

The influence of the Scottish Enlightenment on American Constitutionalism

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It has always been obvious that several of the framers of the US Constitution, who drafted it at the Philadelphia Convention in 1787, were well read in English constitutional history. For instance, the rules on impeachment (US Constitution Article I Sections 2 and 3) are derived from the rules put in place in England after the parliamentary victory in the English civil wars of 1642-9. Thomas Jefferson's *Manual of Parliamentary Practice*, first compiled when he was Vice-President between 1797 and 1801, and periodically revised, lists the English precedents for the impeachment clauses in Section 53, paragraphs 601-20¹. Several of the state ratifying conventions complained that the original constitution did too little to protect individuals from officers of the state. Again, the drafters of the Bill of Rights (the first ten amendments of the US Constitution, ratified in 1791) turned to English precedents. For instance, the VIIth Amendment ('Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted')

derives directly from the English Bill of Rights of 1689, which states, 'That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted'. The English bill of Rights was drawn up after the flight of King James II (James VII of Scotland) in 1688. A Convention Parliament, meeting on its own initiative without a monarch to convene it, offered the English throne to William of Orange and his wife Mary, imposing a set of conditions embodied in the Bill of Rights. An entirely separate but formally similar process took place in Scotland, where the Claim of Rights Act 1689 imposed a different set of conditions on William and Mary. They accepted both the English and the Scottish conditions. Clearly, the lawyers and historians among the American Framers saw themselves in a very similar position to that of the English Parliament of 1689. They had deposed a king, and were writing a new constitution. It is no surprise that they took some of its wording from the

nearest there was to a written English constitution.

However, the Scottish constitutional tradition was distinct. The Scots chose William and Mary on their own terms. The differences between the English and Scottish contracts between parliament and monarch could only be resolved by the Union of 1707, which created the kingdom of Great Britain. How familiar were the US Framers with Scottish constitutional argument?

Three of the most influential American players had direct Scottish links. James Wilson, a signatory of both the Declaration of Independence and the US Constitution, was born in Scotland in 1742. He attended the Universities of St. Andrews and Glasgow, although, as was common in the 18th century, he did not take a degree. He emigrated to Pennsylvania in 1766. In the 1787 Convention he was regarded as one of the most learned delegates. His intellectual equal, James Madison, was educated at the College of New Jersey (now Princeton) by its principal, John Witherspoon, who had been a prominent Scottish intellectual before his emigration to the USA. And Jefferson, who wrote the Declaration of Independence, was also educated by a Scot, William Small, at the College of William & Mary. Jefferson was not at the Constitutional Convention because he was US Minister in Paris from 1784 to 1789. But he played a large part in constitutional interpretation, not only through his *Manual* already mentioned, but in a (now) famous letter which, as President, he sent to a committee of Baptists in Danbury, Connecticut, on the interpretation of the First Amendment.

In a short paper there is no space to trace all the Scottish influences on all of the US Founding Fathers. We concentrate

therefore on two Scots – David Hume and Adam Smith – and two Americans – Madison and Jefferson.

Adam Smith was not present at the Philadelphia convention of 1787. No delegate there seems to have referred in the debates either to his *Theory of Moral Sentiments*² or to his *Wealth of Nations*³, which includes 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*⁴ contains one very relevant extract from *The Wealth of Nations*⁵: 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 and Free Exercise Clauses of the First Amendment: «Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...».

This paper aims to fill that gap⁶.

Church-State Relations in Scotland

Jefferson's teacher William Small and Madison's teacher John 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 *The Wealth of Nations*: Hume had argued for establishment of religion; Smith argued against it⁷.

The Scottish Enlightenment started as a dialogue about church and state. Calvinism, the creed of the Church of Scotland,

involves a set of beliefs about personal responsibility to a God who punishes unrighteousness with eternal punishment, and rewards the elect with eternal life⁸. But it also encompasses a set of beliefs about church and state. It is triply anti-hierarchical. All ministers are of equal standing. Church government is in the hands of ministers and lay elders with equal authority. And 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 Melvill(e)⁹, 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 Chryst¹⁰.

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 government-appointed bishops on the presbyterian Church of Scotland, which had been governed by assemblies since the time of the Reformation¹¹. English politicians were more comfortable with Erastianism, as bishops had long been appointed by the crown and sat in the House of Lords¹². 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.

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 blasphemy¹³. 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 imposed¹⁴. Religious freedom for the presbyterian Church of Scotland was guaranteed by the Act of Union 1707¹⁵. 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 executive¹⁶. No officer of the state was available to fortify Christ's Kirk by hanging blasphemers.

This vacuum 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 Enlightenment¹⁷. Smith would secularize ethics further; Hume would take religion out of ethics altogether. Hume was open about his skepticism in various writings, including the attack on miracles as a ground of belief in the *Enquiry concerning Human Understanding*¹⁸, and two later works, *The Natural History of Religion*¹⁹ and the posthumous *Dialogues concerning Natural Religion*²⁰. On his death-bed he imagined himself arguing with Charon, the ferryman of the dead. Smith published an affecting but sanitized version of what Hume said²¹. 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 instant²².

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 so²³.

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 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) party²⁴. 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 religions²⁵. Austere Calvinists are austere about drink and sex. This benefits the poor, who 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.

In Aberdeen, there were two universities, one each for the Loose and Austere²⁶. 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 between austere Calvinism and Humean skepticism²⁷. 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 there²⁸.

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 of them circulated around Scotland²⁹. The lectures on ethics found their way into Smith's *Theory of Moral Sentiments*³⁰. The Lectures on Rhetoric and Belles-Lettres were discovered, in a student copy, in 1958.

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 do³¹. 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 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 Connecticut³². Article II of the Massachusetts constitution, drafted by John Adams³³, 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». 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».

Those two states³⁴ therefore had an established church but offered (some) free exercise of religion. To be sure, Boston in 1780 was not Edinburgh in 1697. Adams' constitution offers toleration to 'every denomination of Christians'³⁵. 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' constitution; but he would have preferred it to the Virginians' (below). Adams' 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 establishment³⁶. This was a cardinal point for Roger Williams, the founder of Rhode Island³⁷. After being expelled from Massachusetts for his 'separatist' views, Williams obtained charters for Rhode Island which protected religious pluralism there. Below we discuss (but reject) the contention that Williams laid the

foundation stones of Jefferson's now famous wall of separation.

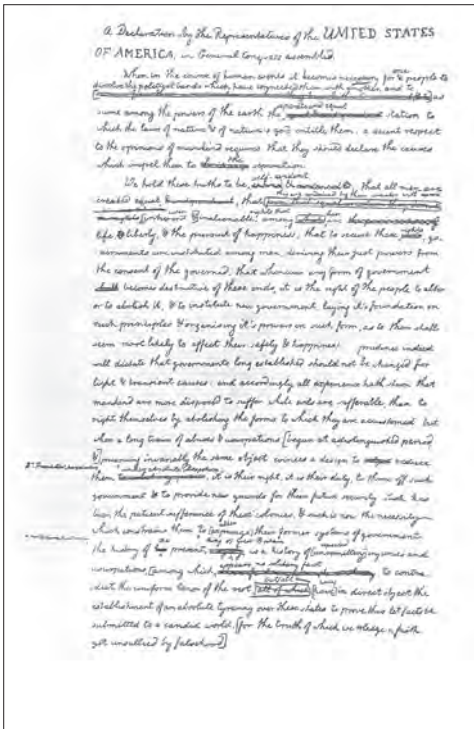
Madison's Transmission of Enlightenment Principles

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*³⁸.

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 1802³⁹. 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 Rights⁴⁰. 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 majority⁴¹.

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



Draft of the Declaration of Independence of the United States of America (July 4 1776)

in stronger language, arguing that if the sovereign lacks power to interfere in religion, then the legislature, its 'creatures and viceregents' cannot have that authority⁴². «Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants», rather than 'sillie vassals'. Moreover, people who submit to such encroachments upon inalienable rights 'are slaves'. 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 reli-

gion is in Book V, Chapter 1, Part III, *Of the Expence of publick Works and publick Institutions*⁴³. There he makes the point that religion is not the kind of public good that merits government funding, as the military or education do; quite the contrary⁴⁴. 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»⁴⁵. 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 authority⁴⁶.

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 persecution⁴⁷.

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 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?»⁴⁸. 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 disciples⁴⁹.

Religious competition, left to itself, 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 started⁵⁰. 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 laws⁵¹. He identifies two sources of the bad legislation: the representative bodies and the people themselves⁵². The difficulty with the people is that they «are divided into different interests or factions, as they happen to be creditors or debtors – Rich or poor – husbandmen, merchants or manufacturers – members of different religious sects... &c &c»⁵³.

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

violations of the rights and interests of the minority»⁵⁴. 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[achusetts] or Connect[icut]?

The third candidate is religion, which also fails to impose an adequate constraint on faction⁵⁵. 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 Ties', individuals in popular assemblies have approved acts against which their individual consciences would have revolted. 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.

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 NY ratifying convention to support the Constitution⁵⁶. 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 newspapers.

Factions have led to bad laws in the individual states⁵⁷. 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 coincide⁵⁸. 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'⁵⁹), 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*»⁶⁰. Thus, it is necessary either to prevent a majority from sharing interests or to prevent the majority from oppressing the minority⁶¹. A large republic ('a Government in which the scheme of representation takes place') does both: 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 dishonor-

able purposes, communication is always checked by distrust'). 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...⁶²

Adam Smith had made a nearly identical point eleven years earlier⁶³:

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 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 admirers⁶⁴.

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 history⁶⁵ that had been a device for both Adam Smith and Adam Ferguson⁶⁶. 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»⁶⁷.

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, 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 prayers⁶⁸. 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»⁶⁹. 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:⁷⁰.

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.

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 rights⁷¹. 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 liberty⁷². 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 others⁷³.

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 Henry⁷⁴. He was elected to the House of Representatives, and became the floor manager for what became the Bill of Rights. 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).

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 1992⁷⁵. In *Lee v. Weisman*, the majority on the Supreme Court held a school's commencement ceremony unconstitutional under the Establishment Clause. Justice Scalia, in his dissent, accepted 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 prayer⁷⁶. 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 proclamations⁷⁷.

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»⁷⁸. 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»⁷⁹. However, it is left to Souter to rebut Scalia's historical arguments.

He does so first by tracing the legislative history of the establishment clause⁸⁰. 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»⁸¹. 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»⁸², 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»⁸³. 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



Protestant Association marching toward the House of Commons, June 2 1780

be infringed»⁸⁴. 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»⁸⁵. 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 states⁸⁶. However, by omitting references to 'a religion', 'a national

religion', 'one religious sect' or '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 money⁸⁷. 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. In 2005 the debate was repeated in an abbreviated form, and a majority of the justices supported Souter's reasoning⁸⁸.

The difficulty with Justice Scalia's position on this issue is that he selects on the dependent variable, emphasizing only actions like the proclamations of fast and

thanksgiving by George Washington and John Adams that support his position⁸⁹. However, Thomas Jefferson refused to issue such proclamations, and James Madison, who issued them, later repudiated his actions⁹⁰. Jefferson also believed that most southerners would find his radical version of non-establishment acceptable, that it was only New England that might object. Thus, the uniform continuity of behavior that Justice Scalia finds is simply not there⁹¹. As Martha Nussbaum has argued, Scalia's position lacks historical or philosophical moorings⁹².

Constitutional politics require supermajorities: two-thirds of both houses of Congress (forty-three representatives and eighteen senators in 1789) must propose textual amendments⁹³. Such a supermajority 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 hypothesized 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 itself⁹⁴, 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 State⁹⁵.

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 calculation⁹⁶. Declaring himself 'averse' to dealing with petitions⁹⁷, 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 sect⁹⁸.

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'⁹⁹. Lincoln advised him that this paragraph would do him harm in New England, where civic feasts, proclamations, and fasts, were part of ordinary life¹⁰⁰. Jefferson therefore deleted 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 1879¹⁰¹. Numerous documents from Jefferson and 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 game¹⁰². 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». This did not prevent the states from making, or continuing, such laws. Massachusetts and Connecticut still had pro-establishment clauses in constitutions. That is why Jefferson underlines *their* in his letter¹⁰³. 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 was thus an installment in the war on two fronts that Adam Smith had picked with David Hume, on the one hand, and the Evangelicals, on the other, twenty-five years earlier. Jefferson was as always less cautious than Madison. Observe the reference to 'a matter which lies solely between man and *his* God' (our italics). Your God may differ from my God, a probably unpopular proposition for most New England voters in 1802¹⁰⁴. 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*¹⁰⁵, the writings of Roger Williams or of the Scots-born propagandist James Burgh, and Locke's *Letter Concerning Toleration*¹⁰⁶. Hooker uses the phrase pejoratively, as a characterization of dissenters' arguments, which he 'could easily demolish'¹⁰⁷. Although Jefferson owned (by 1815) a copy

of Hooker¹⁰⁸, 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»¹⁰⁹. 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 saith of the parli[ament] who framed the act of toler[atio]n but where he stopped short, we may go on»¹¹⁰. Locke's rules excepted Roman Catholics and atheists from his generally tolerant approach¹¹¹. He also allowed for a (tolerant) establishment¹¹². 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.

Attribution of Jefferson's position to James Burgh evaporates upon close exami-

nation 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 Franklin¹¹³. 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 20th 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 *consciences* 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 regiment¹¹⁴.

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 day¹¹⁵.

Williams' wall serves a different purpose: the wall is intended to protect religion, not the state¹¹⁶. Moreover, Williams' wall does not work; God himself has bro-

ken it down and removed the candle¹¹⁷. Second, the theological language of mid-seventeenth century Puritan providential history (type, Anti-type) would have meant nothing to most of the drafters of 1787-91. 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 history¹¹⁸. 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. Although the 1663 Rhode Island charter included the first free exercise clause in a constitutional text, it is not a direct ancestor of the First Amendment.

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 I¹¹⁹. The lead English negotiator was Sir Harry Vane, Williams' patron, who had been a controversial governor of Massachusetts before Williams' expulsion¹²⁰. 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 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 'call upon the civil magistrate to persecute, destroy, or drive out their adversaries, as disturbers of the public peace'¹²¹. Jefferson picks up the same theme in 1779 when he is drafting the preamble for the Virginia Statute of Religious Freedom:

that 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 liberty¹²².

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 1780¹²³. Some of his last letters to Jefferson deplore the continuance of blasphemy laws in Massachusetts¹²⁴. The relevant clause in the Massachusetts constitution was not repealed until 1833¹²⁵.

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 matters¹²⁶. 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)¹²⁷.

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.

¹ Most conveniently found at the Founders Constitution's website, <http://press-pubs.uchicago.edu/founders/documents/a1_2_5s1.html>, consulted 30.12.2009.

² A. Smith, *The Theory of Moral Sentiments* (1759), Indianapolis, Liberty Fund, 1982.

³ A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), Indianapolis, Liberty Fund, 1981. The Liberty Classics edition of *The Wealth of Nations* is a reprint of the authoritative Glasgow edition. Citations to the work in this article follow the Glasgow edition.

⁴ Founders Constitution's website, <<http://press-pubs.uchicago.edu/founders>> (hereinafter 'Founders' Constitution'), published as P. B. Kurland, R. Lerner, *The Founders' Constitution*, Chicago,

University of Chicago Press, 2000.

⁵ Founders' Constitution, Amendment I (Religion), Document 31, quoting *Of the Expence of the Institutions for the Instruction of People of all Ages*, WN, pp. 1-9.

⁶ No reference to Smith is captured in Farrand's indices to *The Records of the Constitutional Convention of 1787*, 1911, searched at Farrand's Records website <<http://memory.loc.gov/ammem/amlaw/lwfr.html>>.

⁷ Smith, *The Wealth of Nations*, cit., pp. 3-9; D. Hume, *The History of England*, Manchester, Manchester University Press, 1983, pp. 134-136.

⁸ Calvinism, in AA.VV., *The Concise Oxford Dictionary of the Christian Church*, Oxford, Oxford University Press, 2006.

⁹ J. Kirk (edited by), *The Second book of discipline* (1578), Edinburgh, St. Andrews Press, 1980; *Idem*, Melville, Andrew (1545-1622), in *Oxford Dictionary of National Biography*, Oxford, Oxford University Press, 2004.

¹⁰ J. Melville, *The Autobiography and Diary of James Melville, with a Continuation of the Diary*, Edinburgh, Wodrow Society, 1842, pp. 369-370. 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]. 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, Act of the Scottish Parliament*, 1690, c. 5.
- ¹¹ See, e.g., J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century, 1603-1689*, Cambridge, Cambridge University Press, 1928, pp. 85-90.
 - ¹² I. McLean, B. Linsley, *The Church Of England And The State: Reforming Establishment For A Multi-Faith Britain*, London, New Politics Network, 2004.
 - ¹³ J. Buchan, *Capital of the Mind: How Edinburgh Changed the World*, London, John Murray, 2003, p. 56; Michael Hunter, *Aikenhead, Thomas* (bap. 1676, d. 1697), in *Oxford Dictionary of National Biography*, cit.
 - ¹⁴ C. Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000*, Cambridge, Cambridge University Press, 2008.
 - ¹⁵ *Act for an Union of the Two Kingdoms of England and Scotland*, 6 Ann. c. 8 (1706) Article VII, incorporating verbatim the *Act for Securing the Protestant Religion*, Act of the Scottish Parliament c. 6 (1707). The latter act was passed before the former; the reversed dates are a result of England's continued use of the Julian Calendar until 1752.
 - ¹⁶ I. McLean, *Adam Smith, radical and egalitarian*, Edinburgh, Edinburgh University Press, 2006, ch. 2.
 - ¹⁷ L. Turco, *Moral sense and the foundations of morals*, in «The Cambridge Companion to the Scottish Enlightenment», n. 136, 2003.
 - ¹⁸ D. Hume, *An Enquiry Concerning Human Understanding*, Oxford, Oxford University Press, 2007, § X.
 - ¹⁹ D. Hume, *A Dissertation on the Passions; The Natural History of Religion*, Oxford, Oxford University Press, 2007.
 - ²⁰ D. Hume, *Dialogues concerning Natural Religion and Other Writings*, Cambridge, Cambridge University Press, 2007.
 - ²¹ Smith published it along with Hume's short autobiography in 1776. Cfr. McLean, *Adam Smith, radical and egalitarian*, cit. p. 19.
 - ²² Letter from Adam Smith to Alexander Wedderburn dated 14 August 1776, in E.C. Mossner, I.S. Ross, *Correspondence of Adam Smith*, Oxford, Oxford University Press, 1977, #163.
 - ²³ Letter from Alexander Wedderburn to Adam Smith dated 6 June 1776, ivi, #159.
 - ²⁴ J.H.S. Burleigh, *A Church History of Scotland*, Oxford, Oxford University Press, 1960, p. 331.
 - ²⁵ Smith, *The Wealth of Nations*, V. i. C., 10-14.
 - ²⁶ P. Wood, *The Aberdeen Enlightenment: The Arts Curriculum in the Eighteenth Century*, Aberdeen, Aberdeen University Press, 1993.
 - ²⁷ H.F. Klemme, *Scepticism and Common Sense*, in *The Cambridge Companion To The Scottish Enlightenment*, edited by A. Broadie, Cambridge, Cambridge University Press, 2003, p. 127.
 - ²⁸ T. Jefferson, *Writings*, New York, Library of America, 1984, p. 4. See also H.L. Ganter, *William Small, Jefferson's Beloved Teacher*, in «The William & Mary Quarterly», Third Series, vol. 4, n. 4, 1947, p. 505.
 - ²⁹ A. Smith, *Lectures on Rhetoric and Belles-Lettres* 27 (1985). *Lectures On Rhetoric and Belles Lettres*, edited by J.C. Bryce, in *Works and Correspondence of Adam Smith*, Indianapolis, vol. IV, Liberty Fund, 1985, p. 27.
 - ³⁰ Smith, *The Theory of moral sentiments*, cit.
 - ³¹ J.N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, New York, Alfred A. Knopf, 1996, pp. 318-336.
 - ³² Massachusetts Constitution (1780), First Part, Articles II-III. Reprinted in F.N. 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 (Govt. Print. Off. 1909). See also K. Olds, *Privatizing the Church: Disestablishment in Connecticut and Massachusetts*, in «Journal of Political Economics», n. 277, 1994, p. 102.
 - ³³ D.G. McCullough, *John Adams*, New York, Simon & Schuster, 2001, p. 220.
 - ³⁴ T.J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment*, Oxford, Oxford University Press, 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).
 - ³⁵ Massachusetts Constitution (1780), Art. III para. 5.
 - ³⁶ *Pennsylvania Constitution* (1776), *Declaration of Rights*, Article II ('[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 Thorpe, *The Federal and State Constitutions* cit., note 116, at 3081. *Charter of Rhode Island and Providence Plantations* (1663), ivi at 3211. See also M. Nussbaum, *Liberty of conscience: in defense of America's tradition of religious equality*, New York, Basic Books, 2008, p. 49.
 - ³⁷ Nussbaum, *Liberty of conscience* cit., pp. 46-48.
 - ³⁸ Rakove, *Original Meanings* cit., pp. 34 ff.; J. Madison, *Writings*, New York, Library of America, 1999, pp. 29 ff.
 - ³⁹ Jefferson, *Writings*, cit., p. 510.
 - ⁴⁰ Founders' Constitution, Amendment I (Religion), Document 25.
 - ⁴¹ *Ibidem*.
 - ⁴² Madison, *Writings*, cit., pp. 30-31.
 - ⁴³ Smith, *The Wealth of Nations*, cit., V., i. c. et seq.
 - ⁴⁴ S. Peterson, *Rational choice, religion and the marketplace: Where does Adam Smith fit in?*, in «Journal for the Scientific Study of Religion», 2009, p. 186.

- 45 Smith, *The Wealth of Nations*, cit., V., i. g. 1.
- 46 *Idem* at V., i. g. 17.
- 47 Madison, *Writings*, cit., pp. 32-33.
- 48 Ivi, p. 33.
- 49 Smith, *The Wealth of Nations*, cit., V., i. g. 8.
- 50 Madison, *Writings*, cit., pp. 69-80.
- 51 Rakove, *Original Meanings* cit., p. 47.
- 52 Madison, *Writings*, cit., p. 75.
- 53 Ivi, p. 76.
- 54 Ivi, p. 77.
- 55 Ivi, pp. 77-78.
- 56 The series had already reached Number 9 when Hamilton approached Madison, after two false starts, to become the third member of 'Publius'. I. McLean, *Madison's political thought; James Madison: The Theory and Practice of Republican Government*, Stanford, Stanford University Press, 2003, p. 14.
- 57 Madison, *Writings*, cit., pp. 160-167.
- 58 Ivi, p. 161.
- 59 Ivi, p. 162.
- 60 Ivi, p. 163.
- 61 Ivi, p. 164.
- 62 Ivi, p. 167.
- 63 P.B. Kurland, *The origins of the establishment clauses of the constitution*, in «William & Mary Law Revue», 1985-1986, p. 858.
- 64 Smith, *The Wealth of Nations*, cit., V., i. g. 8.
- 65 I. Brant, *James Madison: Commander in chief, 1812-1836*, Indianapolis, 1961, p. 429.
- 66 See, e.g., Smith, *The Wealth of Nations*, cit., V., i (discussing the types of armies best suited to different stages in history).
- 67 H. Martineau, *Retrospect of Western Travel*, Cambridge, Cambridge University Press, 1838, p. 195.
- 68 J. Madison, *Notes of Debates in the Federal Convention of 1787*, 1987, pp. 209-211 (1987). *The suggestion that it was sarcastic is Madison's. Letter to Jared Sparks dated 8 April 1831*, in J. Madison, *Writings*, cit., pp. 855-856.
- 69 United States Constitution, Art. VI cl. 3.
- 70 Madison, *Notes of Debates in the Federal Convention* cit., pp. 560-561.
- 71 Rakove, *Original Meanings* cit., p. 318.
- 72 Madison, *Notes of Debates in the Federal Convention* cit., p. 354, pp. 360-361.
- 73 Founders' Constitution, Amendment I (Religion), Document 51.
- 74 Rakove, *Original Meanings* cit., pp. 77-79. See also letter from Madison to Edmund Randolph dated 2 November 1788, in Madison, *Writings*, cit., p. 423.
- 75 *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).
- 76 Ivi, 632-636, 112 S.Ct. 2679-2681.
- 77 Ivi, 633-635, 112 S.Ct. 2679-2680 (emphasis added).
- 78 Ivi, 590, 112 S.Ct. 2657 quoting Madison, *Memorial and Remonstrance*. The quote is from point 7, which we have called 'pure Adam Smith'.
- 79 Ivi, 608, 112 S.Ct. 2666.
- 80 For an expanded version of Justice Souter's historical argument see D. Laycock, 'Nonpreferential' aid to religion: a false claim about original intent, in «William & Mary Law Revue», 1985-1986, p. 875.
- 81 Ivi, 612, 112 S.Ct. 2668, quoting *Annals of Congress*, 1789, p. 434.
- 82 Ivi, 112 S.Ct. 2669, quoting *Annals of Congress*, p. 731.
- 83 Ivi, 613, 112 S.Ct. 2669, quoting 1 *Documentary History of the First Federal Congress of the United States of America* 136 (Senate Journal) (L. de Pauw ed. 1972); *Annals of Congress*, 1789, p. 765.
- 84 Ivi, quoting *Documentary History* at 151, *Annals of Congress* at 136.
- 85 Ivi, 614, 112 S.Ct. 2669, quoting *Documentary History* at 166.
- 86 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 Ed. of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed.2d 711 (1947). Between then and *Lee*, no member of the Supreme Court had proposed disincorporating it. *Lee* at 620 n. 4, 112 S.Ct. 2673. Justice Thomas, who takes a different view, was not on the court in 1992. See also Nussbaum, *Liberty of conscience* cit., p. 105.
- 87 *Lee*, 505 U.S. at 620, 112 S.Ct. 2673.
- 88 *McCreary v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 125 S.Ct. 2722 (2005).
- 89 *Lee*, 505 U.S. at 633, 112 U.S. 2679; see also *Van Orden v. Perry*, 545 U.S. 677, 686, 125 S.Ct. 2845, 2862 (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. G. Wills, *Head and Heart: American Christianities*, Penguin, 2007, p. 169. 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'. R.L. Ketchem, *The Madisons at Montpelier: Reflections on the Founding Couple*, Charlottesville, University of Virginia Press, 2009, p. 103.
- 90 *Lee* 505 U.S. at 624-25, 112 S.Ct. 2675.
- 91 *McCreary v. American Civil Liberties Union of Kentucky*, 545 U.S. at 877, 125 S.Ct. 2743 ('[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').
- 92 Nussbaum, *Liberty of conscience* cit., pp. 266-269.
- 93 U.S. Const. Art. V.
- 94 *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244 (1878); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 16, 67 S.Ct. 504, 91 L.Ed. 711 (1947).
- 95 Early editions, and some modern ones, mistranscribe this word as 'legislative'. See, e.g., Founders'

- Constitution, Amendment I (Religion), Document 58; Jefferson, note 111, 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. The original manuscript is available online at Library of Congress, Jefferson Papers, Series 1 (General Correspondence 1651-1827), image 558/1218, <http://memory.loc.gov/master/mss/mtj/mtj1/025/0500/0558.jpg> and is reprinted in D.L. Dreisbach, *Thomas Jefferson and the wall of separation between church and state*, New York, New York University Press, 2002. Series 1 of the Jefferson Papers is available online at http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser1.html.
- ⁹⁶ J.H. Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, in «The William & Mary Quarterly», 1999, p. 775. See also J. Hutson, 'A wall of separation': FBI helps restore Jefferson's obliterated draft, in «Library of Congress Information Bulletin», 1998 (available online at <http://www.loc.gov/loc/lcib/9806/danbury.html>).
- ⁹⁷ Letter from Thomas Jefferson to Levi Lincoln dated 1 January 1802, Library of Congress, Jefferson Papers, Series 1, note 184, image 561/1218.
- ⁹⁸ The original draft is available online at Library of Congress, Jefferson Paper, Series 1, image 557/1218, and the fair revised copy is at image 558/1218.
- ⁹⁹ Dreisbach, *Thomas Jefferson* cit., p. 43. Letter to Levi Lincoln, note 97.
- ¹⁰⁰ *Ibidem*.
- ¹⁰¹ *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244 (1878). Waite read 'legislative' in place of 'legitimate'.
- ¹⁰² P. Hamburger, *Separation of Church and State*, Harvard University Press, 2002, p. 163.
- ¹⁰³ This crucial underlining is omitted in several of the standard collections of Jefferson's writings.
- ¹⁰⁴ 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'. T. Jefferson, *Query XVII, Notes on the State of Virginia*, p. 285.
- ¹⁰⁵ R. Hooker, *Of the Laws of Ecclesiastical Polity* (1604), VIII.i.2.
- ¹⁰⁶ Dreisbach, *Thomas Jefferson* cit., p. 79.
- ¹⁰⁷ Hamburger, *Separation of Church and State*, cit., p. 36.
- ¹⁰⁸ J. Gilreath, D.L. Wilson (edited by), *Thomas Jefferson's Library: A Catalogue with the Entries in His Own Order*, 1989, p. 80. It was item 24.411 in this catalogue and may have been a late addition. A search using LibraryThing (<http://www.librarything.com/profile/ThomasJefferson>) on 30 September 2009 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.
- ¹⁰⁹ R. Hooker, *Of the Laws of Ecclesiastical Polity*, cit.
- ¹¹⁰ J.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*, New York, Palgrave/MacMillan, 2009, p. 38 (internal quotes omitted).
- ¹¹¹ J. Locke, *Political Writings*, New York, Penguin Books, 1993, pp. 425-426.
- ¹¹² Ivi, pp. 428-429.
- ¹¹³ C.H. Hay, *Burgh, James (1714-1775)* in *Oxford Dictionary of National Biography*.
- ¹¹⁴ J. Burgh, *Crito, or Essays on Various Subjects* (1766). Trull: a low prostitute or concubine; a drab, strumpet, trollope. Oxford English Dictionary (online ed.)
- ¹¹⁵ R. Williams, *Mr. Cotton's Letter Lately Printed, Examined and Answered*, in «Publications of the Narragansett Club» (1644), 1866, p. 392.
- ¹¹⁶ Hamburger, *Separation of Church and State*, cit., p. 44.
- ¹¹⁷ Wills, *Head and Heart* cit., p. 95.
- ¹¹⁸ Gilreath, Wilson (edited by), *Thomas Jefferson's Library* cit., 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.
- ¹¹⁹ O.E. Winslow, *Master Roger Williams: A Biography*, New York, MacMillan, 1957, pp. 178-187.
- ¹²⁰ Ivi, p. 180. Before traveling to England, Williams was receiving 'Scotch Intelligence' from John Winthrop (the son of the Massachusetts governor who had expelled him). Letter dated 7 August 1640, R. Williams, *The Correspondence of Roger Williams*, Rhode Island Historical Society, 1988, pp. 206, 207. The editor of his letters hypothesizes that Williams feared the imposition of bishops on the Scots.
- ¹²¹ Smith, *The Wealth of Nations*, cit., V., i, g. 1.
- ¹²² Jefferson, *Writings*, cit., p. 347.
- ¹²³ McCullough, *John Adams* cit., p. 631.
- ¹²⁴ Letters dated 3 February 1821 and 23 January 1825, in *The Adams-Jefferson Letters: The Complete Correspondence between Thomas Jefferson and Abigail and John Adams*, University of North Carolina Press, 1959, p. 572, p. 608.
- ¹²⁵ Olds, *Privatizing the Church* cit.
- ¹²⁶ McCreary, 545 U.S. at 876, 125 S.Ct. 2742.
- ¹²⁷ *Ibidem*.