

Adam Smith at the Constitutional Convention

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Abstract

Adam Smith is not referred to in the records of the Constitutional Convention of 1787, but he indirectly influenced not only the substance of the framers' decisions, predominantly the First Amendment's Establishment Clause, but also the larger environment in which the decisions were made.

I 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, and in France to boot. Nevertheless his hand is present in the instigation of the American War for Independence, whether the cause was 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: Madison and Jefferson. And Jefferson's letter to the Danbury Baptist Association carries Smith's theme to its logical end, not just as political rhetoric but as a matter of principle. Thus, even though the founders failed to acknowledge their reliance on Smith, his hand in the creation of the independent republic is far from an invisible one.

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Adam Smith at the Constitutional Convention

Introduction

My title is of course ironic. Adam Smith (1723-90) was not present at the Philadelphia convention. No delegate there seems to have referred either to his *Theory of Moral Sentiments* (1759) or to his *Wealth of Nations* (1776, with very full discussions of British and American politics¹) in the debates, nor in the selection of letters, commentaries, and speeches in state ratifying conventions collected by Farrand. The online *Founders' Constitution* contains one very relevant extract from *WN*, containing Smith's argument against David Hume that liberty is best secured by religious pluralism, not by an established church. But the editors of the *Founders' Constitution* do not trace the link from Smith to the Constitution, specifically to the Establishment Clause. This paper aims to fill that gap.²

Smith's best friend David Hume (1711-76) did not fare much better at Philadelphia. Using the same sources, I have found only one citation of Hume by a Philadelphia delegate, viz., Alexander Hamilton. Hamilton's speech on 22 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. We have taken up many ideas upon trust, and at last, pleased with our own opinions, establish them as undoubted truths. 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

¹ Respectively Smith 1982, 1981. Referencing of *TMS* and *WN* follows the industry standard explained in McLean 2006a pp. x-xi.

² No reference to Smith is captured in Farrand's indices to *The Records of the Constitutional Convention*, (Farrand 1911) searched at <http://memory.loc.gov/ammem/amlaw/lwfr.html>. For *WN* in *The Founders' Constitution* see http://press-pubs.uchicago.edu/founders/documents/amendI_religions31.html. I have not found an electronic finding aid to the 21 volumes of *The Documentary History of the Ratification of the Constitution* (Jensen et al. 1976-)

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. It is difficult to put any exclusive regulation into effect. We must in some degree submit to the inconvenience.

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'. (Hume 1741/1994, p. 24). The public-choice tone of Hume's maxim fits both Hamilton's and Madison's thought at the time.

Nevertheless, a single citation of Hume and zero citations of Smith make it hard to claim a strong direct influence from those towering figures of the Scottish Enlightenment on moral and political debate in America in 1787-91. This paper argues, however, for strong indirect influence.

'Very zealous in American affairs'

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. Elsewhere (McLean 2006a chapter 6) I present the full 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. The following section summarizes this evidence.

The political patron of Scotland in Smith's youth and middle age was Archibald Campbell, Lord Ilay, later third Duke of Argyll (1682-1761). Smith entered his patronage network at an early age, perhaps during a visit in 1741 to one of the Argyll family estates in Adderbury, north Oxfordshire. Argyll was also a patron of Glasgow University, and Smith tried to meet him in 1751 on University business while a professor and administrator there between 1751 and 1764. He visited the remote ducal seat at Inveraray, about 100 miles (probably three days' travel each way) from Glasgow in 1759 or 1760. After a gap, Argyll was succeeded as Scottish political manager by two men of more modest origins: Alexander Wedderburn, later Lord Loughborough (1733-1805), and Henry Dundas, later Viscount Melville (1742-1811). Smith knew them both, the first intimately.

Through the Argyll connection, Smith entered both political and noble circles. The politician Charles Townshend (1725-67), who according to Hume 'passes for the cleverest Fellow in England' (Hume to AS 12.04.1759; Mossner and Ross 1987. # 31), was married to a sister of the second duke of Argyll, Ilay's elder brother. Her previous husband had been the heir to Scotland's other biggest landowner, the Duke of Buccleuch. Townshend was therefore the stepfather of the young (3rd) Duke of Buccleuch. In 1759, when Smith came to Townshend's notice because of the

publication of *TMS*, the Duke was a schoolboy at Eton. Townshend apparently first mentioned the idea of Smith acting as the Duke's tutor in 1759; in 1763 he made a firm invitation, which Smith accepted. He remained on the Buccleuch payroll for the rest of his life, which gave him financial independence and access to policymakers.

From the early 1760s Townshend decided that the American colonists should bear a larger share of the costs of their defense. The Seven Years' War (1756-63) was fought between the imperial powers of Britain and France, at the outer fringes of their empires, Canada and India, using, in part, proxy warriors such as Native Americans and Indian princes. The British victories in Canada under General Wolfe in 1759 removed a French tourniquet over American colonial expansion. 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. Their key stronghold, on the Ohio River in modern Pennsylvania, was Fort Duquesne. On capture by the British it was renamed Fort Pitt in honour of the wartime Prime Minister Pitt the Elder. It is now Pittsburgh.

The British victory removed the tourniquet. But the expensive campaign, led by American-born British officers such as Major George Washington, was funded entirely by the British taxpayer, 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. Townshend wished to end the colonists' free ride. In July 1766 Pitt appointed Townshend Chancellor of the Exchequer. Townshend started to use Smith as a specialist adviser in 1766, as 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. Townshend's calculations, corrected by Smith, show that the Sinking Fund was then building up too slowly to achieve this, therefore Townshend concludes that he needs to raise taxes, and raise the yield of existing taxes by reducing smuggling, in order to increase the tax yield by a total of £400,000 per annum. 'I will add to these a *real American Revenue*' (Townshend to AS, late 1766; Mossner and Ross 1987 # 302; stress in original).

Townshend presented his budget in March 1767, including his proposals for a *real American Revenue*. He would get his American revenue by imposing a duty on British goods landed in the colonies, including, ominously, tea. 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.

Townshend's duties led to the Boston Tea Party (1773) and the outbreak war in 1775. Townshend did not live to see this, as he died suddenly in September 1767. But Adam Smith did. This led the economist C. R. Fay to comment 'in the last analysis it was professional advice which lost us [the UK] the first empire' (Fay 1956, p. 116). From his 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. This is crystal clear in advice which Smith gave to his old friend Wedderburn, when the latter was Solicitor-General, in 1778 (Mossner and Ross 1987, Appendix B, discussed below). It is also clear in the long chapter on colonies in *WN* (IV.vii, especially IV.vii.c.71-74).

But Smith would not have approved of the specific form that the Townshend duties took for at least three reasons. First, the tea duties were an inefficient form of taxation. They do not conform to the canons of taxation that Smith sets out in *WN* Book V. Second, 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 (Thomas 2004). The tea duties 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' (*WN* IV.vii.c.75).

Lord Shelburne was a fellow minister with Townshend, although they did not get on well. Smith had known the family since 1758, when Shelburne had suggested that his younger brother should go to Glasgow rather than to Oxford, and that Smith should be his tutor. Smith took on this duty and discharged it conscientiously (Mossner and Ross 1987 ## 27-30). Hume later reported that Shelburne 'always speaks of you with regard' (DH to AS, 13.09.1763; Mossner and Ross 1987 # 75). 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' (quoted by Fleischacker 2004, p. 21). In early 1767 Shelburne was the minister responsible for India and America. At the same time as helping Townshend over tax policy, Smith sent Shelburne a letter enclosing some travellers' tales of journeys in the South Seas, together with a proposal for a British expedition of discovery and some notes on Roman colonies, later incorporated in the chapter on colonies in *WN* (Mossner and Ross 1987 # 101). Nothing came of this, but in 1768 Smith thanked Shelburne for the 'kindness' he had shown to him in London; and in 1784 he presented him with a copy of *WN* (Mossner and Ross 1987 ## 113, 241).

Shelburne left the government in 1768, and did not return to government until 1782-3, when he was briefly and unsuccessfully Prime Minister. But while in office, he drafted what became the Quebec Act 1774 (Watson 1960, p. 128). I cannot prove that Smith wrote the Quebec Act. But the circumstantial evidence is strong. 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 entirely consistent with Smith's 1778 advice to another friend and minister, Wedderburn. Therefore I claim that Smith was probably involved in the ideas underlying it.

The Quebec Act 1774 has recently come to be seen as one of the most important *casus belli* of the American War of Independence. 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. But it was already clear when Shelburne was minister that this was unsustainable. The people of this greater 'Quebec' remained mostly French-speaking and Catholic in religion. Britain could no more govern them directly than can the United States govern Iraq directly. Therefore the 1774 Act provided for an appointed legislature, and recognised the legitimacy of Catholic religion and

French civil law in the province. This in itself enraged some of the militant Calvinists of New England. But it was ‘enlarging its boundaries’ that was truly explosive. The act defined the southern boundary of Quebec as following the present US-Canadian border westwards as far as the NW corner of Pennsylvania. But there it was to strike southwards along the Ohio River valley, passing just west of Fort Pitt (Pittsburgh), until it joined the Mississippi, and up the Mississippi until it met the southern boundary of Hudson’s Bay territory (then governed by a separate chartered company).³

Schofield has analysed how fundamentally this threatened the material and strategic interests of the American colonists (Schofield 2006 pp. 72-90). The Ohio and Mississippi valleys were the key to westward expansion of the American colonies and the trunk transport route for all goods – and troops – into or out of the western states. Politicians, including George Washington, were actively speculating in ‘empty’ land (i.e., land inhabited only by Native Americans) west of the Appalachians, and states were making sometimes conflicting claims to incorporate these western lands in their territories. South of the new ‘Quebec’, Spain still claimed, albeit feebly, to control the Mississippi valley, and France controlled New Orleans at its mouth. 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.

But then, why did Smith, Shelburne, and Prime Minister Lord North fail to anticipate that the Quebec Act would tip the colonists 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 (2006, p. 72) that they received a secret signal before 4 July 1776 of the French support that was to prove crucial for the ultimate American victory.⁴

While advising successive governments about American policy, Smith was also busy writing what became the chapter on colonies in *WN*: Book IV, chapter vii. His friends were eagerly awaiting it, in the hope that his advice would be available in the worsening crisis. When it appeared, it cannot have been what anyone expected. Smith repeats his long-held view that the colonies cannot expect to take a free ride on their defence (IV.vii.b.20). He argues that 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. The one exception is the government of slaves. Slaves in Haiti (then the French colony of St-Domingue) are treated better than those in the

³ The Act is reproduced in Schofield 2006 pp. 85-90. It is one of the listed grievances against George III in the Declaration of Independence. For an Address from the Continental Congress to the Inhabitants of the Province of Quebec, 26 Oct. 1774 (‘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’), see *The Founders’ Constitution*, under the Establishment Clause, Document # 20, at http://press-pubs.uchicago.edu/founders/documents/amendI_religions20.html.

⁴ It is a nice theory. However, in McLean 2006b I cast doubt on whether the documents support Schofield’s chronology.

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 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 (IV.vii.b.54-5).

Smith leaves the discussion of slaves in the air, not exploring the multiple ironies that he has (surely deliberately) introduced. He passes on to some complimentary remarks about the colonists. They 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.... 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 (IV.vii.b.51 and 64).

But 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. British mercantilism took the form of Navigation Acts and enumerated commodities. The former stipulated that only British ships might carry goods to or from the British colonies. The latter 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.

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. 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. (IV.vii.c.66)

If that was too radical, his alternative proposal was scarcely less so. He was dismissive of the American cry of ‘no taxation without representation’, observing that

Guernsey and Jersey had lived perfectly happily with it for a long time. But, he went on, if some of the American colonies insisted on representation in Parliament, they should be offered it, with the carrot that the more their taxes raised, the more seats in Parliament they would be offered.

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. (IV.vii.c.75)

In a much told, but 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 of Saratoga in 1777. The British nation must be ruined, said Sinclair. "Be assured, my young friend", replied the imperturbable philosopher, "there is a great deal of ruin in a nation" (Sinclair 1837, p. 37). By this Smith meant 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. 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 favour, because the 'ulcerated minds of the Americans are not likely to consent to any union even upon terms the most advantageous to themselves'. 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. Option II, an American victory, would bring the advantages he had spoken of in *WN*. Britain would no longer have to pay for the defence of America. A Machiavellian suggestion is that in the event of an American victory Britain should

restore Canada to France and the two Floridas⁵ 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.

But American victory (let alone the ingenious idea of handing back Canada and Florida) 'would not, in the eyes of Europe appear honourable to Great Britain'. 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 between the British and American elites that it would be gradually dismantled – but it would be hard to keep such an agreement secret; and IV, 'the submission or conquest of a part, but a part only' of the rebel colonies. He saw that as the likeliest, and worst, option, because of the military burden. 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 at the peace negotiations of 1783, so that the clever idea of ceding Canada to France and Florida to Spain did not see the

⁵ 'The two Floridas' were East and West Florida. 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.

light of day until the memorandum was rediscovered in the 1930s. (All quotations in this paragraph are from the memorandum in Mossner and Ross 1987, Appendix B, pp. 380-5).

No wonder they didn't quote him at Philadelphia.

Thus Smith's opinions in *WN* offended the entire political class in both countries (and in France, for good measure). But underneath the Smithian scorn, it is clear that he respected the colonists' 'republican manners'. I wish now to argue that this republican bond left a huge, and mostly unacknowledged, influence on US constitutionalism. It shaped, above all, the Establishment Clause of the First Amendment, and to this day gives shape to the legal and political debates about that clause's meaning.

It is now well established that the thought of the Scottish Enlightenment had a profound influence on US constitutionalism (Adair 1974, 2000; Wills 1978; Himmelfarb 2005). There were two immediate routes: via William Small, Thomas Jefferson's teacher at William & Mary; and via John Witherspoon, James Madison's teacher at Princeton. Small and Witherspoon stood for the liberal and conservative Scottish traditions, respectively. Witherspoon nevertheless taught the work of the 'infidel' Hume. And Smith held a public discussion with Hume in the pages of *WN*. Hume had argued for establishment; Smith argued against.

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

Table 1. Scottish Enlightenment positions on church and state

Atheist	Deist ('Moderate')	Calvinist ('Popular')
David Hume	Francis Hutcheson Adam Smith Thomas Reid William Small	John Witherspoon John Adams (in 1776)
?Thomas Jefferson (in 1776)	Thomas Jefferson (in 1800) James Madison John Adams (in 1820)	

Start with the Calvinist position, as it is the least understood today. Calvinism involves a set of beliefs about personal responsibility to a God who punishes unrighteousness (especially, it seems, sexual) with eternal punishment, and rewards those elected to it with eternal life. But it also encompasses a set of beliefs about church and state. It is triply anti-hierarchical. First, there are no grades of clergymen – no bishops, archbishops, deans or cardinals. All ministers are of equal standing. Secondly, church government is in the hands of ministers and lay elders with equal authority. Thirdly, the doctrine of the two kingdoms states that the civil magistrate has a duty to protect the church but no right to interfere in it. In 1596, the real founder of Scottish Calvinism, Andrew Melville, 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!... the quhilk na Christian King nor Prince sould controll and discharge, but fortifie and assist, utherwayes nocht fathfull subjects nor members of Chryst'.⁶

Seventeenth-century Scotland was an often terrifying place, where kings and their local officials were called upon to fortify and assist Christ's Kirk with numerous floggings and hangings. As late as 1697, an Edinburgh student, Thomas Aitkenhead, was hanged for blasphemy. 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. Religious freedom for the presbyterian Church of Scotland was guaranteed by the Act of Union 1707. But 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. 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 Hutcheson and Smith, and the atheist Hume, to survive and to write (more or less) unmolested. Francis Hutcheson (1694-1746; described by Adam Smith as 'the never to be forgotten Dr Hutcheson') was an Ulster Scot who was Smith's professor at Glasgow University from 1737 to 1740. His philosophy broke free from theology. This led him into trouble with the Presbytery of Glasgow, which tried to prosecute him for heresy in 1738 (during Adam Smith's freshman year). A remarkable student-published *Vindication of Dr Hutcheson* explains that his alleged offence was to have taught that 'we have a notion of moral goodness prior in the order of knowledge to any notion of the will or law of God'. Yes, that was exactly what he had done, wrote his student defenders – who may have included the precocious Adam Smith:

We count God morally Good, on this account, that we justly conclude, he has essential Dispositions to communicate Happiness and Perfection to his creatures... we must have another notion of moral Goodness, prior to any Relation to Law, or Will.... Otherways, when we say God's Laws are Good, we make no valuable Encomium on them; and only say, God's Laws are conformable to his Laws or, his Will is conformable to his Will.... So, when we say God is morally good or excellent, we would only mean, he is conformable to himself; which would be no Praise unless he were previously known to be good. (*Vindication* 1738, p.7).

Thus Hutcheson made the first essential move in the secular ethics of the Scottish Enlightenment. His student Adam Smith would secularise ethics further; his rival David Hume would take religion out of ethics altogether. Hume was open about his scepticism in various writings, including the attack on miracles as a ground of belief in the *Essay on Human Understanding*, and two later works, *The Natural History of Religion* and the posthumous *Dialogues concerning Natural Religion*. On his death-bed he imagined himself arguing with Charon, the ferryman of the dead. Smith

⁶ Diary of James Melvill, 1596, in Pitcairn (1842), pp. 369-70. sillie: plain, simple. divers: various. sa: so. mon: must. Saxt: Sixth. whase: whose. nocht: not. whame: whom. the quhilk na: which no. utherwayes: otherwise [sc. they are]

published an affecting but sanitised version of what Hume said. The unsanitised 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 . (Mossner and Ross 1987, # 163: AS to Alexander Wedderburn 14 Aug. 1776).

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. Both Smith and, earlier, Hutcheson had opposed the election of the atheist Hume to a philosophy chair in a Scottish university.

By 1760, then, Scottish philosophers had challenged orthodox Melvillean Calvinism from both deist (Hutcheson, Smith) and atheist (Hume) standpoints. Two of the three standpoints were institutionalised 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. In *WN*, Smith vividly characterizes the Moderates and Evangelicals as 'Loose' and 'Austere' respectively, and offers a Humean natural history of their religions. Austere Calvinists are austere about drink and sex. This appeals to, and benefits, the poor, because they can be ruined by drink and sex, and therefore they 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 (*WN* V.i.g.10-14).

In Aberdeen, there were two universities, one each for the Loose and Austere. Jefferson's teacher William Small attended the Austere university (Marischal College) but listened to Loose lecturers from the other one (King's College). 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 scepticism. 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 (Jefferson, *Autobiography*, in Peterson 1984, p. 2).

I hypothesize that Small's W&M lectures on ethics, rhetoric, and belles letters derived from Adam Smith. Smith had started giving such lectures in Edinburgh in the 1740s. Student copies of them circulated around Scotland. The lectures on ethics found their way into *TMS*. Those on rhetoric and belles-lettres were discovered, in a student copy, in 1958 and have now been published in the collected works of Adam Smith.

Thus, referring again to Table 1, three models of church-state relations were available to the Framers at Philadelphia and to the drafters of the Bill of Rights. 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 implicit in Jefferson's thought

at the time, but he never stated it in public so far as I know. It may have appealed to a few delegates. But it was not in contention for polite discussion in America, unlike in France.

The Calvinist model was already in force in New England. The Massachusetts Constitution of 1780, drafted by John Adams, states at Part I Arts II and III:

Art. II. It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.

Art. III. As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality, and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion, and morality: Therefore, To promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies 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.

And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided, notwithstanding, That the several towns, parishes, precincts, and other bodies-politic, or religious societies, shall at all times have the exclusive right of electing their public teachers and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship and of the public teachers aforesaid shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid toward the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

And every denomination of Christians, demeaning themselves peaceably and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another

shall ever be established by law. [Quoted from http://press-pubs.uchicago.edu/founders/documents/amendI_religions38.html. Cf McCullough 2001 pp. 220-5].

To be sure, Boston in 1780 was not Edinburgh in 1697. Adams' constitution offers toleration to 'every denomination of Christians'. But each town had the duty of supervising public Protestant worship and schooling. Andrew Melvill would not have liked Adams' constitution; but he would have preferred it to the Virginians'. Adams' Constitution recognizably fortifies and assists the congregational church of each town in Massachusetts.

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. Madison's successful blast against this, a *Memorial and Remonstrance against Religious Assessments*, shows him to be a follower of Smith, not of Witherspoon⁷. This is particularly clear in point 7 of the Memorial, which is practically a précis of Smith's argument in *WN*:

We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "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." [Virginia Declaration of Rights, art. 16] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. ... We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no 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.

2. Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. ... The Rulers who are guilty of such an encroachment, 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....

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. 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. Enquire of the Teachers of Christianity

⁷ But Witherspoon's lecture notes show that he taught the ethics of liberal as well as conservative Scots, including Hutcheson and Smith. Adair (2000), p. 26.

for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive State in which its Teachers depended on the voluntary rewards of their flocks, many of them predict its downfall. On which Side ought their testimony to have greatest weight, when for or when against their interest? (Rakove 1999 pp. 30-3).

The Memorial is 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. Point 1 acknowledges the problem of majority tyranny (it was no doubt designed to appeal to the minority lobby of Baptists in Virginia). Point 2 has an echo of Andrew Melvill, but mostly it, too, looks forward to Danbury. Point 7, as already stated, is pure Adam Smith.

The second prequel 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. Under point #11, 'Injustices of the Laws of States', Madison wrote:

A still more fatal if not more frequent cause lies among the people themselves. All civilized societies 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--followers of different political leaders--inhabitants of different districts--owners of different kinds of property &c &c. In republican Government the majority however composed, ultimately give the law....

will Religion the only remaining motive be a sufficient restraint? It is not pretended to be such on men individually considered. Will its effect be greater on them considered in an aggregate view? quite the reverse. The conduct of every popular assembly acting on oath, the strongest of religious Ties, proves that individuals join without remorse in acts, against which their consciences would revolt if proposed to them under the like sanction, separately in their closets. When indeed Religion is kindled into enthusiasm, its force like that of other passions, is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of religion, and while it lasts will hardly be seen with pleasure at the helm of Government. Besides as religion in its coolest state, is not infallible, it may become a motive to oppression as well as a restraint from injustice....

If an enlargement of the sphere is found to lessen the insecurity of private rights, it is not because the impulse of a common interest or passion is less predominant in this case with the majority; but because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a great than by a small number. The Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits. (Rakove 1999, pp. 75-9).

The germ of Federalist #10 is here – in fact, more than the germ. 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 references to religion, and polished it for the New York newspapers. An extended republic offers the best solution to the tyranny of the majority, because no one religious or political faction is likely to be dominant:

Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.... A zeal for different opinions concerning religion, concerning Government and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for their common good.... From this view of the subject, it may be concluded, that a pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual.... The two great points of difference between a Democracy and a Republic are, first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest: secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.... 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.

Compare Adam Smith, in *WN* V.i.g.8:

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 thousand small sects, of which no one could be considerable enough to disturb the public 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.

From Philadelphia to Danbury, CT

As is well known, there was little discussion of religion at the Philadelphia Convention. The best-known was Franklin's perhaps sarcastic suggestion that sessions should be opened with prayers. The only mention of religion in the original constitution is in Article VI.3 listing 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'. 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:

Note that 'or Affirmation', an important saving for Quakers and other sects who refuse(d) to take oaths, was added with apparently no discussion at all. The only mild dissent to the prohibition of religious tests came, appropriately, from a New Englander, Roger Sherman (CT).

However, one of the pressures for what became the Bill of Rights came from those who argued (whether sincerely or strategically) that the original constitution did not offer sufficient protection of rights. 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. 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. (Quoted from http://press-pubs.uchicago.edu/founders/documents/amendI_religions51.html).

There is no space in this already long paper to examine the process by which the First Amendment was drafted and ratified. I therefore examine, finally, the post-Amendment justification of it.

The best-known such justification, so well known now that some lawyers have quoted it as if it were part of the Constitution itself, is President Jefferson's letter of Jan. 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 legislative 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 (in Appleby and Ball 1999, p. 397).

As often with Jefferson, behind the ringing words lies shrewd calculation. Recent discoveries by the staff of the manuscript division of the Library of Congress throw light on the calculation. Declaring himself 'averse' to dealing with petitions, 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 [Text as deciphered by FBI in Hutson 1998]

This was raw politics. The Federalists had charged Jefferson 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, his Attorney-General, Levi Lincoln, advised him that this paragraph would do him harm in New England, where civic feasts, proclamations, and fasts, were part of ordinary life. Jefferson therefore deleted it.

The Establishment Clause, recall, opens '*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*'. This did not prevent the states from making, or continuing, such laws. Massachusetts, as we have seen, still had a pro-establishment clause in its 1780 Adams constitution. Jefferson's Danbury letter was an instalment in the two-way fight that Adam Smith had picked with David Hume and the Evangelicals 25 years earlier. I am not going so far as to claim that Jefferson was directly applying Smith's reasoning. His own and Madison's reasoning going back to their collaboration in Virginia in the 1780s sufficed to define his position. But Jefferson was as always less cautious than Madison. Observe the reference to 'a matter which lies solely between man and *his* God' (my italics). Your God may differ from my God, a probably unpopular proposition in New England in 1802.

In their evening correspondence, John Adams came round to Jefferson's position. In the Massachusetts constitutional convention of 1820 Adams tried, but failed, to repeal the pro-establishment clauses he had himself written in 1780. One of his last letters to Jefferson deplors the continuance of blasphemy laws, even in Massachusetts (JA to TJ 3 Feb. 1821 and 23 Jan. 1825, in Cappon 1987 pp 572, 608). The relevant clause in the Massachusetts Constitution was not repealed until 1833. Perhaps indeed Adam Smith has been *too* successful. The Danbury letter is after all not the Constitution. Those conservatives who would like to weaken the separation of church and state are entitled to say that the Constitution admits a Witherspoon interpretation as well as a Smith one. Probably most people now engaged in this heated argument would be surprised to learn that it began in Glasgow and Aberdeen over 250 years ago.

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