in the United States, and he likely had a hand in the drafting of the Quebec Act. He opposed British economic policy in the American colonies, and he advocated British abandonment of the colonies as a way of saving the military and others the costs of maintaining them. His advice in political economy cut across the political grain and was unlikely to make him an attractive source of authority in debates about the Constitution.

#### FROM SCOTLAND TO THE NEW WORLD: TRANSMISSION OF THE ENLIGHTENMENT

Although his policy recommendations offended the entire political class in both Great Britain and the United States, he clearly respected the colonists’ “republican manners.” We argue that this republican bond left a huge, and mostly unacknowledged, influence on U.S. constitutionalism. It shaped, above all, the Establishment and Free Exercise Clauses of the First Amendment.

#### CHURCH-STATE RELATIONS IN SCOTLAND

It is now well established that the thought of the Scottish Enlightenment had a profound influence on U.S. constitutionalists, including specifically James Madison and Thomas Jefferson.<sup>104</sup> There were

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100. *Smith’s Thoughts on the State of the Contest with America*, *supra* note 93, at 383-84.

101. *Id.* at 384-85.

102. *Id.* at 383.

103. The memorandum containing his advice was lost until that time. *Id.* at 377.

104. DOUGLASS ADAIR, *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER* 33 (Mark E. Yellin ed., Lexington Books 2000) (1943) [hereinafter *INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY*]; *see also generally* DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* (Trevor Colbourn ed., 1974); GERTRUDE HIMMELFARB, *THE ROADS TO MODERNITY: THE BRITISH, FRENCH, AND AMERICAN ENLIGHTENMENTS* (2004);

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two immediate routes: via William Small, Jefferson’s teacher at the College of William & Mary;<sup>105</sup> and via John Witherspoon, Madison’s teacher at the College of New Jersey (Princeton).<sup>106</sup> Small and Witherspoon stood for the liberal and conservative Scottish traditions, respectively.<sup>107</sup> Witherspoon nevertheless taught the work of the “infidel” Hume. And Smith held a public discussion with Hume in the pages of *The Wealth of Nations*: Hume had argued for establishment; Smith argued against it.<sup>108</sup>

The Scottish Enlightenment started as a dialogue about church and state. The thinkers relevant to this paper may be shown in summary (Table 1).

| <b>Atheist</b>             | <b>Deist (“Moderate”)</b>  | <b>Calvinist (“Popular”)</b> |
|----------------------------|--|------------------------------|
|                            | Frances Hutcheson  |                              |
| David Hume                 | Adam Smith<br>Thomas Reid<br>William Small                       | John Witherspoon             |
| Thomas Jefferson<br>(1776) | Thomas Jefferson<br>(1800)<br>James Madison<br>John Adams (1820) | John Adams (1776)            |

Table 1: Scottish Enlightenment Positions on Church and State

Calvinism involves a set of beliefs about personal responsibility to a God who punishes unrighteousness with eternal punishment, and rewards the elect with eternal life.<sup>109</sup> In strong forms, Calvinism involves the double predestination skewered in Robert Burns’ *Holy Willie’s Prayer* and James Hogg’s *The Private Memoirs and Confessions of a Justified Sinner*.<sup>110</sup>

GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* (1978).

105. MARTIN RICHARD CLAGETT, *SCIENTIFIC JEFFERSON REVEALED* iii-iv (2009).

106. Ned C. Landsman, *John Witherspoon (1723-1794)*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY*, *supra* note 13; JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 3 (1990).

107. *INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY*, *supra* note 104, at 33.

108. *WEALTH OF NATIONS*, *supra* note 3, at book V, ch. i.g.3-9; *see also* 3 DAVID HUME, *THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, at 134–36 (Liberty Fund, Inc. 1983) (1778).

109. *Calvinism*, *THE CONCISE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH* 91 (E.A. Livingstone ed., 2006).

110. ROBERT BURNS, *HOLY WILLIE’S PRAYER* (1785), *available at* [http://www.robertburns.org.uk/Assets/Poems\\_Songs/holy\\_willie.htm](http://www.robertburns.org.uk/Assets/Poems_Songs/holy_willie.htm) (last visited Mar. 16, 2010); JAMES HOGG, *THE PRIVATE MEMOIRS AND CONFESSIONS OF A JUSTIFIED SINNER* (1999). Both are expositions of the problems inherent in individual predestination, which can lead to antinomianism. Acknowledging sin, Holy Willie assumes that he will be forgiven although others will not; Hogg’s

However, it also encompasses a set of beliefs about church and state. It is triply anti-hierarchical in that, first, all ministers are of equal standing;<sup>111</sup> second, church government is in the hands of ministers and lay elders with equal authority;<sup>112</sup> third, the doctrine of the two kingdoms states that the civil magistrate has a duty to protect the church but no right to interfere with it.<sup>113</sup> In 1596, the real founder of Scottish Calvinism, Andrew Melvill(e),<sup>114</sup> grabbed the sleeve of King James VI (later James I of the United Kingdom) to make his point:

And thairfor, Sir, as divers tymes befor, sa now again, I mon tell yow, thair is twa Kings and twa Kingdomes in Scotland. Thair is Chryst Jesus the King, and his Kingdome the Kirk, whase subject King James the Saxt is, and of whase Kingdome nocht a king, nor a lord, nor a heid, bot a member! . . . [T]he quhilk na Christian King nor Prince sould controll and discharge, but fortifie and assist, utherwayes nocht fathfull subjects nor members of Chryst.<sup>115</sup>

This quotation exemplifies the anti-Erastian character of the Church of Scotland. Among the most important disagreements between Scotland and England were the efforts of James VI/I and Charles I and II to impose or to re-impose government-appointed bishops on the Presbyterian Church of Scotland, which had been governed by assemblies since the time of the

anti-hero commits murder in the expectation that he will not be punished.

111. 3 Stair Memorial Encyclopaedia, *Churches and Other Religious Bodies* ¶ 1551; *See also* JAMES L. WEATHERHEAD, *THE CONSTITUTION AND LAWS OF THE CHURCH OF SCOTLAND* ch. 6 ¶¶ 3-4 (1997).

112. JAMES L. WEATHERHEAD, *THE CONSTITUTION AND LAWS OF THE CHURCH OF SCOTLAND* CH. 6 ¶¶ 3-4 (1997).

113. Church of Scotland Act, 1921, 11 & 12 Geo. 5 c. 29 (Gr. Brit.), Schedule, Article IV; Confession of Faith Ratification Act, 1690, A.P.S. ix 133 c. 7 (Scotland), Acts of the Scottish Parliament before the union of the Scottish and English Parliaments in 1707 are collected at <http://www.rps.ac.uk>. Westminster Confession of Faith, ch. XXIII Art. III, ch. XXXI Art. V, available at <http://www.churchofscotland.org.uk/extranet/xchurchlaw/xchurchlawconfession.htm>.

114. James Kirk, *Andrew Melville (1545-1622)*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY*, *supra* note 13. The Scots spelling “Melvill” is not always followed, but it helps to distinguish him from Henry Dundas, who became Lord Melville. *See supra* note 18.

115. JAMES MELVILLE, *THE AUTOBIOGRAPHY AND DIARY OF JAMES MELVILL, WITH A CONTINUATION OF THE DIARY 370* (Robert Pitcairn ed., 1842). “Sillie” means “plain, simple”; “divers” means “various”; “sa” means “so”; “mon” means “must”; “Saxt” means “Sixth”; “whase” means “whose”; “nocht” means “not”; “whame” means “whom”; “the quhilk na” means “which no”; and “utherwayes” means “otherwise” [sc. they are]. The distinction between the authority of the church and of the “Civil Magistrate” was formalized in the Westminster Confession of Faith, which was negotiated during the English Civil War and which became a part of the law of Scotland but not of England. Act Ratifying the Confession of Faith and Settling Presbyterian Church Government, 1690, c. 5 (Scotland).

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Reformation.<sup>116</sup> English politicians were more comfortable with Erastianism, as bishops had long been appointed by the crown and sat in the House of Lords.<sup>117</sup> The question concerns the degree of subordination of the established church to the state; in England, where the monarch was supreme governor of the Church of England, the church was subordinate; in Scotland, it was not.<sup>118</sup>

In 17th-century Scotland, civic officials were nevertheless called upon to fortify and assist Christ's Kirk with numerous floggings and hangings. As late as 1697, an Edinburgh student, Thomas Aikenhead, was hanged for blasphemy.<sup>119</sup> But the revolution settlement of 1689-1707 had a dramatic effect on state and church in Scotland. It removed the threat of a hostile state church being imposed.<sup>120</sup> Religious freedom for the Presbyterian Church of Scotland was guaranteed by the Act of Union 1707.<sup>121</sup> This was part of removing the state altogether from Scottish public life. Scotland became a weak state remotely governed by agents of the UK executive.<sup>122</sup> No officer of the state was available to fortify Christ's Kirk by hanging blasphemers.

This vacuum had important consequences. At its most banal, it allowed the liberals, Francis Hutcheson and Smith, and the atheist Hume, to survive and to write (more or less) unmolested. Francis Hutcheson made the first essential move in the secular ethics of the Scottish Enlightenment.<sup>123</sup> Smith would secularize ethics further.<sup>124</sup> Hume would take religion out of ethics altogether in various writings, including the attack on miracles as a ground of belief in the *Enquiry Concerning Human*

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116. See, e.g., J. R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689, at 85-90 (1928).

117. IAIN MCLEAN & BENJAMIN LINSLEY, THE CHURCH OF ENGLAND AND THE STATE: REFORMING ESTABLISHMENT FOR A MULTI-FAITH BRITAIN 5 (2004).

118. *Id.* at 9.

119. JAMES BUCHAN, CAPITAL OF THE MIND: HOW EDINBURGH CHANGED THE WORLD 56 (2003); Michael Hunter, *Thomas Aikenhead (baptised 1676, died 1697)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 13.

120. COLIN KIDD, UNION AND UNIONISMS: POLITICAL THOUGHT IN SCOTLAND, 1500-2000 (2008).

121. Act for an Union of the Two Kingdoms of England and Scotland, 1706, 6 Ann., c. 8, art. VII (Eng.). The (Scottish) Union with England Act, A.P.S. xi 406 c. 7, Article XXV, incorporated verbatim the Protestant Religion and Presbyterian Church Act, 1706, A.P.S. xi 402 c. 6.

122. MCLEAN, *supra* note 8, at 27 ch. 2.

123. Luigi Turco, *Moral Sense and the Foundations of Morals*, in THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT 136 (Alexander Broadie ed., 2003).

124. See modifications to ADAM SMITH, THE THEORY OF MORAL SENTIMENTS note 2, *supra*, part III.2.31 (removing references to religion).

*Understanding*,<sup>125</sup> and two later works, *The Natural History of Religion*<sup>126</sup> and the posthumous *Dialogues Concerning Natural Religion*.<sup>127</sup> On his deathbed, he imagined himself arguing with Charon, the ferryman of the dead; Smith published an affecting but sanitized version of what Hume said.<sup>128</sup> The unsanitized version that Hume gave to Smith, who passed it on in a letter to his politician friend Wedderburn, runs:

I thought I might say, Good Charon, I have been endeavouring to open the eyes of people; have a little patience only till I have the pleasure of seeing the churches shut up, and the Clergy sent about their business; But Charon would reply, O you loitering rogue, that wont happen these two hundred years; do you fancy I will grant you a lease for so long a time? Get into the boat this instant.<sup>129</sup>

Hume's atheism was too strong for Smith, who was deeply embarrassed by his friend's deathbed request to publish the *Dialogues*, and squirmed out of the obligation to do so.<sup>130</sup> Both Smith and, earlier, Hutcheson had opposed the election of the atheist Hume to a philosophy chair in a Scottish university.<sup>131</sup>

By 1760, then, Scottish philosophers had challenged orthodox Melvillian Calvinism from both deist (Hutcheson, Smith) and atheist (Hume) standpoints. Two of the three standpoints were institutionalized as factions of the Scottish church (Hume was beyond the pale). The "Moderates" were a group of ministers in Edinburgh who seized control of the General Assembly in 1750 and retained it until the 1830s, when they were overthrown by the majority "Popular" or "Evangelical" (i.e., orthodox Calvinist) party.<sup>132</sup> In *The Wealth of Nations*, Smith vividly characterizes the Moderates and Evangelicals as "Loose" and "Austere" respectively, and offers a Humean natural history of their religions.<sup>133</sup> Austere Calvinists are

125. DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING § 10 (Eric Steinberg ed., 2d ed. Hackett Publishing Co. 1993) (1748).

126. DAVID HUME, A DISSERTATION ON THE PASSIONS; THE NATURAL HISTORY OF RELIGION (Tom L. Beauchamp ed., Oxford Univ. Press 2008) (1757).

127. DAVID HUME, DIALOGUES CONCERNING NATURAL RELIGION: AND OTHER WRITINGS (Dorothy Coleman ed., Cambridge Univ. Press 2007) (1779).

128. Smith published it along with Hume's short autobiography in 1776. MCLEAN, *supra* note 8, at 19.

129. Letter from Adam Smith to Alexander Wedderburn (Aug. 14, 1776), in MOSSNER & ROSS, *supra* note 11, at 203 No. 163.

130. ROSS, *supra* note 14, at 290-91; Letter from Alexander Wedderburn to Adam Smith (June 6, 1776), in MOSSNER & ROSS, *supra* note 11, at 197 No. 159.

131. ROSS, *supra* note 14, at 112-13.

132. JOHN H. S. BURLEIGH, A CHURCH HISTORY OF SCOTLAND 331 (1960).

133. WEALTH OF NATIONS, *supra* note 3, at book V, ch. i.g.10-14.

austere about drink and sex, and, as a result, this appeals to and benefits the poor, because they can be ruined by drink and sex, and they therefore have a material interest in binding themselves to the mast of austerity; the rich can afford to be Loose: drink and sex are superior goods.<sup>134</sup>

In Aberdeen, there were two universities, one each for the Loose and Austere.<sup>135</sup> Jefferson's teacher William Small attended the Austere university (Marischal College) but listened to Loose lecturers from the other one (King's College).<sup>136</sup> When Small was a student, Thomas Reid at King's was developing what became Scottish "common sense" philosophy, a middle way (although not Smith's) between austere Calvinism and Humean skepticism.<sup>137</sup> Small also picked up, and transmitted to Jefferson at William & Mary, what Jefferson describes as "the first . . . ever . . . regular lectures in Ethics, Rhetoric & Belles Lettres" given there.<sup>138</sup>

We hypothesize that Small's lectures at the College of William and Mary on ethics, rhetoric, and belles letters derived from Adam Smith's Edinburgh lectures of the same title. Student copies circulated around Scotland.<sup>139</sup> The lectures on ethics found their way into Smith's *Theory of Moral Sentiments*.<sup>140</sup> The Lectures on Rhetoric and Belles-Lettres were discovered, in a student copy, in 1958.<sup>141</sup>

Thus three recent Scottish models of church-state relations were available to the framers at Philadelphia and to the drafters of the Bill of Rights. The Bill of Rights was required when several state ratifying conventions tried to make their ratification of the original Constitution contingent on amendments that would protect the individual more fully against the executive than the original document was felt to do.<sup>142</sup> The atheist model (religion is a potential source of trouble, to be controlled by the state in the interests of social peace) is explicit in Hume. It may be

134. WEALTH OF NATIONS, *supra* note 3, at book V, ch. i.g.10-14. Cf. ANDREW SCHOTTER, MICROECONOMICS 70-72 (2009) (defining superior goods).

135. PAUL WOOD, THE ABERDEEN ENLIGHTENMENT: THE ARTS CURRICULUM IN THE EIGHTEENTH CENTURY (1993).

136. See CLAGETT, *supra* note 105.

137. Heiner F. Klemme, *Scepticism and Common Sense*, in THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT 127 (Alexander Broadie ed., 2003).

138. THOMAS JEFFERSON, *Autobiography*, in THOMAS JEFFERSON: WRITINGS 1, 4 (Merrill D. Peterson ed., 1984); see also HERBERT L. GANTER, *William Small, Jefferson's Beloved Teacher*, 4 WM. & MARY Q. 505 (1947).

139. ADAM SMITH, LECTURES ON RHETORIC AND BELLES-LETTRES 27 (Glasgow ed. 1985).

140. *Id.* at 3.

141. *Id.* at 1.

142. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 318-336 (1996) [hereinafter ORIGINAL MEANINGS].

implicit in Jefferson's thought at the time, but he never stated it in public so far as we know. It was not in contention for polite discussion in America, unlike in France.

A Calvinist model was already in force in Massachusetts and Connecticut.<sup>143</sup> Article II of the Massachusetts Constitution, drafted by John Adams,<sup>144</sup> stated that it was the right and duty of every member of the commonwealth to worship God and that no one would be "hurt, molested, or restrained" for worshipping "in the manner and season most agreeable to the dictates of his own conscience," so long as he or she did not "disturb the public peace or obstruct others in their religious worship."<sup>145</sup> Article III, however, permitted the legislature to "authorize and require" local governments "to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily."<sup>146</sup>

Those two states,<sup>147</sup> therefore, had an established church but offered (some) free exercise of religion. To be sure, Boston in 1780 was not Edinburgh in 1697. Adams's constitution offers toleration to "every denomination of Christians."<sup>148</sup> But each town had the duty of supervising public Protestant worship and schooling and of insuring that there were teachers of religion if none were provided voluntarily. Andrew Melvill would not have liked Adams's constitution; but he would have preferred it to the Virginians'. Adams's Constitution recognizably fortifies and assists the congregational church of each town in Massachusetts. Other states, notably Rhode Island and Pennsylvania, protected free exercise but denied establishment.<sup>149</sup> This was a cardinal point for Roger Williams, the founder

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143. MASS. CONST. (1780) art. II-III (1780), *reprinted in* 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1888 (1909); *see also* Kelly Olds, *Privatizing the Church: Disestablishment in Connecticut and Massachusetts*, 102 J. POL. ECON. 277 (1994).

144. DAVID G. McCULLOUGH, JOHN ADAMS 220 (2001).

145. MASS. CONST. (1780) art. II.

146. MASS. CONST. (1780) art. III.

147. Massachusetts and Connecticut, along with New Hampshire, were the states where Congregationalists were dominant. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986). Other state establishments in 1787 included Georgia (Church of England, abolished 1798), New Hampshire (Congregational, abolished 1790), and South Carolina (Church of England, abolished 1790). *Id.*

148. MASS. CONST. (1780) art. III, para. 5 (1780).

149. PENN. CONST. art. II (1776) ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding. . . ."), *reprinted in* 5 THORPE, *supra* note 143, at 3081. CHARTER OF RHODE ISLAND AND PROVIDENCE

of Rhode Island.<sup>150</sup> After being expelled from Massachusetts for his “separatist” views, Williams obtained charters for Rhode Island which protected religious pluralism there. Below this Article discusses (but rejects) the contention that Williams laid the foundation of Jefferson’s now famous “wall of separation.”

#### MADISON’S TRANSMISSION OF ENLIGHTENMENT PRINCIPLES

State support for denominational schooling was anathema to Jefferson and Madison. It brought them together for their first joint campaign in Virginia, against a bill levying a state tax to support teachers of Christianity and produced Madison’s famous *Memorial and Remonstrance Against Religious Assessments*.<sup>151</sup>

The first of fifteen points offered in support of the remonstrance is also the first prequel, not only of Federalist 10, but of the radical interpretation of the Establishment Clause espoused by President Jefferson in his letter to the Danbury Baptist Association of 1802.<sup>152</sup> Point one acknowledges the problem of majority tyranny (it was no doubt designed to appeal to the minority lobby of Baptists in Virginia). It provides that “Religion . . . must be left to the conviction and conscience of every man” and that it is “an inalienable right,” echoing article 16 of the Virginia Declaration of Rights.<sup>153</sup> Madison continues, “[N]o other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.”<sup>154</sup>

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PLANTATIONS (1663), *reprinted in* 6 THORPE, *supra*, at 3211 (“[W]ee [*i.e.* Charles II] beinge willinge to encourage the hopefull undertaking of oure sayd loyall and loveing subjects, and to secure them in the free exercise and enjoyment of all their civill and religious rights . . . doe hereby publish, graunt, ordeyne and declare, That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and their owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned. . . .”); *see also* MARTHA CRAVEN NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 49 (2008).

150. NUSSBAUM, *supra* note 149, at 46-48.

151. RAKOVE, *supra* note 1065, at 34-35; JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* [hereinafter *Memorial and Remonstrance Against Religious Assessments*], in JAMES MADISON: WRITINGS 29, 29-36 (Jack Rakove ed., 1999).

152. Letter from Thomas Jefferson to the Danbury Baptist Association (1802), in THOMAS JEFFERSON: WRITINGS, *supra* note 138, at 510.

153. [Amendment I (Religion)] FOUNDERS’ CONSTITUTION, *supra* note 4, at document 25.

154. *Memorial and Remonstrance Against Religious Assessments*, *supra* note 151, at 30.

Point 2 has an echo of Andrew Melvill, but mostly it, too, looks forward to Danbury. Madison converts Melvill's statement, made to James VI/I in person, into a general principal of political philosophy but in stronger language, arguing that if the sovereign lacks power to interfere in religion, then the legislature, its "creatures and vicegerents," cannot have that authority.<sup>155</sup> "Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants."<sup>156</sup> Moreover, people who submit to such encroachments upon inalienable rights "are slaves."<sup>157</sup> The legislature cannot invade an area forbidden to the sovereign people; when it does it harms itself and those who comply with the law.

Finally, Point 7 is pure Adam Smith. Smith's only statement on organized religion is "Of the Expence of publick Works and publick Institutions."<sup>158</sup> There he makes the point that religion is not the kind of public good that merits government funding, as the military or education do.<sup>159</sup> Quite the contrary, he argues that clergy subsidized by the state "are apt gradually to lose the qualities, both good and bad, which gave them authority and influence with the inferior ranks of people" and when confronted with competing sects "feel themselves as perfectly defenseless as the indolent, effeminate and full fed nations of the southern parts of Asia, when they were invaded by the active, hardy, and hungry Tartars of the North."<sup>160</sup> In fact, a government-subsidized, religious monopoly threatens the security of the state: "When the authorised teachers of religion propagate through the great body of the people doctrines subversive of the authority of the sovereign, it is by violence only, or by the force of a standing army, that he can maintain his authority."<sup>161</sup> Compare Madison: "During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution."<sup>162</sup>

Madison goes on to question the credibility of those who both point to the age of the "greatest lustre" of Christianity as the period before it became

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155. *Memorial and Remonstrance Against Religious Assessments*, *supra* note 126, at 30-31.

156. *Id.* Cf. text accompanying note 116 *supra*.

157. *Memorial and Remonstrance Against Religious Assessments*, *supra* note 151, at 31.

158. WEALTH OF NATIONS, *supra* note 3, Book V, ch. i.c.

159. Scot Peterson, *Rational Choice, Religion and the Marketplace: Where does Adam Smith fit in?*, 48 J. SCIENTIFIC STUDY OF RELIGION 185, 187 (2009).

160. WEALTH OF NATIONS, *supra* note 3, at book V, ch. i.g.1.

161. *Id.* at book V, ch. i.g.17.

162. *Memorial and Remonstrance Against Religious Assessments*, *supra* note 151, at 32-33.

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established, and who at the same time “predict its downfall” should they be forced to return to the “primitive State in which its Teachers depended upon the voluntary rewards of their flocks”; “[o]n which side ought their testimony to have greatest weight, when for or when against their interest?”<sup>163</sup> Smith’s ideal system advocates exactly the kind of religious competition Madison does:

[I]f politics had never called in the aid of religion . . . it would probably have dealt equally and impartially with all the different sects, and have allowed every man to chuse his own priest and his own religion as he thought proper. There would in this case, no doubt, have been a great multitude of religious sects. Almost every different congregation might probably have made a little sect by itself, or have entertained some peculiar tenets of its own. Each teacher would no doubt have felt himself under the necessity of making the utmost exertion, and of using every art both to preserve and to increase the number of his disciples.<sup>164</sup>

Religious competition, left alone, is capable of promoting the individual interests of those, including the clergy, who benefit from it; government involvement skews incentives and leads to unintended, adverse consequences.

The second prequel to Federalist 10 and the letter to the Danbury Baptists is *Vices of the Political System of the United States*, the briefing note which Madison wrote for the Virginia delegation before the Constitutional Convention started.<sup>165</sup> In it, Madison is concerned to see not only why Congress and the states had been unable to coordinate national government but also why the individual states had made bad laws.<sup>166</sup> He identifies two sources of the bad legislation: the representative bodies and the people themselves.<sup>167</sup> The difficulty with the people is that they “are divided into different interests and factions, as they happen to be creditors or debtors—Rich or poor—husbandmen, merchants or manufacturers—members of different religious sects. . . .”<sup>168</sup>

The problem is to prevent these factions, when they form a majority,

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163. *Memorial and Remonstrance Against Religious Assessments*, *supra* note 151, at 33.

164. WEALTH OF NATIONS, *supra* note 3, at book V, ch. i.g.8. Cf. FLEISCHACKER, *supra* note 8.

165. JAMES MADISON, *Vices of the Political System of the United States* [hereinafter *Vices of the Political System*], in JAMES MADISON: WRITINGS, *supra* note 151, at 69, 69-80.

166. RAKOVE, *supra* note 105, at 47.

167. *Vices of the Political System*, *supra* note 165, at 75.

168. *Id.* at 76.

from “unjust violations of the rights and interests of the minority. . . .”<sup>169</sup> Madison considers means of checking this impulse: first, recognition that the good of the faction lies primarily with the good of society as a whole, which is “too often unheeded” and second, concern for character. In individuals, character is important; however, in large groups it is less so: “Is it to be imagined that an ordinary citizen or even an assembly-man of R[hode] Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or Holland; or even in Mass[achuset]ts or Connect[icut]?”<sup>170</sup> The third candidate is religion, which also fails to impose an adequate constraint on faction.<sup>171</sup> Unlike character, religion fails even to constrain individuals, who may think it imposes an affirmative duty to force their beliefs on others and to violate the rights of minorities. He argues that when acting on oath, “the strongest of religious [t]ies,” individuals in popular assemblies have approved acts against which their individual consciences would have revolted.<sup>172</sup> He continues,

When indeed Religion is kindled into enthusiasm, its force like that of other passions, is increased by the sympathy of a multitude. . . . [A]s religion in its coolest state, is not infallible, it may become a motive to oppression as well as a restraint from injustice. Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third? Will the latter be secure? The prudence of every man would shun the danger.<sup>173</sup>

Rather than increasing the tendency of legislatures to legislate for “the general and permanent good of the Community,” religion detracts from it.

More than the germ of Federalist 10 is here. The Federalist Papers were projected by Alexander Hamilton and John Jay as a series of articles in the New York newspapers designed to convince wavering members of the New York ratifying convention to support the Constitution.<sup>174</sup> Federalist 10 had to be composed in a hurry, and Madison simply took the arguments of this section of “Vices,” dropped some (but not all) of the

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169. *Vices of the Political System*, *supra* note 165, at 77.

170. *Id.*

171. *Id.* at 77-78.

172. *Id.* at 78.

173. *Id.*

174. The series had already reached Number 9 when Hamilton approached Madison, after two false starts, to become the third member of “Publius.” Iain McLean, *Before and After Publius: The Sources and Influence of Madison’s Political Thought*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 14, 23 (Samuel Kernell ed., 2003).

references to religion, and polished it for the newspapers.

The overall argument of Federalist 10 is familiar to all.<sup>175</sup> Factions are bad and have led to bad laws in the individual states. They could be abolished by eliminating liberty, which would be worse than the evils to which they give rise, or by making everyone's interests coincide.<sup>176</sup> Given especially the divergence of interests in property ("Those who are creditors and those who are debtors . . . A landed interest, a manufacturing interest, a mercantile interest"<sup>177</sup>), but also the "zeal for different opinions concerning religion," "the *causes* of faction cannot be removed"; therefore, "relief is only to be sought in the means of controlling its *effects*."<sup>178</sup> Thus, it is necessary either to prevent a majority from sharing interests or to prevent the majority from oppressing the minority.<sup>179</sup> A large republic ("a Government in which the scheme of representation takes place") does both.<sup>180</sup> First, the representatives are sufficiently numerous to bar the cabals of a few and at the same time sufficiently small to eliminate confusion; in addition, the electors are numerous enough to make it difficult to fix elections; finally, interests are sufficiently numerous and diverse that they will be unable to agree on a minority to oppress, either by acting together or by communicating their desire to do so ("where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust").<sup>181</sup> He continues:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States: a religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it, must secure the national Councils against any danger from that source: a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union, than a particular member of it. . . .<sup>182</sup>

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175. THE FEDERALIST NO. 10 (James Madison), *reprinted in* JAMES MADISON: WRITINGS, *supra* note 151, at 160, 160-68.

176. *Id.* at 161.

177. *Id.* at 162.

178. *Id.* at 163.

179. *Id.* at 164.

180. *Id.*

181. THE FEDERALIST NO. 10 (James Madison), *reprinted in* JAMES MADISON: WRITINGS, *supra* note 151, at 166.

182. *Id.* at 167.

Adam Smith had made a nearly identical point eleven years earlier:<sup>183</sup>

The interested and active zeal of religious teachers can be dangerous and troublesome only where there is either but one sect tolerated in the society, or where the whole of a large society is divided into two or three great sects; the teachers of each acting by concert, and under a regular discipline and subordination. But that zeal must be altogether innocent where the society is divided into two or three hundred, or perhaps into as many as a thousand small sects, of which no one could be considerable enough to disturb the publick tranquility. The teachers of each sect, seeing themselves surrounded on all sides with more adversaries than friends, would be obliged to learn that candour and moderation which is so seldom to be found among the teachers of those great sects whose tenets being supported by the civil magistrate, are held in veneration by almost all the inhabitants of extensive kingdoms and empires, and who therefore see nothing round them but followers, disciples, and humble admirers.<sup>184</sup>

Ample evidence supports the life-long influence that Adam Smith and the Scottish Enlightenment exercised over Madison. In May 1818, he gave an address before the Agricultural Society of Albermarle, in which he treated agriculture as a period in the stadial history<sup>185</sup> that had been a device for both Adam Smith and Adam Ferguson as well.<sup>186</sup> In February 1835, the year before his death, the English utilitarian philosopher Harriet Martineau visited him, and during their conversation he “declared himself perfectly satisfied that there is in the United States a far more ample and equal provision for pastors, and of religious instruction for the people, than could have been secured by a religious establishment of any kind.”<sup>187</sup>

Just as one central problem of civil government is the potential for capture by mercantile interests like the monopolies that operate in the colonies for Smith; so, too, the domestic problem is one of capture by factions, even when they constitute a majority. One of the major risks here for the eighteenth-century political theorist is that a religious faction will capture the government. Competition among religious and other groups will reduce the probability of that happening. Madison’s theory of faction,

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183. PHILIP B. KURLAND, *The Origins of the Establishment Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 858 (1985-86).

184. WEALTH OF NATIONS, *supra* note 3, at Book V, ch. 1.g.8.

185. IRVING BRANT, JAMES MADISON: COMMANDER IN CHIEF, 1812-1836, at 429 (1961).

186. *See, e.g.*, WEALTH OF NATIONS, *supra* note 3, at Book V, ch. i (discussing the types of armies best suited to different stages in history).

187. 1 HARRIET MARTINEAU, RETROSPECT OF WESTERN TRAVEL 195 (London, Saunders & Otley 1838).

presented in Federalist 10, grows out of a concern with religious faction that springs directly from the writings of Adam Smith.

### JAMES MADISON AND THE CONSTITUTION

There was little discussion of religion at the Philadelphia Convention. The best known was Benjamin Franklin's perhaps sarcastic suggestion that sessions should be opened with prayers.<sup>188</sup> The only mention of religion in the original constitution specifies those who "shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."<sup>189</sup> For a question that had caused thousands, perhaps millions, of deaths in Europe, the discussion was remarkably perfunctory. From Madison's *Notes* on August 30:

Art: XX. taken up—"or affirmation" was added after "oath."

Mr. Pinkney moved to add to the art:—"but no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States."

Mr. Sherman thought it unnecessary, the prevailing liberality being a sufficient security agst. such tests.

Mr. Govr. Morris & Genl. Pinkney approved the motion,

The motion was agreed to nem: con:<sup>190</sup>

Note that "or Affirmation," an important saving for Quakers and other sects who refused to take oaths, was added with apparently no discussion at all. The only mild dissent to the prohibition of religious tests came from a New Englander, Roger Sherman, representative of a state (Connecticut) that had an established church.<sup>191</sup>

However, one of the pressures for what became the Bill of Rights came from those who argued (whether sincerely or strategically) that the

188. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 209-11 (1987) [hereinafter 1787 FEDERAL CONVENTION NOTES]. The suggestion that it was sarcastic is Madison's. See Letter from James Madison to Jared Sparks (Apr. 8, 1831), in JAMES MADISON: WRITINGS, *supra* note 151, at 854-56.

189. U.S. CONST. art. VI, cl. 3.

190. 1787 FEDERAL CONVENTION NOTES, *supra* note 188, at 560-61.

191. The degree of consensus on the point is also supported by Luther Martin, an Anti-Federalist, who wrote that it was "adopted by a great majority of the convention. Luther Martin, *Genuine Information* (1788), in [Art. 6, cl. 3] FOUNDERS' CONSTITUTION, *supra* note 4, at document 18.

original constitution did not offer sufficient protection of rights.<sup>192</sup> In the Virginia ratifying convention, Madison argued that explicit protection of religion was unnecessary, repeating his argument from Federalist 10 that an extended republic would secure religious liberty.<sup>193</sup> Nevertheless, Virginia forwarded a draft amendment that echoed the language of Madison's own Memorial and Remonstrance:

Twentieth, That religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.<sup>194</sup>

Madison therefore changed his position. In the first Congress, he was not elected to the Senate because of opposition from his anti-federalist enemy in the Virginia legislature, Patrick Henry.<sup>195</sup> He was elected to the House and became the floor manager for what became the Bill of Rights.<sup>196</sup> He based his draft on proposals that had been made by several states in their ratifying conventions (and also by North Carolina, which had refused to ratify until a bill of rights had been added).<sup>197</sup>

Madison's conduct in the events that led to the Establishment Clause became part of the school-prayer debate in the United States Supreme Court in 1992.<sup>198</sup> *Lee v. Weisman* involved a middle-school student, Deborah Weisman, who objected to a rabbi's invocation and benediction at her school's commencement exercise.<sup>199</sup> Justice Kennedy wrote the majority opinion, which barred future prayers in the district, joined by Justices Blackmun, Stevens, O'Connor and Souter; Justice Scalia wrote the dissent, in which Justices White and Thomas and the Chief Justice joined.

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192. ORIGINAL MEANINGS, *supra* note 142, at 318.

193. James Madison, Speech in the Virginia Ratifying Convention in Defense of the Constitution (June 6, 1788), in JAMES MADISON: WRITINGS, *supra* note 151, at 354, 360-61.

194. Virginia Ratifying Convention, Proposed Amendments, in [Amendment 1 (Religion)] FOUNDERS' CONSTITUTION, *supra* note 4, at document 51.

195. RAKOVE, *supra* note 105, at 77-79; *see also* Letter from James Madison to Edmund Randolph (Nov. 2, 1788), in JAMES MADISON: WRITINGS, *supra* note 151, at 423.

196. RAKOVE, *supra* note 105, at 81.

197. RAKOVE, *supra* note 105, at 127-28, 318-36.

198. *Lee v. Weisman*, 505 U.S. 577 (1992).

199. *Id.* at 581. Ironically, the dispute was in Providence, Rhode Island, one of the first places to be assured of religious freedom by the crown. *See supra* note 123. The opinions do not specify whether Weisman and her father objected because they were atheists or because they were Orthodox Jews who objected to a rabbi taking part in a secular ceremony.

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Justice Kennedy's majority opinion ignored *Lemon v. Kurtzman*<sup>200</sup> and focused on the degree of coercion imposed on a middle-school student who objects (or whose family objects) to prayers but who wants to attend commencement.<sup>201</sup> Justice Scalia concentrated on the novelty and unmanageability of what he called the 'psychological coercion' test and the inconsistency of the holding with long-standing practices concerning middle-school and high-school commencement ceremonies.<sup>202</sup> He went further, though, accepting the claims of the school district that the Establishment Clause should be interpreted based upon contemporary *practice* at the time of its adoption and pointing to indicators that the founders did not object to non-sectarian prayer.<sup>203</sup> These include President Washington's, Madison's and Jefferson's invocations of God in their inaugural addresses and the practice of "almost every President" in issuing thanksgiving proclamations.<sup>204</sup>

Every opinion in the case contains references to Madison. Justice Kennedy refers to the Memorial and Remonstrance in support of his position that Madison did not intend the Establishment Clause solely as protection for minorities, which might support a non-preferential interpretation of the clause; instead, establishment was inherently damaging: "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."<sup>205</sup> Justice Blackmun relies upon the passage that we have said echoes Andrew Melvill, arguing that those who use religious authority to pursue secular ends "exceed the commission from which they derive their authority and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves."<sup>206</sup> However, it is left to Souter to rebut Scalia's historical arguments.

He did so first by tracing the legislative history of the Establishment

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200. 403 U.S. 602 (1971).

201. *Id.* at 593-94; see also *The Supreme Court, 1991 Term*, 106 HARVARD L. REV. 259, 261-62 (1992); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT REV. 123, 131 (1992).

202. *Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (referring to the test as "its instrument of destruction, the bulldozer of its social engineering").

203. *Id.* at 632-36 (Scalia, J., dissenting).

204. *Id.* at 633-35 (Scalia, J., dissenting) (emphasis added); see also *infra* text accompanying note 227.

205. *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (quoting *Memorial and Remonstrance Against Religious Assessments*, *supra* note 151). The quote is from point 7, which we have called "pure Adam Smith."

206. *Id.* at 608 (Blackmun, J., concurring) (quoting *Memorial and Remonstrance Against Religious Assessments*, *supra* note 151); see also *supra* text accompanying note 129.

Clause.<sup>207</sup> Introduced by James Madison in terms that would have prohibited state, as well as national, establishments, it said, “[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”<sup>208</sup> Samuel Livermore, a representative from Connecticut (where Congregationalism was established), amended it in the Committee of the Whole to provide, “Congress shall make no laws touching religion, or infringing the rights of conscience,”<sup>209</sup> and it was further narrowed before it went to the Senate, but the term “establish” was inserted: “Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.”<sup>210</sup> The first version in the Senate was expressly non-preferential: “Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed.”<sup>211</sup> That version was dropped in favor of the House version, minus its final clause concerning conscience. However, before being sent back to the House, it was modified again, so that it read, “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.”<sup>212</sup> The House rejected this version and called for a conference, where the House conferees prevailed, so that the final version, sent to the States for ratification, provided, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”

The changes between the introduction of the amendment and its approval by Congress restricted its applicability to Congress, whereas Madison had intended for it to apply to the states.<sup>213</sup> However, by omitting references to “a religion,” “a national religion,” “one religious sect,” or

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207. For an expanded version of Justice Souter’s historical argument, see Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1985-86).

208. *Lee v. Weisman*, 505 U.S. 577, 612 (1992) (Souter, J., concurring) (citations omitted).

209. *Id.* (Souter, J., concurring) (citations omitted).

210. *Id.* at 613 (Souter, J., concurring) (quoting 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 136 (Senate Journal) (L. de Pauw ed. 1972)).

211. *Lee*, 505 U.S. at 613 (1992) (Souter, J., concurring) (quoting 1 DOCUMENTARY HISTORY, *supra* note 210, at 151).

212. *Id.* at 614 (Souter, J., concurring) (quoting 1 DOCUMENTARY HISTORY, *supra* note 209, at 166).

213. This limitation was unanimously eliminated when the religion clauses were incorporated into the Due Process Clause of the Fourteenth Amendment in *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947). Between then and *Lee*, no member of the Supreme Court had proposed disincorporating it. *Lee*, 505 U.S. at 620 n.4 (Souter, J., concurring). Justice Thomas, who takes a different view, was not on the court in 1992. See also NUSSBAUM, *supra* note 149, at 105.

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“articles of faith” (admittedly in the context of inter-chamber negotiation), Congress made it clear that non-preferential establishment was not an option. Justice Souter went even further, however, relying on Madison’s most candid writings on establishment, and argued that Madison disapproved of military and congressional chaplains paid with public money.<sup>214</sup> At the same time, he signaled to Scalia and the “originalists” on the court that more drastic approaches to the Establishment Clause were not only possible, they were historically justifiable.<sup>215</sup> In 2005, the debate was repeated in an abbreviated form, and a majority of the justices supported Souter’s reasoning.<sup>216</sup>

The difficulty with Justice Scalia’s position on this issue is that he attended to the dependent variable, emphasizing only actions like the proclamations of fast and thanksgiving by George Washington and John Adams that support his position.<sup>217</sup> However, Thomas Jefferson refused to issue such proclamations, and James Madison, who issued them, later repudiated his actions.<sup>218</sup> Jefferson also believed that most southerners would find his radical version of non-establishment acceptable, that it was only New England that might object.<sup>219</sup> Thus, the uniform continuity of behavior that Justice Scalia finds is simply not there.<sup>220</sup> As Martha Nussbaum has argued, Scalia’s position lacked historical or philosophical moorings.<sup>221</sup>

Constitutional politics require super-majorities: two-thirds of both houses of Congress (forty-three representatives and eighteen senators in

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214. *Lee v. Weisman*, 505 U.S. 577, 620 (1992) (Souter, J., concurring).

215. *See generally id.* at 609 (Souter, J., concurring). The votes of Justices Stephens and especially O’Connor in support of Souter’s concurrence are difficult to explain; they may have been cheap talk.

216. *McCreary v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

217. *Lee*, 505 U.S. at 633 (Scalia, J., concurring); *see also Van Orden v. Perry*, 545 U.S. 677, 686 (2005). Washington’s Christianity has been brought into question by Garry Wills, who points out that Washington attended church but did not take communion; when the minister complained, Washington stopped attending on communion Sundays. GARRY WILLS, *HEAD AND HEART: AMERICAN CHRISTIANITIES* 169 (2007) [hereinafter *HEARD AND HEART: AMERICAN CHRISTIANITIES*]. In later life Madison told Jared Sparks that Washington had never “attended to the arguments for Christianity” but rather “took those things as he found them existing.” RALPH LOUIS KETCHAM, *THE MADISONS AT MONTPELIER: REFLECTIONS ON THE FOUNDING COUPLE* 103 (2009).

218. *Lee*, 505 U.S. at 624-25 (Souter, J., concurring).

219. *See infra* note 229 and accompanying text.

220. *McCreary*, 545 U.S. at 877 (“[T]he dissent’s argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed.”).

221. NUSSBAUM, *supra* note 149, at 266-69.

1789) must propose textual amendments.<sup>222</sup> Such a super-majority could not be found either for Madison's universal prohibition of state establishments like those in Massachusetts, Connecticut, and New Hampshire or for the non-preferential establishment advocated in the Senate. Nor was liberty of conscience explicitly protected. *At least* the forty-third representative (serving on the conference committee) objected to non-preferential establishment, and we hypothesize that there was even less support for universal disestablishment in 1789. But inclusion of a Lockean conception of "conscience" also failed to meet the political requirements of the day.

### THOMAS JEFFERSON AND THE DANBURY BAPTISTS

The best-known justification of a strict interpretation of the Establishment and Free Exercise Clauses, which followed Madison's efforts in the First Congress and which has been quoted in Supreme Court opinions from the beginning of First Amendment jurisprudence as though it were part of the Constitution itself,<sup>223</sup> is President Thomas Jefferson's letter of January 1, 1802 to the committee of the Danbury (CT) Baptist Association:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.<sup>224</sup>

As often with Jefferson, behind the ringing words lies shrewd

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222. U.S. CONST. art. V.

223. *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947).

224. Letter from Thomas Jefferson to the Committee of the Danbury Baptist Association (Jan. 1, 1802), in DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 17 (2002); see also Library of Congress, Jefferson Papers, Series 1 (General Correspondence 1651–1827) at image 558/1218 [hereinafter Jefferson Papers, Series 1], <http://memory.loc.gov/master/mss/mtj/mtj1/025/0500/0558.jpg> (reproducing Thomas Jefferson's letter to the Danbury Baptist Association) (last visited Apr. 8, 2010). Early editions, and some modern ones, mistranscribe the word "legitimate" in this passage as "legislative." See, e.g., Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), in [Amendment 1 (Religion)] *FOUNDERS' CONSTITUTION*, *supra* note 4, at document 58; see also *THOMAS JEFFERSON: WRITINGS*, *supra* note 138 at 510. This mistranscription may have put holes in the walls constructed by Chief Justice Waite and Justice Black, but not in the one intended by Jefferson. Series 1 of the Jefferson Papers is available online at [http://memory.loc.gov/ammem/collections/jefferson\\_papers/mtjser1.html](http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser1.html).

calculation. Recent discoveries by the staff of the manuscript division of the Library of Congress throw light on the calculation.<sup>225</sup> Declaring himself “averse” to dealing with petitions,<sup>226</sup> Jefferson nevertheless found that of the Danbury Baptists a handy peg on which to hang a political argument against the Federalist Party. His original draft continues:

Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even those occasional performances of devotion, practiced indeed by the Executive of another nation as the legal head of its church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect.<sup>227</sup>

This was raw politics. Jefferson had narrowly won the bitterly contested election of 1800. The Federalists had charged him with atheism and had taunted him to declare a proclamation of thanksgiving for the recently announced peace between Britain and France. Knowing that he would never do so, they planned to use such refusal as yet further evidence of Jefferson’s atheism. Jefferson’s draft reply pointedly referred to the Executive of another nation—by which he meant King George III. So to the opposition’s *Atheist!* He retorted *Monarchist!* Jefferson’s argument is that an established church is a slippery slope back to monarchism. However, as he told Attorney-General Levi Lincoln, the draft “is at present seasoned to the southern taste only.”<sup>228</sup> Lincoln advised him that this paragraph would do him harm in New England, where civic feasts, proclamations, and fasts were part of ordinary life.<sup>229</sup> Jefferson therefore removed it.

The Danbury Baptists did not publicize Jefferson’s reply. Other New England Republicans did, but it did not become nationally famous until cited, with a crucial mistranscription, by Chief Justice Waite in *Reynolds v. United States* in 1879.<sup>230</sup> Numerous documents from Jefferson and

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225. James H. Hutson, *Thomas Jefferson’s Letter to the Danbury Baptists: A Controversy Rejoined*, 56 WM. & MARY Q. 775 (1999); see also JAMES HUTSON, “A Wall of Separation”: *FBI Helps Restore Jefferson’s Obliterated Draft*, 57 LIBRARY OF CONGRESS INFORMATION BULLETIN (1998), <http://www.loc.gov/loc/lcib/9806/danbury.html>.

226. Letter from Thomas Jefferson to Levi Lincoln (Jan. 1, 1802) [hereinafter Levi Lincoln Letter], in Jefferson Papers, Series 1, *supra* note 224, at image 561/1218.

227. See Jefferson Paper, Series 1, *supra* note 224, at image 557/1218 (original draft); see also *id.* at image 558/1218 (fair revised copy).

228. DREISBACH, *supra* note 224, at 43; Levin Lincoln Letter, *supra* note 226.

229. Letter from Levi Lincoln to Thomas Jefferson (Jan. 1, 1802), in Jefferson Papers, Series 1, *supra* note 224, at image 562/1218.

230. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878). See also discussion in note 224, *supra*.

Madison, notably the letter to Levi Lincoln just quoted, make it clear that the Establishment and Free Exercise clauses were products of a coalition between the deists Madison and Jefferson and separatist evangelical sects including Quakers and Baptists. Although Jefferson took care to implicate the Danbury Baptists in his version (“Believing with you,” he begins, going on to reflect some of their separatist views back to them), the Danbury Baptists apparently did not want to play his game.<sup>231</sup> Perhaps they found even the toned-down version of the letter that they received to be too political.

The Establishment Clause, recall, opens “*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>232</sup> This did not prevent the states from either making or continuing such laws. Massachusetts and Connecticut still had pro-establishment clauses in constitutions. That is why Jefferson underlines *their* in his letter.<sup>233</sup> The legislative history of the clauses (above) shows that the coalition which drafted them included some New Englanders who wanted to preserve state establishment, including from any threat of national establishment of a different sect to theirs. Jefferson’s Danbury letter continued Adam Smith’s war on two fronts with David Hume, on the one hand, and the Evangelicals on the other. Jefferson was as always less cautious than Madison. Observe the reference to “a matter which lies solely between man and *his* God” (emphasis added). Your God may differ from my God, a probably unpopular proposition for most New England voters in 1802.<sup>234</sup> Levi Lincoln may have done his president a disservice by allowing that phrase to remain in as well, and that may go some way to explain its non-publication by its audience in Danbury.

### TOLERATION, CONSCIENCE AND ADAM SMITH

Alternative sources proposed for Jefferson’s “wall of separation” include Richard Hooker’s *Laws of Ecclesiastical Polity*,<sup>235</sup> the writings of Roger Williams or of the Scots-born propagandist James Burgh, and

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231. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 163 (2002).

232. See source cited *supra* note 6.

233. This crucial underlining is omitted in several of the standard collections of Jefferson’s writings.

234. Compare his statement, “The legitimate powers of government extend to such act only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god.” THOMAS JEFFERSON, *Notes on the State of Virginia*, in THOMAS JEFFERSON: WRITINGS, *supra* note 138, at 123, 285.

235. RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY, at book VIII (London, George Rutledge & Sons 1888).

Locke's *Letter Concerning Toleration*.<sup>236</sup> Hooker uses the phrase pejoratively, as a characterization of dissenters' arguments, which he "could easily demolish."<sup>237</sup> Although by 1815 Jefferson owned a copy of Hooker,<sup>238</sup> Hooker, an Erastian, *opposed* separation. The passage comes from the same paragraph as his famous statement that "there is not any man of the Church of England but the same man is also a member of the commonwealth; nor any man a member of the commonwealth which is not also of the Church of England."<sup>239</sup> It seems unlikely that Jefferson took his metaphor from that source.

John Locke's *Letter* is widely understood as the precursor of religious freedom in the United States, and it certainly lies within the broad outlines of the enlightenment argument for religious freedom. However, Locke's explicit and necessary reliance on *religious* arguments to support his claim for toleration had more appeal to the Baptist than to the Deist arm of the coalition. As Jack Rakove has shown, Jefferson's own notes on Locke, taken at the time he was drafting the Virginia Declaration of Rights, reveal his attitude: "It was a great thing to go so far (as he himself said of the parli[ament]) who framed the act of toler[atio]n but where he stopped short, we may go on."<sup>240</sup> Locke's rules excepted Roman Catholics and atheists from his generally tolerant approach.<sup>241</sup> He also allowed for a (tolerant) establishment.<sup>242</sup> Non-theistic Scots, who influenced Jefferson and Madison, would have objected to the former, and even the Danbury Baptists would have objected to the latter. Nevertheless this strand of the establishment clause, most evident in Justice Kennedy's non-coercion test above, flourishes to the present day, despite the fact that Locke's core concept of conscience dropped out during the debate in Congress.

236. DREISBACH, *supra* note 224, at 79; *see also* John Locke, A Letter Concerning Toleration (1685) [hereinafter Letter Concerning Toleration], in JOHN LOCKE: POLITICAL WRITINGS 390, 390 (David Wooten ed., reprtg. 2003) [hereinafter JOHN LOCKE: POLITICAL WRITINGS].

237. HAMBURGER, *supra* note 231, at 36.

238. THOMAS JEFFERSON'S LIBRARY: A CATALOGUE WITH THE ENTRIES IN HIS OWN ORDER 80 (James Gilreath and Douglas L. Wilson eds., 1989) [hereinafter THOMAS JEFFERSON'S LIBRARY]. It was item 411 in this catalogue and may have been a late addition. A search using LibraryThing (<http://www.librarything.com/profile/ThomasJefferson>) fails to reveal Hooker's work in either Jefferson's 1783 or 1789 catalogues. The 1783 catalogue was compiled before he went to Paris but has additions interlined. The 1789 catalogue is his library after his return from Paris.

239. HOOKER, *supra* note 235, at 300.

240. Jack N. Rakove, *Beyond Locke, Beyond Belief: The Nexus of Free Exercise and Separation of Church and State*, in RELIGION, STATE, AND SOCIETY: JEFFERSON'S WALL OF SEPARATION IN COMPARATIVE PERSPECTIVE 38 (Robert Fatton, Jr. & R.K. Ramazani eds., 2009) (internal quotes omitted).

241. Letter Concerning Toleration, *supra* note 236, at 425-26.

242. *Id.* at 428-29.

Attribution of Jefferson's position to James Burgh evaporates upon close examination of the actual text. Burgh was a Scots-born London schoolteacher and journalist who belonged to the radical pro-American circle including Richard Price, Joseph Priestley, and Benjamin Franklin.<sup>243</sup> His *Crito* is in the brutally sarcastic style of his contemporary Junius, or of Thomas Paine in the next generation. Addressing the citizens of the 20<sup>th</sup> Century, he writes:

A church is nothing more than a community of persons united together in affection and esteem, by their holding the same religion, and stands wholly unconnected with *secular* concerns. The combination of a sect of idle and greedy men, who, supported by *power*, set themselves up for *lords* over the *conscienc*es of others, and who unite together, under the pretext of being religious *rulers*, for carrying on a sordid plan of *power* and *riches*; is an execrable *conspiracy*, which all friends of mankind ought to join together to *overturn* from the *foundation*. . . .

Build an impenetrable wall of *separation* between things *sacred* and *civil*. Do not send a *graceless* officer, reeking from the arms of his *trull*, to the performance of a *holy* rite of *religion*, as a *test* for his holding the command of a regiment.<sup>244</sup>

Whatever the Danbury Baptists might have made of this sentiment, they would have revolted at its expression.

Finally, here is Roger Williams' wall:

[T]he Church of the Jews under the Old Testament in the type and the Church of the Christians under the New Testament in the Antitype, were both Separate from the world; and . . . when they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wildernes of the world, God hath ever broke down the wall it selfe, removed the Candlestick, etc, and made his Garden a Wildernesse, as at this day.<sup>245</sup>

There are formidable obstacles to seeing Williams' wall as a textual precursor of the First Amendment or of Jefferson's wall. First, Williams' wall serves a different purpose: the wall is intended to protect religion, not

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243. Carla H. Hay, *James Burgh (1714-1775)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 13.

244. JAMES BURGH, *CRITO, OR ESSAYS ON VARIOUS SUBJECTS* (1766). "Trull" means a low prostitute or concubine; a drab, strumpet, trollope. OXFORD ENGLISH DICTIONARY, *supra* note 47.

245. Roger Williams, *Mr. Cotton's Letter Lately Printed, Examined and Answered*, in 1 PUBLICATIONS OF THE NARRAGANSETT CLUB 392 (1866) (1644).

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the state.<sup>246</sup> Moreover, Williams' wall does not work; God himself has broken it down and removed the candle.<sup>247</sup> Second, the theological language of mid-seventeenth century Puritan providential history (type, Anti-type) would have meant nothing to most of the drafters of 1787–1791. Third, there is no evidence that the framers or Jefferson knew of this passage. It is not among the books listed in his 1815 library, nor are any works of Puritan theology or history.<sup>248</sup> It was published in London, and although Williams' writings were being rediscovered by the Baptist historian Isaac Backus, he does not seem to have quoted this passage. Fourth, and crucially, Rhode Island was absent from the Constitutional Convention and from the First Congress where the First Amendment was drafted. To Madison, the state was an exemplar of the “improper and wicked” projects that the federal constitution was designed to end.<sup>249</sup> Although the 1663 Rhode Island charter included the first free exercise clause in a constitutional text,<sup>250</sup> it is not a direct ancestor of the First Amendment.

At a deeper contextual level, however, the arguments of Williams and Burgh share their Scottish roots with those of Hume and Smith. Williams was in London in 1643 when the Scots and English negotiators agreed on the Solemn League and Covenant against King Charles I.<sup>251</sup> The lead English negotiator was Sir Harry Vane, Williams' patron, who had been a controversial governor of Massachusetts before Williams' expulsion.<sup>252</sup> The Scots had demanded that the English adopt their religion in return for support from the Scots army. The Solemn League and Covenant brought the theology of Melvill to London. If it had been enforced (it was not), it would have brought Melvillian Calvinism to the Church of England and Ireland. Melvill did not favor either disestablishment or the free exercise of religion, but he did favor the separation of church and state. Calvinism insisted upon it. Later, Baptists and Quakers accepted the Calvinist

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246. HAMBURGER, *supra* note 231, at 44.

247. WILLS, *supra* note 217, at 95.

248. See generally THOMAS JEFFERSON'S LIBRARY, *supra* note 238. Madison's unsuccessful 1783 recommendations for acquisition by Congress included works by Cotton Mather, but that collection was intended to include the histories of all the states. 6 JAMES MADISON, THE PAPERS OF JAMES MADISON 62-115 (W.T. Hutchinson & W.M.E. Rachal, eds. 1962).

249. See *supra* note 183.

250. See *supra* note 149.

251. OLA ELIZABETH WINSLOW, MASTER ROGER WILLIAMS: A BIOGRAPHY 178-87 (1957).

252. *Id.* at 180. Before traveling to England, Williams was receiving 'Scotch Intelligence' from John Winthrop (the son of the Massachusetts governor who had expelled him). Letter from John Winthrop to Roger Williams (Aug. 7, 1640), in 1 THE CORRESPONDENCE OF ROGER WILLIAMS 206, 207 (Glenn W. LaFantasie ed., 1988). The editor of his letters hypothesizes that Williams feared the imposition of bishops on the Scots.

doctrine of separation, but refused to accept establishment and insisted on free exercise. Roger Williams reached this point in 1644; James Burgh, intended to be a minister in the Church of Scotland, reached it in his own way in 1767; Adam Smith reached it by 1776. Of these three, however, only Smith reached the conclusion on the purely secular grounds that sprang from the Scottish enlightenment and that could have appealed to Deists like Jefferson and Madison.

In Scots Calvinism of the kind that influenced Burgh and Williams, the civil magistrate has the duty to protect, but not to govern, the church. Smith rejects this in the passage we have argued is the wellspring of Madison's 'Memorial', pointing out that when confronted with an enthusiastic, non-established sect the comfortable but out-of-touch clergy of the establishment can only "[c]all upon the civil magistrate to persecute, destroy, or drive out their adversaries, as disturbers of the public peace."<sup>253</sup> Jefferson picked up the same theme in 1779 when he drafted the preamble for the Virginia Statute of Religious Freedom:

[T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty.<sup>254</sup>

This and other passages in the preamble show that Jefferson had read *The Wealth of Nations* very soon after its publication or had learned of Smith's ideas through William Small. The preamble was adopted along with the statute in 1785, and its language was quoted by Chief Justice Waite in his opinion in *Reynolds*.

In later life, even John Adams came around to Jefferson's and Smith's position on establishment. In the Massachusetts constitutional convention of 1820 he proposed, but failed, to repeal the pro-establishment clauses that he had written in 1780.<sup>255</sup> Some of his last letters to Jefferson deplore the continuance of blasphemy laws in Massachusetts.<sup>256</sup> The relevant clause in the Massachusetts constitution was not repealed until 1833.<sup>257</sup>

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253. WEALTH OF NATIONS, *supra* note 3, at book V, ch. i.g.1.

254. JEFFERSON, *A Bill for Establishing Religious Freedom*, in THOMAS JEFFERSON: WRITINGS, *supra* note 138, at 347.

255. MCCULLOUGH, *supra* note 144, at 631.

256. Letters from John Adams to Thomas Jefferson (Feb. 3, 1821; Jan. 23, 1825), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 572, 608 (Lester J. Cappon ed., 1959).

257. R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 14 (1982).

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Smith's continuing influence, however, is most evident in Justice Souter's approach to the Establishment Clause. Writing in *McCreary* and with the support of a majority of the court, he repeated his claim that the clause was not only, as Locke might have had it, adopted to protect the integrity of the individual conscience in religious matters.<sup>258</sup> Instead, it was adopted "to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists)."<sup>259</sup> Or, we would add, to their Calvinist forbears and to *their* descendants in the Scottish Enlightenment. The debate began in Glasgow and Aberdeen 250 years ago, Adam Smith took it to the constitutional convention in 1787, and it continues in current interpretations of the First Amendment to the present day.

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258. *McCreary v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 876 (2005).

259. *Id.*