

Adam Smith, James Wilson, and the US Constitution*

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Abstract

Two men born in Fife, Scotland, helped to shape the US Constitution and Bill of Rights. James Wilson (born Ceres, near Cupar, Scotland, in 1742; died Edenton, NC, USA in 1798) signed the Declaration of Independence; led the Federalist side in the 1787 Convention in Philadelphia; signed the US Constitution; became an Associate Justice of the US Supreme Court; wrote one of the first US law texts; and died soon after being imprisoned for debts due to another signer of the Constitution. His Scottish origins, and what they imply for the texts and original public meanings of the constitution, have only recently started to be explored. Adam Smith's influence on the US Constitution is again a recent subject of study. Not only were they both Fifers, but Wilson certainly knew Smith's work; was in Glasgow, borrowing University library books, in 1763-4; and may have attended Smith's class under him or Thomas Young, who taught from Smith's notes after Smith left for France in 1764.

Preliminary: Scottish v. English constitutionalism

Until the 1970s, it was customary to write Scotland out of Anglophone constitutional history not written by Scots. Conventionally, the British Constitution (miscalled the English Constitution by the most influential English writers such as Bagehot 1865/2001 and Dicey 1915) was given its present shape by the (perhaps Glorious) revolutions of the period between 1628 and 1689. In that time of conflict between kings and parliaments, the final victory of the latter introduced a regime of parliamentary sovereignty. What used to be called the "Whig interpretation of history" (Butterfield 1931) held that English (glossed as British) constitutional history was a gradual upward progress from despotism to liberty, represented in its finest flowering by the constitution celebrated by Bagehot and Dicey. It is important for what follows that the most intellectual of the American Founding Fathers, Thomas Jefferson and James Madison, were steeped in the Whig history tradition. Of course, their story had a different ending. But for Jefferson, the autocratic rule of the British executive, caricatured in his draft Declaration of Independence (cf Wills 1979) as personal rule by George III, was a temporary obstruction in the road to Whiggish perfection. Such was marked in the USA not by parliamentary sovereignty but by the checks and balances, and hostility to overpowering governments, to be found in the US Constitution and Bill of Rights. The very name of the latter, and some of its contents, recall the English "Glorious Revolution" of 1688-9, in which a convention Parliament deposed James II and invited William and Mary to be parliamentary monarchs constrained by the Bill of Rights Act 1689. Consider for instance the following provisions of the US Constitution and Bill of Rights:

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment. (US Const. I.2 para 5)

The Senate shall have the sole power to try all Impeachments (US Const. I.3. para. 6)

All Bills for raising Revenue shall originate in the House of Representatives (US Const. I.7)¹

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it (US Const. I.9).²

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted (US Const. Amendment VIII ratified 1791).³

These provisions of the US constitution derive directly from the long struggle between English kings and their parliaments that began in 1628 and culminated in the parliamentary victory of the Glorious Revolution. The Eighth Amendment is almost a word-for-word copy of s.10 of the English Bill of Rights of 1689.

In the last known letter he ever wrote, Jefferson declined an invitation from the Mayor of Washington DC to attend the city's fiftieth anniversary celebrations of the Declaration of Independence, to be held on July 4 1826.⁴ In a letter obviously intended as his personal testament, Jefferson wrote:

may it [the Declaration of Independence] be to the world, what I believe it will be, (to some parts sooner, to others later, but finally to all,) the Signal of arousing men to burst the chains, under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings & security of self-government. that form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. all eyes are opened, or opening, to the rights of man. the general spread of the light of science has already laid open to every view. the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of god⁵.

Nothing could be more English-Whiggish than that: or could it? But Douglass Adair (1974: 274-88; article originally published in 1952) showed that the imagery of 'saddles on their backs ... booted and spurred' came straight from the dying speech of Richard Rumbold, a Whig republican executed in 1685 for treason. Even Adair, however, did not notice that Rumbold and his speech had already been cited in James Wilson's *Lectures on Law*, first published by his son in 1804 (Wilson 1804/2007: I, 477).

¹ Cf Bill of Rights, sec. 4 1 W. & M., 2d sess., c. 2, 16 Dec. 1689: 4. *That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.*

² Cf Habeas Corpus Act 31 Car. 2, c. 2, 27 May 1679.

³ Cf Bill of Rights, 1 W. & M., 2d sess., c. 2, 16 Dec. 1689, s. 10: *That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.*

⁴ In the event, both Jefferson and John Adams died on that day.

⁵ Jefferson to Roger A. Weightman, 24 June 1826. TJ's spelling and punctuation. At Library of Congress, <http://www.loc.gov/exhibits/jefferson/214.html>, accessed 02.01.2013.

But Rumbold was a Scot, executed in Edinburgh. There were two successful British revolutions in 1688-90, not one. After the flight of James VII and II, who had governed England and Scotland separately, both countries summoned Convention parliaments: i.e., parliaments not summoned by a king, because there was no king to summon them. In Edinburgh, there was a large Jacobite faction, but they bolted the parliament to follow the banners of Bonnie Dundee, in the words of Sir Walter Scott:

To the Lords of Convention 'twas Clavers who spoke.
'Ere the King's crown shall fall there are crowns to be broke;
So let each Cavalier who loves honour and me,
Come follow the bonnet of Bonny Dundee.⁶

This left the Presbyterian faction in control. They issued an invitation to the same couple as the English Parliament, namely the Dutch Calvinist William of Orange and his English wife Mary, to become king and queen of Scotland. The Scottish terms were quite different to the English terms. In particular, they demanded that William and Mary recognize the established state of the Presbyterian Church of Scotland: which they did. Accordingly the Scots confirmed the invitation, and passed the Claim of Right Act 1689, which differs from the English Bill of Rights. Among its enumerated grievances against James VII are:

By levying or Keeping on foot a standing army in tyme of Peace without Consent of Parliament which army did exact localitie free and dry quarters⁷

And among the promises it had exacted from William and Mary are

That Prelacy and the superiority of any office in the Church above presbyters is and hath been a great and insupportable greivance and trouble to this Nation and contrary to the Inclinationes of the generality of the people ever since the reformatione (they haveing reformed from popery by presbyters) and therfor ought to be abolished⁸

If the Eighth Amendment comes straight from the English Revolution, equally the Third comes straight from the Scottish Revolution⁹. There were therefore two, not one, Anglophone sources for texts limiting the rights of governments over people, both of them available to the US Framers at Philadelphia, and members of the state and federal congresses that considered and amended the Philadelphia text. Furthermore, those two constitutions created different regimes in what had become by 1787 a single semi-federal country. The Acts of Union 1706-7 embodied the relevant

⁶ Sir Walter Scott, *Bonnie Dundee* (original version). The poem has been frequently adapted and parodied, e.g., by Lewis Carroll in *Alice through the looking Glass* and in a Confederate march written for the Battle of Antietam in 1862. 'Clavers' and 'Bonnie Dundee' both denote John Graham of Claverhouse, 1st Viscount Dundee (1648-89).

⁷ Cf US Const. Amendment III: *No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.*

⁸ Claim of Right Act 1689, preamble and c.28. At <http://www.legislation.gov.uk/aosp/1689/28/contents>. Both the Scottish and English Acts are still in force.

⁹ Also, arguably (but not in this paper) the Second. For studies of the militia question in Scotland see Fletcher 1997 and the sources cited there.

provisions of both the English and the Scottish Acts of 1689 for their respective countries. The final Act, the English Act of Union 1706, uses the phrase “the true Protestant religion” twice: in one section to define the established Church of England, and in another to define the established Church of Scotland (McLean 2010: 6). One might have thought that there can be at most one true Protestant religion, but the Acts of Union – still at least until 2014 the fundamental constitutional text for the UK – embed this logical contradiction in constitutional law.

At this point a critic may well say, *This is all very fine, but it was never mentioned in Philadelphia and scarcely in Jefferson’s or Madison’s voluminous writings. So the fact that the Scottish constitutional settlement of 1689-1707 differed from the English constitutional settlement of the same period is of antiquarian interest only. You cannot show that it had any influence on the Americans.* The rest of this paper endeavours to meet this challenge by reference to the lives and works of Wilson and Smith.

James Wilson of Cupar

Wilson was schooled in Cupar at what is now Bell-Baxter High School, and at the early age then customary went to St Andrews University in 1757 on a bursary. But apparently for financial reasons he left early¹⁰, and details of what happened then were until recently sketchy. The *American National Biography* has no details of his life between St Andrews and Philadelphia. The (UK) *Dictionary of National Biography* says, “It has been variously said, but without sustaining evidence, that Wilson was thereafter briefly a university student at Glasgow and Edinburgh” (Conrad 2004). He emigrated in 1765, to Philadelphia, where the College of Philadelphia, now the University of Pennsylvania, soon gave him an honorary degree ‘in consideration of his merit and his having had a regular education in the universities of Scotland’. Soon after, he formally studied law under an English-trained lawyer, and moved to western Pennsylvania to practise law. Like Thomas Jefferson in Virginia, he was drawn into politics on the issue of whether the UK parliament had the right to make laws for the American colonies. He argued for a federal solution, but nevertheless signed the Declaration of Independence. He opposed the populist Constitution of Pennsylvania, and speculated heavily in western lands, before becoming a delegate to the Constitutional Convention in Philadelphia. There, along with Gouverneur Morris, also of Pennsylvania, and James Madison of Virginia, he became one of the three most active delegates on the Federalist side. They may fairly be regarded as the three true Founding Fathers; although their text was of course heavily influenced by the need to make concessions to multiple other interests in order to produce a document with a chance of ratification.

In 1790 Wilson led the successful campaign to amend the Constitution of Pennsylvania to incorporate more checks and balances, and in the same year was appointed a law lecturer at the (now) University of Pennsylvania. He was already an associate justice of the US Supreme Court, and petitioned President Washington unsuccessfully for the post of Chief Justice. However, his land speculation ended in wartime failure. While still a serving Associate Justice, he was jailed by his

¹⁰ In 1762 according to *DNB*; after enrolling as a divinity student in 1761 according to *ANB*. Clagett (2012) has shown that both are wrong. Wilson is recorded in St Andrews only from 1757 to 1759 before returning to Cupar, where he became a legal apprentice to the Town Clerk.

creditors at the instance of fellow-Framer Pierce Butler, and died bankrupt in 1798. (Jefferson also died bankrupt but unlike Wilson had the fortune to die in his own home).

Wilson's reputation, unlike Jefferson's and Madison's, also went bankrupt and the debt has only recently been cleared. Martin Clagett has recently uncovered the signatures of a James Wilson, strongly resembling the signature of "our" Wilson while known to have been at St Andrews, in two places: as assistant to the town clerk of Cupar in 1761 and as a member of Glasgow University between 1763 and 1765¹¹.

By comparing the signatures here with those on the St Andrews list, with those on the records from the Cupar Council and Burgh Records, with the signatures on the Declaration of Independence and the Constitution, the handwriting is the same. The partial library lending list from the University of Glasgow finds the same signature that appeared in the St Andrews lending lists of 1758 and 1759 and reappeared in the Cupar Register of Bonds in 1761, and showing up in Glasgow's list for 1763-1765 (Clagett 2012:xx).

Hence

there is the intriguing, although not documented, possibility that James Wilson also attended lectures given by Adam Smith, Thomas Reid and John Millar. Thomas Reid followed Adam Smith as the Professor of Moral Philosophy in 1764, modeling his lectures on those both of Smith and his predecessor Francis Hutcheson. (Clagett 2012: xx).

Adam Smith's final year as Professor of Moral Philosophy was 1763-4, when he left part way through the year to take up a position as travelling tutor to the young Duke of Buccleuch and his brother. His lecture notes for his last two sessions in Glasgow have been preserved by two students. These *Lectures on Jurisprudence* show that Smith's Glasgow class encompassed both the moral philosophy that became his *Theory of Moral Sentiments* and the political economy that became his *Wealth of Nations*. The jurisprudence that linked the two covered legal and historical sociology, Smith's stadial theory of social development, and comparative public and private law. Late in life, Smith described one of "two other great works upon the anvil" as being "a sort of theory and history of Law and Government"¹². This book, it is reasonable to assume, was being worked up from the middle part of the Glasgow lectures, and would have supplied the link between *TMS* and *WN* of which we now only have the student notes that comprise *LJ*.

Wilson's borrowings from Glasgow University Library were mostly works of literature and history, not of law or philosophy, so how much of the work of Smith, Reid, and Millar he may have absorbed must remain a matter of speculation. But Glasgow University was a small place; and only a year later Wilson got his Pennsylvania honorary degree on the strength of his knowledge of the Scottish Enlightenment.

¹¹ Clagett has compared the signatures of three students named James Wilson at Glasgow between 1763 and 1765 with the signatures of James Wilson of Ceres on the St Andrews University Library records and on the US Declaration of Independence and Constitution. He infers that Wilson of Ceres attended for sure the class of John Anderson and borrowed library books. There is no firm evidence to link him with the class successively taught by Adam Smith, Thomas Young, and Thomas Reid, nor with John Millar's.

¹² AS to le Duc de La Rochefoucauld [d'Enville], 01.11.1785 in *Correspondence of Adam Smith (Glasgow Edition vol 6)* Indianapolis: Liberty Fund 1987, Letter 248.

Wilson, then, was trained in Scots law through his Cupar apprenticeship before he studied English common law in Philadelphia. He must have encountered the thinking of three giants of the Scottish Enlightenment including Adam Smith while in Glasgow. What does this mean for our interpretation of Wilson's constitutionalism?

One of Wilson's successors as a law professor at Penn has recently considered the impact of Wilson's Scots law background on the drafting of the US Constitution (Ewald 2008, 2010). In May 1787 the Virginia deputation to the Constitutional Convention arrived ten days early, and James Madison met Wilson, who was living in Philadelphia. They already knew each other from their service in the Continental Congress – the ineffectual national government that the Constitution was designed to supplant. (For instance, they were both involved in an abortive attempt to create a library of French and English-language Enlightenment books for Congress in 1783). Wilson may therefore have helped Madison draft what became known as the "Virginia Plan" that was presented to the Convention as soon as it got going (Ewald 2008: 935). In one of his numerous speeches at the Convention, Wilson said, according to Madison's notes:

[Mr. Wilson] entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal n^o of representatives, and different numbers of people different numbers of representatives. (June 9 1787 in Madison 1987: 97)

A month later Wilson proposed the wording that now forms Art. IV.4 of the Constitution: "that a Republican form of Governm^t shall be guarantied to each State" (Madison 1987: 322; July 18.) He may have been the first delegate to suggest opening the Constitution with the phrase "We the People" (Ewald 2008: 988), and of what became Art. IV.1: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State" (Ewald 2008: 999).

Is that a Scotsman or an Englishman speaking? Consider what sort of Scotland the young law clerk left in 1765. It had an established church, but the semi-federal state of Great Britain guaranteed religious freedom: anyone in England or Scotland oppressed by church establishment there could move to the other country. It had a strong but distant state, where before 1707 Scotland had had the close and sometimes malevolent state that conspired with the Kirk to hang the 21-year old Thomas Aikenhead for blasphemy in 1697 (Hunter 2004). That strong but distant state was an essential condition for the Scottish Enlightenment. Only fifty years after Aikenhead, David Hume could produce his devastating attacks on religion. The writings of the "infidel Hume" (Witherspoon quoted by Noll 1989: 39) featured on the reading lists issued by America's most revered educator, John Witherspoon, the Evangelical minister from East Lothian who became President of Princeton and Madison's tutor.

So Philadelphia was quite a lot like Glasgow, and Pennsylvania was quite a lot like Scotland. They both had freedom of the press and religion and a remote government. Wilson's first publication was a plea for federalism rather than independence (Wilson 1774/2007). His first legal citation was in denial of the claim to parliamentary sovereignty made by Sir William Blackstone, a precursor of Dicey who was the most studied English lawyer in the American colonies. Sovereignty in America lay, not with the House of Commons, but with the commons themselves – i.e., the British people including (in 1774) the people of Pennsylvania (Wilson 1774/2007, pp. 4, 16). The position of the US colonies was not identical to Scotland's: Scotland, unlike the colonies, was represented in the UK

Parliament. But there were useful analogies. This is the context in which to note Adam Smith's comments on America. Although written after Wilson's brush with Smith in Glasgow, they reflect the libertarian free-trading spirit of Smith's Glasgow lectures. Smith was "very zealous in American affairs" according to a reported comment from the Duke of Buccleuch to David Hume, and was a special advisor, as we would now say, to various UK governments from 1767 to 1778. He takes a robust view of American "taxation without representation" claims – in his view, the colonists were taking a free ride on the defence services provided for them by the British Empire, from which only they benefited. But in other respects he sympathises with them. In *WN* he says

Their manners are more republican, and their governments ... 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 (*WN* IV.vii.b.53 and 64)

Remarkably, writing in 1776, Smith uses "republican" as a term of praise. His manner of thinking is exactly the same as Wilson's (McLean 2006: 100-13). The active and enterprising Wilson of Cupar, Glasgow, and Philadelphia, is the sort of person Smith has in mind.

Ewald (2008, 2010) and Pfander and Birk (2010) have studied US constitutionalism in the light of scholars' new understanding of the importance of Scotland, Scots law and the Scottish Enlightenment to the American founding. Scots law is based on Roman law, and is closer to the Continental civil law codes than is English law. Scots lawyers studied in Leiden or Amsterdam and syntheses of Roman-Scots law had been published in the late 17th century. Nothing resembling such a codification of the English common law occurred until Sir William Blackstone's textbook was published in 1765. Though Blackstone became highly influential in the US, the colonies had to reconstruct their legal systems independently of him. As noted, Blackstone is one of the great advocates of parliamentary sovereignty. The phrase "We the people" is not in Blackstone. It is in Wilson and Jefferson. They must have got it from somewhere. Wilson plainly intended to unseat Blackstone when he wrote his *Lectures on Law*. In his pithiest statements:

I cannot consider him [Blackstone] as a zealous friend of republicanism (Wilson 1804/2007, I: 149)

The order of things in Britain is exactly the reverse of the order of things in the United States. Here, the people are masters of the government; there, the government is master of the people (Wilson 1804/2007, I: 719).

Pfander and Birk (2011) focus on Article III of the US Constitution, which Wilson, as a member of the crucial Committee on Detail, helped draft. Article III creates and regulates the federal judiciary. It follows the Scots model of hierarchical courts, not the English model of competing courts. In Wilson's time the Court of Session and the Faculty of Advocates had established the professionalism of Scots Law. Specifically, the first draft from the Committee of Detail of what became the Exceptions and Regulations clause is in Wilson's hand (Pfander and Birk 2011: 1677). Apart from specified domains of original jurisdiction, the Supreme Court's jurisdiction:

shall be appellate, with such Exceptions, and under such Regulations as the Congress shall make (Madison 1987: 393).

Wilson repeats his support for a hierarchy rather than a horizontal competition of courts in his law lectures (Wilson 1804/2007, II: 885-942). The US federal court system derives from Edinburgh rather than London.

Adam Smith of Kirkcaldy

Smith had a much greater influence on the US Constitution than has been recognised (but cf Fleischacker 2002, 2003). He may have influenced Wilson directly¹³; he certainly did indirectly. More importantly Smith's work lies behind 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....

Adam Smith was not present at the Philadelphia convention of 1787. Neither Wilson nor any other delegate there seems to have referred in the debates either to *TMS* or to his *WN*, 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* (<http://press-pubs.uchicago.edu/founders/>, last accessed 09 January 2013) highlights Smith's argument against David Hume that liberty is best secured by religious pluralism, not by an established church (*WN* V.i.g. 3-19). But the editors of the *Founders' Constitution* do not trace the link from Smith to the Constitution. This paper attempts to do so.

Over 60 years ago, Adair (1974) noted that Madison's work made substantial unacknowledged use of the work of that "infidel Hume" whose work Madison had read under the tutelage of John Witherspoon. Adair's argument was reprised by Wills (1979, 1981). However, the focus of this work on Hume – whom Jefferson misread as "the great apostle of Toryism" (TJ to Major John Cartwright, 06.06.1824, in Appleby & Ball 1999: 383) – has led scholars to overlook Hume's best friend and argumentative equal.

At one level, it is unsurprising that Smith was not cited in Philadelphia. As an opponent of free-riding, his view that the colonists should pay for their own frontier defence had led him to sponsor what became the Quebec Act 1774 (McLean 2006: 101-3), which claimed a border down the Ohio River for the British Empire and seriously damaged the material interest of Western land speculators in the colonies such as George Washington and James Wilson. Although Smith's policy recommendations offended the entire political class in both Great Britain and the United States, it is clear that he respected the colonists' "republican manners."

As noted above, the move of the state from Edinburgh to London in 1707 removed the ability of the Kirk to hang Edinburgh undergraduates. The power vacuum in Smith's and Wilson's Scotland had important consequences. At its most banal, it allowed Hutcheson, Smith, and Hume to survive and to write (more or less) unmolested. Hutcheson (another of James Wilson's favourite authors) made the first essential move to detach the ethics of the Scottish Enlightenment from their Calvinist

¹³ Wilson's *Considerations on the Bank of North America* (1785, in Wilson (2007) I: 60-79) quotes *WN* extensively, in a way that is consistent with Wilson having heard Smith's lectures on jurisprudence, from Smith, or Young, or from one of the student transcripts that comprise *LJ*.

foundations. Smith would secularize ethics further; Hume would take religion out of ethics altogether. By 1760, Scottish philosophers had challenged Witherspoon's and the Evangelicals' orthodox Calvinism from both deist (Hutcheson, Smith) and atheist (Hume) standpoints. The deists controlled the Church of Scotland. 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. The most pungent Evangelical of Hume's generation was Witherspoon, who wielded his sarcastic pen against the Moderates with vigour before emigrating. 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, and, as a result, this appeals to and benefits, the poor. The poor can be ruined by drink and sex, and they therefore have a material interest in binding themselves to the mast of austerity. The rich can afford to be Loose: drink and sex are superior goods, as economists would now paraphrase Smith's argument (*WN* V.i.g.10-12).

Thus three recent Scottish models of church-state relations were available to the drafters of the US Bill of Rights: secularist (Humean), Calvinist (Witherspoonesque), and competitive (Smithian). The Bill of Rights was required when several state ratifying conventions tried to make their ratification of the original constitution contingent on amendments that would protect the individual more fully against the executive than the original document was felt to do. The secularist 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 Connecticut: a state church, with ministers appointed by town meetings, which exercised social control on behalf of the state. Unlike 100 years earlier, the state church no longer burnt witches or hanged Quakers, and it tolerated the sort of dissenters who had fled and created Rhode Island to escape its clutches. But it remained established. Other states, notably Rhode Island and Quaker-dominated Pennsylvania, protected free exercise and denied establishment. Virginia had had an established Anglican church, whose authority had collapsed at the Revolution leaving a power vacuum of enormous interest to both Jefferson and Madison (Ragosta 2010). Their first joint campaign in Virginia was against a bill levying a state tax to support teachers of Christianity. It produced Madison's now-famous *Memorial and Remonstrance Against Religious Assessments* (Madison 1999: 29-36).

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

But Point 7 is pure Adam Smith:

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. (*Memorial* 1785, point 7. In Madison 1999: 33).

Madison already knew *WN* in 1785, as he had unsuccessfully lobbied the Continental Congress to buy it in 1783 (see below). Smith's only statement on organized religion is in *WN* Book V, Chapter 1, Part III, "Of the Expence of publick Works and publick Institutions." There he asserts that religion is not the kind of public good that merits government funding, as the military or education do. Quite the contrary, he argues that clergy subsidized by the state "are apt gradually to lose the qualities, both good and bad, which gave them authority and influence with the inferior ranks of people" and when confronted with competing sects "feel themselves as perfectly defenseless as the indolent, effeminate and full fed nations of the southern parts of Asia, when they were invaded by the active, hardy, and hungry Tartars of the North." The Scots, and many of the American colonists of Smith's time, were, he thought, active, hardy, and hungry. In fact, Smith continues, a government-subsidized, religious monopoly threatens the security of the state: "When the authorised teachers of religion propagate through the great body of the people doctrines subversive of the authority of the sovereign, it is by violence only, or by the force of a standing army, that he can maintain his authority." Compare Madison's Point 7 with Smith's

[I]f politics had never called in the aid of religion . . . it would probably have dealt equally and impartially with all the different sects, and have allowed every man to chuse his own priest and his own religion as he thought proper. There would in this case, no doubt, have been a great multitude of religious sects. Almost every different congregation might probably have made a little sect by itself, or have entertained some peculiar tenets of its own. Each teacher would no doubt have felt himself under the necessity of making the utmost exertion, and of using every art both to preserve and to increase the number of his disciples. (*WN* V.i.g.8)

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

The second prequel to Federalist 10 and Jefferson's letter to the Danbury Baptists is *Vices of the Political System of the United States*, the briefing note which Madison wrote for the Virginia delegation before the Constitutional Convention started. In it, Madison is concerned to see not only why Congress and the states had been unable to coordinate national government but also why the individual states had made bad laws. He identifies two sources of the bad legislation: the representative bodies and the people themselves. 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.'

Religion fails to impose an adequate constraint on faction. 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. Madison 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. (Madison, *Vices* in Madison 1999:78)

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

There is less about religion in Madison's most famous number of *The Federalist*, number 10, which is a hasty rewrite of *Vices* for a different audience: namely, citizens of New York State who needed to be persuaded to ratify the Constitution. But there is enough to show its Smithian origins. Compare this from Madison:

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 (*Federalist* 10, in Madison 1999: 167)

... with this from Smith:

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 admirers (*WN* V.i.g.8).

Reluctant ratifiers, including some in both New York and Virginia, complained that the Constitution as drafted did not protect individual rights against the state sufficiently. Some states tried to make it a condition of their ratification that a Bill of Rights must be added. In the first US Congress Madison was the floor leader in the House of Representatives for what became the Bill of Rights: viz., 12

amendments to protect individual rights, of which ten were ratified.¹⁴ As noted above, the final wording of the first two limbs of the First Amendment is *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*. The best-known interpretation of the Establishment and Free Exercise Clauses, which emerged from Madison's efforts in the First Congress and which has been quoted in US Supreme Court opinions from the beginning of First Amendment jurisprudence as if it were part of the Constitution, is due to Madison's lifelong collaborator Thomas Jefferson. As President in 1802, Jefferson took a political opportunity to reply to a petition he had received from a committee of Baptists in Danbury, CT. The Baptists were on the wrong side of church establishment in their state, as they had earlier been in Virginia.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State (TJ to the Danbury Baptists 01.01.1802, in Appleby and Ball 396-7; transcription errors corrected in McLean and Peterson 2010).

Jefferson's complex political motives have been examined elsewhere (McLean and Peterson 2010). For this paper, the take-home message is that both Jefferson and Madison were true heirs of Adam Smith.

Establishing disputed parenthood

This paper has compared texts from Smith, Wilson, Jefferson, and Madison, and pointed to family resemblances. But resemblance is not parenthood. How far (if at all) can the texts and views of the Americans be sourced directly from the Scots? Or were the Americans simply fishing in a pool of 18th-century commonplaces, fed by many Wilkesite, republican, and/or pro-American pamphleteers in the mid-18th century?

As Fleischacker has said (2002: 898):

The founders hardly ever discussed their intellectual heritage explicitly, and in their writings, they often failed to let the reader know whom they were quoting. The arguments for Hume's influence on Madison, Hutcheson's on Jefferson, and Reid's on Wilson have been supported almost entirely by identifying verbal echoes, coupled with evidence that the relevant Scottish writings were taught in colleges and owned by American libraries.

If Wilson, Jefferson, and Madison had been British, it might indeed be impossible to go further than that. But the Atlantic Ocean may be quite an effective filter of the ideas flowing from the Wilkesite pool. Only what they could read in America (or France, in Jefferson's case), plus whatever mental baggage Wilson brought over from Scotland, can have directly contributed to their intellectual formation. We cannot prove a negative; but, if this or that pamphleteer was not available in the

¹⁴ An eleventh, on congressional pay, became the 27th Amendment when ratified in 1992 by the required number of states.

USA, he may be practically ignored as a potential source. For each of the three American targets of this paper, some available lists show what they read or owned (Table 1).

Table 1. Potential English and Scottish sources for the thought of Wilson, Madison, and Jefferson.

Wilson	Madison	Jefferson
Citations in his Collected Works (Wilson 1804/2007, Bibliographical Glossary, at II: 1205-13)	Purchase recommendations to Congress 1783: <i>Madison Papers</i> VI: 62-115. JM's library (catalog under construction at LibraryThing at http://www.librarything.com/legacylibraries/profile/JamesMadisonLibrary)	TJ's library catalog (Gilreath and Wilson 1989; McLean 2011; <i>Jefferson's Libraries</i> database at http://tjlibraries.monticello.org/)

Wilson's law lectures and political works cite various authors in abbreviated forms. His editors have teased out the abbreviations, which refer to works in law, history, philosophy, and current affairs. Any classification may be queried, but a scheme of classification made for this paper (available from the author on request) classes 109 of Wilson's sources as legal. Of these, 55 refer to English law, 15 to Scots law, and 39 to Roman or civil law. Thus, Wilson's sources are (only) half English, and half Roman or Scots. Roman and Scots influences may be detected in other ways. One striking one is the organisation of his law lectures. The most polished part (Part I, which was actually delivered in lecture form) has the following chapter headings (Table 2).

Table 2. Chapter headings in Wilson, *Lectures in Law*, Part I.

Chapter	Title
I	Introductory Lecture. Of the Study of the Law in the United States
II	Of the General Principles of Law and Obligation
III	Of the Law of Nature
IV	Of the Law of Nations
V	Of Municipal Law
VI	Of Man, as an Individual
VII	Of Man, as a Member of Society
VIII	Of Man, as a Member of a Confederation
IX	Of Man, as a Member of the Great Commonwealth of Nations
X	Of Government
XI	Comparison of the Constitution of the United States, with That of Great Britain
XII	Of the Common Law
XIII	Of the Nature and Philosophy of Evidence

source: Wilson 1804/2007, I: vi-vii.

Does this approach to the subject come from Wilson's studies of English common law under John Dickinson in Philadelphia, or from his time as apprentice to the Town Clerk of Cupar? Unlikely, in both cases. Does it come from exposure to Scots public law and jurisprudence? This is much likelier. Note, first, the sequence from II to V. Going from obligation to the law of nature to the law of nations [i.e., international law] to municipal [i.e., domestic] law is exactly what Smith told his 1763-4 class was the method of 'the civilians', which he would follow in that session, unlike in the previous session (Smith, *LJ*, 22-7, 401 (source of quote)). The oldest endowed law chair in Scotland is the

Regius Chair of Public Law and the Law of Nature and Nations in Edinburgh, founded by queen Anne immediately upon Union in 1707. The title, both of the chair and of Wilson's lecture sequence, follows that of the best-known contemporary 'civilian' in 18th-century Scotland, Samuel Pufendorf, whose *De jure naturae et gentium* ('On the law of nature and nations') was published in 1672.

Secondly, note that after his civilian introduction, Wilson devotes lectures VI-IX to the history and sociology of law. This is exactly the same sequence as Adam Smith took in the 1763-4 session, later to be developed more fully by John Millar, who had arrived in Glasgow as Smith's colleague in 1761. Comparative government follows. Lecture XI, reflecting Wilson's experience of contributing to the Declaration of Independence and the Constitution, is the locus of Wilson's attempt to overthrow Blackstone's doctrine of parliamentary sovereignty in favour of popular sovereignty. Common law then just gets a look in, followed by criminal law, both of which Smith treated equally curtly in his 1763-4 lectures (*LJ*, 24-6). The organisation and content of Wilson's lectures does not prove that he attended, or even read the lecture notes from, Smith's class in 1763-4, nor that he audited the classes of Smith and/or Millar. But the intellectual kinship is striking.

In January 1783, Madison and Jefferson, who were both in Philadelphia, collaborated on a booklist which they hoped to persuade the Continental Congress to buy. They failed, as did Wilson (also a member) who moved an amendment "to confine the purchase for the present to the most essential part of the books" (quoted in Ketcham 1971: 141). But the list is a valuable insight into the minds of Madison, Jefferson, and perhaps Wilson. They wanted Congress to be enlightened by the radical minds of the French and Scots. The list opens with the French Academy's *Encyclopédie Méthodique*. The next subheading is *Law of Nature and Nations*, in which Hutcheson, Adam Ferguson, Grotius, and Pufendorf all feature ahead of English common lawyers. Likewise, the plain *Law* subheading puts Justinian and other civil law books ahead of Coke and Blackstone. Under *History* Madison wants Congress to buy Hume's *History of England*; under *Politics*, the works of the 17th-century English republican theorists (Harrington, Sidney, Locke) and the leading contemporary Scots social scientists (Robert Wallace, Hume, Ferguson, Millar, James Burgh, Sir James Steuart, and Smith).¹⁵

Turning to Jefferson, the primary source available is his library. 'I cannot live without books', he famously wrote (TJ to John Adams, June 10 1815, in Cappon 1987: 443). By analysing the contents of his main catalogs, McLean (2011) attempts to establish the "Scottishness" of Jefferson's holdings. Out of 5322 books bought by Jefferson, 183 have Scottish imprints. This is 5 times the proportion that he would have had on the naïve null hypothesis that he was equally likely to own a book published in any country in the Atlantic world of his time (McLean 2011, Table 5). Although, unlike Wilson, Jefferson was not trained in Scots Law, he correctly classes his Scots law books under Equity and Foreign law (Scots law being 'foreign' to a Virginian because of its roman and civil-law antecedents; Jefferson's cataloguing scheme is explained in Gilreath and Wilson 1989: 1-13).

How much further, if at all, can we go to attribute direct use of the works of Smith or other Scottish Enlightenment figures, especially against a null hypothesis that the ideas of Wilson, Madison, and/or Jefferson derive from swimming in an undifferentiated pool of radical Whig and republican ideas?

¹⁵ Source: *Papers of James Madison*, online edition, Vol. 6, at <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=JSMN-index-6-3-72-1-5-1#JSMN-01-06-02-pb-0065>. Accessed 08 Jan. 2013. Titles include *WN*; Ferguson's *History of Civil Society*; Millar's *Origins of the Distinction of Ranks*; and Burgh's *Political Disquisitions*.

This would require laborious exclusion of other purported sources. To date, this has been done for the Danbury letter but not for the other American writings discussed in this paper.

Alternative sources proposed (e.g., by Dreisbach 2002; Hamburger 2002) for Jefferson's 'wall of separation' have included Richard Hooker's *Laws of Ecclesiastical Polity*; the writings of Roger Williams, the founder of Rhode Island; Locke's *Letter Concerning Toleration*; and the Scots-born propagandist James Burgh. Study of the purported source texts enabled McLean and Peterson (2010) to eliminate all save Burgh. Burgh was a Scots-born London schoolteacher and journalist who belonged to a radical pro-American circle including Richard Price, Joseph Priestley, and Benjamin Franklin (cf Hay 2004). 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 trull¹⁶, to the performance of a holy rite of religion, as a test for his holding the command of a regiment (Burgh 1766: II, 116-19).

Whatever the Danbury Baptists might have made of this sentiment, they would not have liked its expression. Nevertheless, Burgh is a potentially important conduit from the Scottish to the American Enlightenment. He is directly cited by Wilson as the source for Rumbold's "saddles on their backs" speech (Wilson 1804/2007: I. 477), and by Madison in *Federalist* #56 as an authority on the parliamentary Union of 1707 (Madison 1999: 324). His *Political Disquisitions* is on Madison's purchase list for Congress. Jefferson recommended the same book to his law student son-in-law in 1790, in a letter which also described *WN* as "[i]n political economy ... the best book extant" (TJ to TM Randolph 30 May 1790 in Appleby and Ball 1999 260-3).

Thus, although we cannot prove that Smith and his contemporary Scots thinkers were constantly at the side of the three Americans who did most to shape the Declaration of Independence and the Constitution, it is possible to show that they were all familiar with the main works of the Scottish Enlightenment. At least arguably, the Danbury Letter originated in Kirkcaldy.

¹⁶ As Burgh was a Scotsman, he may have meant 'reeking' in the Scottish sense of 'giving off smoke' but the English sense of 'giving off an unpleasant smell' has the same effect. *OED* on line, *reek*, v.i., senses 1 and 4. *Trull*: 'A low prostitute or concubine; a drab, strumpet, trollop' – *OED* online.

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