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**Influence of the Scottish Enlightenment Upon the
Constitution of the United States of America**

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B.A., M.A., J.D.**

**Submitted in Fulfillment of the Requirements for the
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Abstract

A fair amount of scholarship¹ and popular writing² has been devoted to the impact great thinkers of the Scottish Enlightenment had on the American Revolution and Declaration of Independence. The purpose of this thesis is to examine how the Scottish Enlightenment influenced the drafting of the United States Constitution and the establishment of a constitutional republic.

Chapter 1 provides an overview of the Scottish Enlightenment and introduces the key Scottish thinkers whose Enlightenment ideas appear to have influenced the American philosophical debates during the late eighteenth century. Chapter 2 is an examination of that influence upon colonial Americans. Chapter 3 explores the philosophical debates from the Declaration of Independence through the drafting of the Constitution. Chapter 4 takes the debate from the Framers who drafted the proposed Constitution to the Founders who ratified the Constitution through a state convention process. Chapter 5 examines the continued influence of the Scottish Enlightenment during the early days of the constitutional republic.

A final chapter of concluding remarks offers the thesis that, while it is unrealistic to conclude that the Enlightenment influence in American political thought in general or upon the United States Constitution in particular was uniquely Scottish, neither should the distinctively Scottish contributions to the shaping of the constitutional republic be ignored in the historical record as had been the case during most of the nineteenth century. As was true of the development of competing Enlightenment ideas in Scotland, the private deliberations at the Constitutional Convention, the public pamphlet campaign waged by Federalists who supported the proposed Constitution and Anti-Federalists who opposed it, and the successive decisions by state ratifying conventions to adopt the Constitution were all characterized by vigorous debates about reason and passion, virtue and ambition, and authority and liberty. Ultimately, it would be the courageous spirit of reasoned public discourse, as much as the developing themes of liberty, that the Scottish Enlightenment would contribute to the constitutional debates in the emerging United States.

¹ See e.g., Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (Garden City, New York: Doubleday & Company, 1978).

² See e.g., Arthur Herman, *How the Scots Invented the Modern World* (New York: Crown Publishers, 2001).

Contents

Abstract	ii
Contents	iii
Acknowledgement.....	v
Author’s Declaration.....	vi
Chapter 1: Introduction to the Scottish Enlightenment.....	1
Origins of the Scottish Enlightenment.....	1
Contributions to Political Discourse.....	3
<i>Moral Sense Theory</i>	5
<i>Sentimentalists</i>	7
<i>Civil Society</i>	14
<i>Philosophy of Common Sense</i>	17
Summary.....	18
Chapter 2: Enlightenment Theory in Colonial America	19
Scottish Immigration to America.....	20
Reading the Scottish Enlightenment.....	23
Travel and Correspondence	26
Scottish Influence on Colonial American Writings.....	27
Chapter 3: An Enlightened Path to a Constitutional Republic.....	29
Declaration of Independence	29
Revolutionary War and the Confederation.....	32
Constitutional Convention	33
Enlightenment Influences on the Framers of the Proposed Constitution	39
Chapter 4: Ratification of the Constitution	42
Proposed Constitution Presented to the States	42
Ratification Debates.....	42

<i>Power of the People</i>	42
<i>Political Factions and an Extended Republic</i>	45
<i>Political Economy</i>	48
<i>Virtue and Ambition</i>	49
<i>Demand for a Declaration of Rights</i>	50
Ratification by New Hampshire—the Ninth State	52
Confederation Congress Calls for First National Elections.....	52
Virtue and Liberty.....	53
Chapter 5: The Constitution Established.....	54
Early Days of the Republic.....	54
<i>Formation of the Government</i>	54
<i>Adoption of the Bill of Rights</i>	54
Impact of Scottish Enlightenment on Separation of Powers	56
<i>Article I — A Bicameral Legislature</i>	58
<i>Article II — A Unified Executive</i>	60
<i>Article III — An Independent Judiciary</i>	61
Virtue as an Inadequate Protector of Liberty.....	66
<i>First Amendment — First Freedoms</i>	66
<i>Second Amendment — Right to Keep and Bear Arms</i>	68
Scottish Enlightenment Ideas Reflected in the New Republic	69
Chapter 6: Concluding Remarks	74
Bibliography.....	77

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature: C. Alfred Mackenzie

Printed Name: Charles Alfred Mackenzie

Chapter 1

Introduction to the Scottish Enlightenment

The purpose of this thesis is to examine how the Scottish Enlightenment influenced the drafting of the proposed Constitution, the ratification of the Constitution and Bill of Rights, and the establishment of a constitutional republic in the United States of America.

This introductory chapter is meant to place the Scottish Enlightenment in context, both within the broader movement known as the Enlightenment and with respect to the historical setting of eighteenth-century Scotland, as well as to provide an overview of the themes of the Scottish Enlightenment that will become the focus of this inquiry regarding the intellectual origins of the United States Constitution. The Scottish thinkers and the Enlightenment ideas chosen for discussion in this introduction have been selected on the basis of their particular contribution to the philosophical debates accompanying the drafting of the proposed Constitution, the ratification of the Constitution and Bill of Rights, and the establishment of a constitutional republic in the United States.

Christopher Berry describes the Enlightenment as a self-conscious movement in which the intellectuals of the eighteenth century saw themselves as living in and promoting a “century of lights.”¹ Berry cites Immanuel Kant’s essay, “What is Enlightenment?” for the most succinct answer to Kant’s own question: The Enlightenment is *Sapere Aude!*—“dare to know!”² Kant paraphrased his motto of the Enlightenment as “Have courage to use your own reason.”³ The essence of the Enlightenment cannot be circumscribed by a particular set of substantive ideas—instead, the Enlightenment represents the rejection of the traditional appeal to authority in favor of an appeal to reason for the answers to whatever subject happens to be the topic of debate.⁴

Origins of the Scottish Enlightenment

Alexander Broadie identifies three historical events that presumably should have hindered Scotland’s cultural development: (1) the unification of the crowns of Scotland

¹ Christopher Berry, *Social Theory of the Scottish Enlightenment* (Edinburgh: Edinburgh University Press, 1997), 1-2.

² *Ibid.*, 2.

³ Alexander Broadie, ed., *The Scottish Enlightenment: An Anthology* (Edinburgh: Canongate Books, 1997), 1.

⁴ Kenneth R. Merrill, *Historical Dictionary of Hume’s Philosophy* (Plymouth, UK: Scarecrow Press, 2008), 22.

and England in 1603; (2) the disastrous Darien Scheme to establish a colony in Central America, with the attendant adverse economic consequences in Scotland; and (3) the abolition of Scotland's parliament in 1707.⁵ Notwithstanding these political and economic events, the prominence of the university in most of Scotland's major cities provided uncommon educational opportunities in philosophy, theology, law, medicine, mathematics, and science.⁶ The intellectual liveliness of the Scottish universities cultivated an environment in which enlightened thinkers, often referred to as the "literati," were reacting to, and at times in defiance of, the oppressive political and economic conditions of seventeenth-century Scotland.⁷

Berry contends that the pamphlet war that was waged at the time of the Act of Union of 1707 was a significant factor in shaping the character of the Enlightenment, presumably in Scotland, but perhaps beyond.⁸ Certainly, the very notion of a "pamphlet war" would be revisited in the American colonies later in the eighteenth century.

As Broadie points out, many of the writers of the Scottish Enlightenment were not merely contemporaries, but friends, arguing with one another and forming various philosophical societies.⁹ Thomas Reid, for example, was a founder of the Aberdeen Philosophical Society, known as the "Wise Club."¹⁰ The Wise Club often debated the moral philosophy of David Hume,¹¹ who championed the idea that "as the science of man is the only foundation for the other sciences, so the only solid foundation we can give this science itself must be laid on experience and observation."¹² Hume lamented the "separation of the learned from the conversational world," noting that it "seems to have been the great defect of the last age."¹³ Hume considered himself to be an "ambassador from the dominions of learning to those of conversation."¹⁴ Other philosophical and literary societies established during the Age of Enlightenment included the Royal Society

⁵ Broadie, *Scottish Enlightenment*, 10.

⁶ *Ibid.*, 11.

⁷ *Ibid.*, 13-14.

⁸ Berry, *Social Theory*, 9.

⁹ Alexander Broadie, ed., *The Cambridge Companion to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 2003), 1.

¹⁰ David Hume, *Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1896), xx.

¹¹ Alexander Broadie, "Reid in Context," in *The Cambridge Companion to Thomas Reid*, eds. Terence Cuneo and René van Woudenberg (Cambridge: Cambridge University Press, 2004), 33.

¹² Hume, *Human Nature*, xx.

¹³ David Hume, "Of Essay Writing," in *Selected Essays*, eds. Stephen Copley and Andrew Edgar (Oxford: Oxford University Press, 1993), 1.

¹⁴ *Ibid.*, 2.

of Edinburgh, the Literary Society in Glasgow, the Select Society in Edinburgh, and the Society of the Antiquaries of Scotland.¹⁵

These Enlightenment thinkers, however, did not limit their discourse to intellectual debate within the academy. According to R. H. Campbell, the writers of the Enlightenment recognized the links between intellectual and economic development, though Campbell himself argues that the Enlightenment did not initiate a trend toward economic improvement, but, rather, that “attempts to lead Scotland to new forms of economic enterprise were perhaps among the origins of the Enlightenment itself.”¹⁶ Although T.M. Devine concludes that the Scottish merchant community, between 1680 and 1740, made little intellectual contribution to the early Enlightenment, he does suggest that they indirectly helped “to provide, with the professional and landed classes, a social and material environment which was not resistant to change.”¹⁷ A notable example of the active exchange of ideas between the literati and the business community, at least in the latter half of the eighteenth century, was Adam Smith’s practice of previewing his theories of free trade before, and receiving valuable feedback from, the prosperous merchants of Glasgow at such society meetings.¹⁸ Moreover, Berry points to the “Honourable Society of Improvers,” organized with the practical aim of reforming agricultural practices, but which also contributed to the development of the linen industry, as evidence that the literati were directly involved in economic improvement in eighteenth-century Scotland.¹⁹

Contributions to Political Discourse

Although the Enlightenment was equally influential among Scottish scientists, artists, and religious thinkers, it is the Enlightenment’s impact upon moral philosophy and law that takes center stage in an examination of the Scottish Enlightenment’s influence upon the emerging ideological and political landscape in the American colonies.

Knud Haakonssen contends that, “[i]n the mainstream of natural jurisprudence in the eighteenth century, natural rights derived from natural law and natural duty.”²⁰ Haakonssen

¹⁵ Broadie, *Scottish Enlightenment*, 16-17.

¹⁶ R. H. Campbell, “The Enlightenment and the Economy,” in *The Origins and Nature of the Scottish Enlightenment*, eds. R. H. Campbell and Andrew S. Skinner (Edinburgh: John Donald Publishers, 1982), 8, 23.

¹⁷ T. M. Devine, “The Scottish Merchant Community: 1680 - 1740,” in *Origins and Nature of the Scottish Enlightenment*, eds. Campbell and Skinner, 37.

¹⁸ Broadie, *Scottish Enlightenment*, 17.

¹⁹ Berry, *Social Theory*, 11-12.

²⁰ Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996), 311.

further notes that natural law was a prevalent academic form of moral philosophy in the eighteenth century.²¹ And according to Haakonssen, this popular moral philosophy based on natural law was not a hindrance to republican politics.²² “A cornerstone in the natural law theory . . . is the proposition that the law of nature prescribes duties and grants matching rights that, when properly taken care of, contribute to the general common good or greatest happiness in God’s creation.”²³

In his essay on “Law and Enlightenment,” Neil MacCormick, not wishing to narrowly define the period of the Enlightenment, looks to seventeenth century Scots legal writing as a philosophical backdrop.²⁴ MacCormick defines a “natural lawyer” as a “believer in the thesis that there is a natural order of principles regulating every rational being, this order being twice over grounded in reason – first, in that what is right is rationally related to the nature of the being in question, second, in that his reason is what makes a rational being aware of these principles of right conduct.”²⁵ Indeed, James Dalrymple, 1st Viscount Stair, who first published his *Institutions of the Law of Scotland* in 1681 (the foundation of modern Scots law), defined law as “the dictate of reason, determining every rational being to that which is congruous and convenient for the nature and condition thereof.”²⁶ MacCormick points to Stair as a “natural lawyer” *par excellence*.²⁷ Although Broadie places Stair in the pre-Enlightenment period, Broadie himself contends that Stair’s *Institutions*, “more than any other text . . . formed the basis for Scottish discussions on law during the century of the Enlightenment.”²⁸

MacCormick argues that one of the central questions in the Scottish moral philosophy of the eighteenth century is whether “reason” reveals or contains principles of right conduct.²⁹ Stair, who, according to MacCormick, adopted his doctrine from Hugo Grotius, concluded that reason does reveal principles of right conduct.³⁰ Francis Hutcheson, on the other hand, was critical of this view, arguing that reason “is understood

²¹ *Ibid.*, 312.

²² *Ibid.*, 327.

²³ *Ibid.*, 332.

²⁴ Neil MacCormick, “Law and Enlightenment,” in *Origins and Nature of the Scottish Enlightenment*, eds. Campbell and Skinner, 150-51.

²⁵ *Ibid.*, 152.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Broadie, *Scottish Enlightenment*, 11.

²⁹ MacCormick, “Law and Enlightenment,” 155.

³⁰ *Ibid.*

to denote our *Power of finding out true Propositions*.³¹ In Hutcheson's view, moral distinctions were discovered, not by reason, but by a moral sense.³²

Moral Sense Theory

Francis Hutcheson³³ is generally acknowledged to be the “father” of the Scottish Enlightenment.³⁴ Hutcheson's moral sense theory was summed up by his contention that the best action to take is that “which procures the greatest Happiness for the greatest Numbers.”³⁵ Furthermore, Hutcheson, rejecting Thomas Hobbes' claim that all human action is self-interested,³⁶ argued that “all Men have Self-Love as well as Benevolence,” which by definition requires such a man to be capable of a “desire of, or delight in, the Good of others.”³⁷ Hutcheson defined moral goodness as “our Idea of some Quality apprehended in Actions, which procures Approbation and Love toward the Actor, from those who receive no Advantage from the Action.”³⁸ Berry points to the following example: suppose we benefit equally from two men; the first does so “from delight in our happiness,” the second from “views of self-interest or by constraint.”³⁹ Although the benefit is the same, Hutcheson declared that we have “quite different Sentiments of them.”⁴⁰ That difference is perceived by the moral sense.⁴¹ The principle of self-interest, according to Hutcheson, is insufficient to explain the reality of morality.⁴²

According to T.D. Campbell, Hutcheson's intellectual objective was to demonstrate “the benevolent intentions of the ‘Author of nature’ in the functional inter-relationships of the constituent elements of human society.”⁴³ As Wolfgang Leidhold points out, however,

³¹ Francis Hutcheson, *An Essay on the Nature and Conduct of the Passions and Affections, with Illustrations on the Moral Sense*, ed. Aaron Garrett (Indianapolis: Liberty Fund, 2002), 137.

³² Merrill, *Historical Dictionary of Hume's Philosophy*, 143.

³³ Francis Hutcheson was born in Drumalig, Ireland, in 1694, graduated from the University of Glasgow in 1712, became the chair of moral philosophy at the University of Glasgow in 1729, and died in 1746. Broadie, *Scottish Enlightenment*, 799-800.

³⁴ T. D. Campbell, “Francis Hutcheson: ‘Father’ of the Scottish Enlightenment,” in *Origins and Nature of the Scottish Enlightenment*, eds. Campbell and Skinner, 167.

³⁵ Francis Hutcheson, *An Inquiry into the Original of Our Ideas of Beauty and Virtue in Two Treatises*, ed. Wolfgang Leidhold (Indianapolis: Liberty Fund, 2008), 125.

³⁶ Campbell, “Francis Hutcheson,” 168.

³⁷ Hutcheson, *Ideas of Beauty and Virtue*, 103-04.

³⁸ *Ibid.*, 85.

³⁹ Berry, *Social Theory*, 158.

⁴⁰ Hutcheson, *Ideas of Beauty and Virtue*, 90.

⁴¹ Berry, *Social Theory*, 158.

⁴² *Ibid.*, 159.

⁴³ Campbell, “Francis Hutcheson,” 167.

phrases used by Hutcheson, like “publick Good,” revealed a political perspective in his moral philosophy:⁴⁴

Should any one ask even concerning these two ultimate Ends, private Good and publick, is not the latter more reasonable than the former?—What means the Word reasonable in this Question? . . . If the meaning of the Question be this, “does not every Spectator approve the Pursuit of publick Good more than private?” The Answer is obvious that he does: but not for any Reason or Truth, but from a moral Sense.⁴⁵

According to Hutcheson, our “Ideas of Rights” derived from this moral Sense.⁴⁶ Hutcheson classified two primary categories of rights, as either *perfect*—those rights which “are of such necessity to the publick Good, that the universal Violation of them would make human Life intolerable”; or *imperfect*—those rights which, “when universally violated, would not necessarily make Men miserable.”⁴⁷ Hutcheson enumerated as instances of perfect rights: “those to our Lives; to the Fruits of our Labours; to demand Performance of Contracts upon valuable Considerations, from Men capable of performing them; to direct our own Actions either for publick, or innocent private Good, before we have submitted them to the Direction of others in any measure; and many others of like nature.”⁴⁸ “Instances of imperfect Rights are those which the poor have to the Charity of the Wealthy; which all Men have to Offices of no trouble or expence to the Performer; which Benefactors have to returns of Gratitude, and such like.”⁴⁹ In addition, Hutcheson identified a third category of *External* rights—those which, though they be “really detrimental to the Publick” are such that “universally denying Men this Faculty of doing, possessing, or demanding that Thing, or of using Force in pursuance of it, would do more mischief than all the Evils to be fear’d from the Use of this Faculty.”⁵⁰

Of government, Hutcheson concluded “[t]hat all human Power, or Authority, must consist in a Right transferr’d to any Person or Council, to dispose of the alienable Rights of others; and that consequently, there can be no Government so absolute, as to have even an external Right to do or command everything.”⁵¹ Because there can be “no Right, or Limitation of Right, inconsistent with, or opposite to the greatest publick Good,” Hutcheson recognized that, when a “Necessity to avoid Ruin requires it, the Subjects may

⁴⁴ Wolfgang Leidhold, “Introduction to Hutcheson,” *Ideas of Beauty and Virtue*, xvii.

⁴⁵ Hutcheson, *Illustrations on the Moral Sense*, 144.

⁴⁶ Hutcheson, *Ideas of Beauty and Virtue*, 183.

⁴⁷ *Ibid.*, 183-84.

⁴⁸ *Ibid.*, 184.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 185.

⁵¹ *Ibid.*, 192.

justly resume the Powers ordinarily lodg'd in their Governours, or may counteract them."⁵² As Hutcheson stated, "No Person, or State can be happy, where they do not think their important Rights are secur'd from the Cruelty, Avarice, Ambition, or Caprice of their Governours."⁵³

MacCormick distinguishes the strict "moral sense" man in Hutcheson, from his successors, David Hume and Adam Smith, who have been described as "sentimentalists."⁵⁴

Sentimentalists

David Hume,⁵⁵ whom Broadie characterizes as the "greatest philosopher of the Scottish Enlightenment, and perhaps its central figure,"⁵⁶ advanced a moral philosophy that emphasized utility—all acts that are morally praiseworthy are considered useful as "conducive to the happiness of mankind."⁵⁷

According to Hume, to say that moral distinctions may be "discernible by pure reason" was a specious argument.⁵⁸ Although truth is disputable, taste is not: "what exists in the nature of things is the standard of our judgment; what each man feels within himself is the standard of sentiment."⁵⁹ In *An Enquiry Concerning the Principles of Morals*, Hume acknowledged a contemporaneous controversy "concerning the general foundation of Morals," which he posed as follows:

whether they be derived from Reason, or from Sentiment; whether we attain the knowledge of them by a chain of argument and induction, or by an immediate feeling and finer internal sense; whether, like all sound judgment of truth and falsehood, they should be the same to every rational intelligent being; or whether, like the perception of beauty and deformity, they be founded entirely on the particular fabric and constitution of the human species.⁶⁰

⁵² *Ibid.*, 194-95.

⁵³ *Ibid.*, 195.

⁵⁴ MacCormick, "Law and Enlightenment," 158.

⁵⁵ David Hume was born in Edinburgh in 1711, attended the University of Edinburgh, served as librarian of the Advocates' Library in Edinburgh, and died in 1776. Broadie, *Scottish Enlightenment*, 799.

⁵⁶ Broadie, *Scottish Enlightenment*, 799.

⁵⁷ *Ibid.*, 144.

⁵⁸ David Hume, "An Enquiry Concerning the Principles of Morals," in *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, 2nd ed., ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1902), 171.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 170.

Hume pointed out that John Locke's notion of the tacit consent of the governed was implausible.⁶¹ Hume acknowledged the premise that: "The people, if we trace government to its first origins in the woods and deserts, are the source of all power and jurisdiction, and voluntarily, for the sake of peace and order, abandoned their native liberty, and received laws from their equal and companion."⁶² Nevertheless, Hume argued that any original consent was "very imperfect"—speculating that a chieftain "who had probably acquired his influence during the continuance of war, ruled more by persuasion than command; and till he could employ force to reduce the refractory and disobedient, the society could scarcely be said to have attained a state of civil government."⁶³ The idea, Hume said, of an agreement expressly formed for general submission was "an idea far beyond the comprehension of savages."⁶⁴ According to Hume, even if there had been some contract in the past, it could not bind any but the original contractors.⁶⁵ Furthermore, Hume contended that [a]lmost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people."⁶⁶

Hume stated that we are "to look upon all the vast apparatus of our government, as having ultimately no other object or purpose but the distribution of justice"⁶⁷ Indeed, the subjects of government are motivated to give their allegiance by their perception of the public interest in protection, especially in the administration of justice, an interest which, over time, creates a "moral obligation of honour and conscience."⁶⁸ Even so, Hume described justice as an artificial virtue—that is, one "which arises from the circumstances and necessity of mankind."⁶⁹ According to MacCormick, Hume's conclusion that justice is an artificial virtue led him to the argument that the value of justice is solely in the general utility of those rules which determine men's rights, especially proprietary rights.⁷⁰ As Hume said, "public utility is the *sole* origin of justice."⁷¹ Ultimately, for Hume, the object

⁶¹ Berry, *Social Theory*, 32.

⁶² David Hume, "Of the Original Contract," in *Selected Essays*, eds. Copley and Edgar, 276.

⁶³ *Ibid.*, 277.

⁶⁴ *Ibid.*

⁶⁵ Knud Haakonssen, "The Structure of Hume's Political Theory," in *The Cambridge Companion to Hume*, 2nd ed., eds. David Fate Norton and Jacqueline Taylor (Cambridge: Cambridge University Press, 2009), 353.

⁶⁶ Hume, "Of the Original Contract," 279.

⁶⁷ David Hume, "Of the Origin of Government," in *Selected Essays*, eds. Copley and Edgar, 28.

⁶⁸ Haakonssen, "The Structure of Hume's Political Theory," 354.

⁶⁹ Hume, *Treatise of Human Nature*, 477.

⁷⁰ MacCormick, "Law and Enlightenment," 158.

⁷¹ Hume, "Principles of Morals," 183.

of justice was not equality of possessions but personal liberty—a liberty that is best safeguarded by the administration of justice that protects property and contracts.⁷²

According to Hume, liberty “is also essential to morality, and that no human actions, where it is wanting, are susceptible of any moral qualities, or can be the objects either of approbation or dislike.”⁷³ Hume began with a basic definition of liberty as: “a power of acting or not acting, according to the determinations of the will; that is, if we choose to remain at rest, we may; if we choose to move, we also may.”⁷⁴

For Hume, “the rules of equity or justice depend entirely on the particular state and condition in which men are placed, and owe their origin and existence to that utility, which results to the public from their strict and regular observance.”⁷⁵ Thus, Hume doubted what he called the fiction of a state of nature, a concept, which, he noted, did not originate with Hobbes, but which could be traced back at least as far as Cicero.⁷⁶

Hume acknowledged that both history and common sense inform us that ideas of perfect equality are impracticable and would be pernicious to human nature.⁷⁷ Instead, justice requires laws for the regulation of property; rules, which on the whole, are most useful and beneficial to society.⁷⁸ For Hume, it was necessary to regulate, not only the actions of the governed, but that of the governors as well—“a republican and free government would be an obvious absurdity, if the particular checks and controls, provided by the constitution, had really no influence, and made it not the interest, even of bad men, to act for the public good.”⁷⁹

As a student at the University of Glasgow, Adam Smith⁸⁰ was significantly influenced by Hutcheson.⁸¹ Later, while lecturing in Edinburgh, Smith developed a

⁷² *Ibid.*, 194-95.

⁷³ David Hume, “An Enquiry Concerning Human Understanding,” in *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, 99.

⁷⁴ *Ibid.*, 95.

⁷⁵ Hume, “Principles of Morals,” 188.

⁷⁶ *Ibid.*, 189.

⁷⁷ *Ibid.*, 194.

⁷⁸ *Ibid.*, 194-95.

⁷⁹ David Hume, “That Politics May Be Reduced to a Science,” in *Selected Essays*, eds. Copley and Edgar, 14.

⁸⁰ Adam Smith was born in 1723 in Kirkcaldy, Scotland, attended the University of Glasgow, and then Balliol College, Oxford, returned to Glasgow where he was appointed to the chair of logic and rhetoric in 1751 and to the moral philosophy chair in 1752, and died in 1790. Broadie, *Scottish Enlightenment*, 804.

⁸¹ Knud Haakonssen, “Introduction: The Coherence of Smith’s Thought,” in *The Cambridge Companion to Adam Smith*, ed. Knud Haakonssen (Cambridge: Cambridge University Press, 2006), 1.

significant friendship with Hume.⁸² Like Hume, Smith viewed moral philosophy as the key to a scientific study of human nature.⁸³ Also, like Hume, Smith emphasized the importance of imagination, and its creative capacity, in human life and cognition.⁸⁴ According to Charles Griswold, “Smith presents the imagination as lying at the heart of both ‘sympathy’ and of intellectual endeavor.”⁸⁵

Smith developed his doctrine of sympathy in *The Theory of Moral Sentiments*.⁸⁶ According to Broadie, Smith’s doctrine of sympathy is rooted in the concept of impartial spectator, seeds of which were present in Hutcheson’s moral philosophy, and well-established in Hume’s writings.⁸⁷ Smith’s doctrine of sympathy may be summarized as follows: “That whatever appears to be the proper object of gratitude, appears to deserve reward; and that, in the same manner, whatever appears to be the proper object of resentment, appears to deserve punishment.”⁸⁸ According to Smith, gratitude and resentment “are the sentiments which most immediately and directly prompt to reward and to punish.”⁸⁹ Smith further concluded that only actions of a beneficent tendency, which proceed from proper motives, require reward because they alone excite the sympathetic gratitude of the spectator.⁹⁰ “Beneficence,” Smith said, “is always free, it cannot be extorted by force, the mere want of it exposes to no punishment, because the mere want of beneficence tends to do no real positive evil.”⁹¹ Smith also recognized another virtue—justice—which may be extorted by force, and the violation of which exposes one to resentment and punishment.⁹²

Smith was critical of Hume’s view that the idea of justice arises solely from utility.⁹³ According to Smith, “Man, it has been said, has a natural love for society, and desires that the union of mankind should be preserved for its own sake, and though he himself was to derive no benefit from it.”⁹⁴

⁸² *Ibid.*

⁸³ *Ibid.*, 4.

⁸⁴ Charles L. Griswold, Jr., “Imagination: Morals, Science, and Arts,” in *Cambridge Companion to Adam Smith*, ed. Haakonssen, 22.

⁸⁵ *Ibid.*, 23.

⁸⁶ Alexander Broadie, “Sympathy and Impartial Spectator,” in *Cambridge Companion to Adam Smith*, ed. Haakonssen, 158.

⁸⁷ *Ibid.*, 158-160.

⁸⁸ Adam Smith, *The Theory of Moral Sentiments*, eds. D. D. Raphael and A. L. Macfie (Indianapolis: Liberty Fund, 1984), 67.

⁸⁹ *Ibid.*, 69.

⁹⁰ *Ibid.*, 78.

⁹¹ *Ibid.*

⁹² *Ibid.*, 79.

⁹³ *Ibid.*, 87.

⁹⁴ *Ibid.*, 88.

For Smith, the “four great objects of law are Justice, Police, Revenue, and Arms.”⁹⁵ According to Smith, the end of Justice is to secure a man from injury: (1) as a man (“in his body, reputation, or estate”); (2) as a member of a family (“as a father, as a son, as a husband or wife, as a master or servant, as a guardian or pupil”); and (3) as a member of a state (“a magistrate may be injured by disobedience or a subject by oppression”).⁹⁶ Smith said that rights that a man has to the preservation of his body and reputation from injury are called natural rights, whereas rights to his estate, both real and personal, are called acquired rights.⁹⁷ According to Smith, the “objects of Police are the cheapness of commodities, public security, and cleanliness.”⁹⁸ Revenue is “necessary that the magistrate who bestows his time and labour in the business of the state should be compensated.”⁹⁹ Finally, Arms are necessary so that “the government can defend themselves from foreign injuries and attacks.”¹⁰⁰

In *The Nature and Causes of the Wealth of Nations*, Smith prioritized the duties of the sovereign, placing as the first duty of the sovereign “that of protecting the society from the violence and invasion of other independent societies.”¹⁰¹ The second duty of the sovereign, Smith said, was “that of protecting, as far as possible, every member of society from the injustice or oppression of every other member of it.”¹⁰² According to Smith, “[t]he third and last duty of the sovereign or commonwealth is that of erecting and maintaining those publick institutions and those publick works, which . . . it . . . cannot be expected that any individual or small number of individuals should erect or maintain.”¹⁰³

Regarding public jurisprudence, Smith said that there are two principles that induce men to enter into a civil society: authority and utility.¹⁰⁴ While both of these principles are present in all governments, Smith contended that “in a monarchy the principle of authority

⁹⁵ Adam Smith, *Lectures on Jurisprudence*, eds. R. L. Meek, D. D. Raphael, and P. G. Stein (Indianapolis: Liberty Fund, 1982), LJ(B), 398.

⁹⁶ *Ibid.*, 399.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, 398.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, eds. R. H. Campbell and Andrew S. Skinner, vol. 2 (Oxford: Clarendon Press, 1976), 689.

¹⁰² *Ibid.*, 2:708.

¹⁰³ *Ibid.*, 2:723.

¹⁰⁴ Smith, *Lectures on Jurisprudence*, LJ(B), 401.

prevails, and in a democracey [*sic*] that of utility.”¹⁰⁵ Smith rejected both the idea of a state of nature and the proposition that government owes its origins to a voluntary contract.¹⁰⁶

In explaining the nature of government, Smith reduced the forms of government to various blends of the following three: Monarchical, Aristocratical, and Democratical.¹⁰⁷ As Smith noted, a monarchical government vests the supreme power and authority in one; an aristocratical government vests in a certain order of people the power to choose magistrates, who manage the state; and a democratical government “is where the management of affaires belongs to the whole body of the people together.”¹⁰⁸ Smith concluded that because the last two forms may be called republican, “then the division of government is into monarchical and republican.”¹⁰⁹

Having divided acquired rights into real and personal, Smith defined real rights as property, servitude, pledge, and exclusive privilege.¹¹⁰ The principal real right is that of property, which Smith described as follows:

Property is acquired five ways. 1st, by occupation, or the taking possession of what formerly belonged to no body. 2^d, by accession, when a man has a right to one thing in consequence of another, as of a horse’s shoes along with the horse. 3^d, by prescription, which is a right to a thing belonging to another arising from long and uninterrupted possession. 4, by succession to our ancestors or any other person, whither by a will or without one. 5th, by voluntary transference, when one delivers over his right to another.¹¹¹

Smith further noted that the laws of occupation vary “according to the periods of human society.”¹¹² Smith identified “four distinct states” or “ages” of society: hunting, pasturage, farming, and commerce.¹¹³ According to Smith, “among hunters, there is no regular government; they live according to the laws of nature.”¹¹⁴ Smith presumed that hunters had no need for government because a hunter had little private property in need of protection: “Among savages property begins and ends with possession, and they seem scarce to have any idea of any thing as their own which is not about their own bodies.”¹¹⁵

¹⁰⁵ *Ibid.*, 402.

¹⁰⁶ David Lieberman, “Adam Smith on Justice, Rights, and Law,” in *Cambridge Companion to Adam Smith*, ed. Haakonssen, 223.

¹⁰⁷ Smith, *Lectures on Jurisprudence*, LJ(B), 404.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, 459.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, 404.

¹¹⁵ *Ibid.*, 460.

Among hunters, Smith also said, “every man is a warrior as well as a hunter.”¹¹⁶ In the second stage—that of shepherds—“appropriation of herds and flocks, which introduced an inequality of fortune, was that which first gave rise to regular government.”¹¹⁷ As Ernest Metzger notes, “it is property that prompts the creation of government by making government necessary” in the age of shepherds.¹¹⁸ But it is the agriculture stage that gave rise to property’s “greatest extension” because, for the first time, it became necessary for the farmer to claim a right to cultivate a plot of land.¹¹⁹ Finally, the age of commerce naturally succeeds that of agriculture when man confines himself to one “species of labour” and begins to “natural exchange the surplus of their own commodity for that of another of which they stood in need.”¹²⁰ In a commercial society, everyone is a “merchant”—that is to say, engaged in commerce.¹²¹

In light of the prominence of Smith’s four stages theory, Haakonssen concludes that Smith’s spectator theory made morality as a whole an historical phenomenon, which was developed in depth by Smith’s greatest pupil, John Millar.¹²² Millar observed that there was, in human society, “a natural progress from ignorance to knowledge, and from rude to civilized manners, the several stages of which are usually accompanied with peculiar laws and customs.”¹²³ For Millar, who provided extensive historical examples,¹²⁴ the advancement of societies through the four stages was accompanied, not only by the development of property rights, but also the recognition of authority (by, for example, a chief over the members of a tribe and a sovereign over a state).¹²⁵ According to Adam Tomkins, “[t]he core of Millar’s concern in the *Origin* was to show how the relations between authority, dependence and liberty are rooted in material practices and, in particular, the satisfaction and production of needs and desires.”¹²⁶ Tomkins further notes that in the *Historical View*, Millar identifies “one of the greatest challenges posed for

¹¹⁶ Smith, *Wealth of Nations*, 2:689-90.

¹¹⁷ Smith, *Lectures on Jurisprudence*, LJ(B), 404.

¹¹⁸ Ernest Metzger, “Adam Smith’s Historical Jurisprudence and the ‘Method of the Civilians’,” *Loyola Law Review* 56 (2010): 16.

¹¹⁹ Smith, *Lectures on Jurisprudence*, LJ(B), 460.

¹²⁰ *Ibid.*, 459.

¹²¹ Berry, *Social Theory of the Scottish Enlightenment*, 127.

¹²² Knud Haakonssen, “Natural jurisprudence and the theory of justice,” in *Cambridge Companion to the Scottish Enlightenment*, ed. Broadie, 217.

¹²³ John Millar, *The Origin of the Distinction of Ranks*, ed. Aaron Garrett (Indianapolis: Liberty Fund, 2006), 85.

¹²⁴ See e.g., John Millar, *An Historical View of the English Government*, eds. Mark Salber Phillips and Dale R. Smith (Indianapolis: Liberty Fund, 2006), 28-39.

¹²⁵ Millar, *Distinction of Ranks*, 84-85, 178-89, 194-200.

¹²⁶ Adam Tomkins, “On Republican Constitutionalism in the Age of Commerce: Reflections from the Scottish Enlightenment,” in *Legal Republicanism: National and International Perspectives*, eds. Samantha Besson and José Luis Martí (Oxford: Oxford University Press, 2009), 328.

republicanism in the Age of Commerce: how to construct and sustain a politics of the common good that does not immediately collapse into a politics of interest group pluralism.”¹²⁷ This challenge, of course, would likewise be one of the key challenges facing the Founders of the new American republic.

Civil Society

Adam Ferguson¹²⁸ also challenged the assumption that there existed a “state of nature,” as presumed by Jean-Jacques Rousseau and Thomas Hobbes.¹²⁹ Instead, Ferguson argued that “all situations are equally natural” and that the “State of Nature” is here.¹³⁰ The basis of Ferguson’s criticism was that a study of natural history should be based upon an empirical review of facts and observations, rather than what he described as mere “conjecture” or “imagination.”¹³¹ “If conjectures and opinions formed at a distance have not sufficient authority in the history of mankind, the domestic antiquities of every nation must for this reason be received with caution.”¹³² Still, said Ferguson, it is through the telling of traditional fables that a sort of national character emerges.¹³³

According to Ferguson, the legitimacy of government must be found within society itself, as opposed to a theoretical “state of nature.”¹³⁴ In what Ferguson described as “the history of mankind in their rudest state,” there are both savages, who are not yet acquainted with property, and barbarians, to whom property is a principal object of care and desire, though it is not yet ascertained by laws.¹³⁵ Property is, thus, a matter of progress.¹³⁶ Yet, Ferguson concluded:

mankind still retains many parts of their earliest character. They are still averse to labour, addicted to war, admirers of fortitude, and, in the language of Tacitus, more lavish of their blood than of their sweat.¹³⁷

¹²⁷ *Ibid.*, 331.

¹²⁸ Adam Ferguson was born in Logierait, Scotland, in 1723, graduated from St. Andrews University in 1742, studied divinity, for a time, at Edinburgh, held the chair of natural philosophy at Edinburgh University from 1759 to 1764 and the chair of pneumatics and moral philosophy from 1764 to 1785, and died in 1816. Broadie, *Scottish Enlightenment*, 797-98.

¹²⁹ Berry, *Social Theory*, 23.

¹³⁰ *Ibid.*, 31.

¹³¹ *Ibid.*, 23-24.

¹³² Adam Ferguson, *An Essay on the History of Civil Society* (Farnborough, UK: Gregg International Publishers, 1969), 126-27.

¹³³ *Ibid.*, 127.

¹³⁴ Berry, *Social Theory*, 31.

¹³⁵ Ferguson, *History of Civil Society*, 136.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, 163.

The foundation of government—what Ferguson calls the “ground of a permanent and palpable subordination”—arises to manage the “unequal possessions” accumulated under such conditions by every member of a community.¹³⁸

Although Ferguson also identified a love of equality, a habit of assembling in public councils, and a zeal for the tribe to which one belongs, the difficulty in choosing a magistrate from among equals suppresses the prospect of a republic in favor of the tendency of members of a community to unite behind leaders who are “distinguished by their fortunes, and by the lustre of their birth”—the “rudiments of monarchical government.”¹³⁹ Ferguson observed that when “[t]he enemy occupy their thoughts; they have no leisure for domestic dissensions.”¹⁴⁰ Yet, when the border is secured and the monarch turns toward enlarging the “advantages which belong to his station”:

the follower becomes jealous of rights which are open to encroachment; and the parties who united before, from affection and habit, or from a regard to their common preservation, disagree in supporting their several claims to precedence or profit.¹⁴¹

The “first step toward political establishment, and the desire of a legal constitution” occurs when the “sacred names of Liberty, Justice, and Civil Order are made to resound in the public assemblies.”¹⁴² “To bestow on communities some degree of political freedom,” Ferguson noted, “it is perhaps sufficient, that their members, either singly, or as they are involved with their several orders, should insist on their rights.”¹⁴³ Ferguson later enumerated a number of specific rights:

Thus, a person has a *right* to the use of his faculties and powers; he has a *right* to enjoy the light of the sun, and the air of the atmosphere; he has a *right* to the use of his property, and the fruits of his labour. These are self-evident propositions, and the meaning of the term *right*, which occurs in all of them, may be collected from its uniform signification in each. Agreeably to this rule, *right* is the relation of a person to a thing in which no alteration ought to be made, without his consent.¹⁴⁴

According to Ferguson, the wisest of laws in a free state “are never, perhaps, dictated by the interests and spirit of any order of men; they are moved, they are opposed, or

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, 164, 165, 167.

¹⁴⁰ *Ibid.*, 208.

¹⁴¹ *Ibid.*, 210.

¹⁴² *Ibid.*, 210, 211.

¹⁴³ *Ibid.*, 214.

¹⁴⁴ Adam Ferguson, *Principles of Moral and Political Science*, vol. 2 (New York: AMS Press, 1973), 184-85.

amended, by different hands; and come at last to express that medium and compositions which contending parties have forced one another to adopt.”¹⁴⁵ Ferguson reviewed a number of historical republics and concluded:

In governments properly mixed, the popular interest, finding a counterpoise in that of the prince or of the nobles, a balance is actually established between them by which the public freedom and the public order are made to conflict.¹⁴⁶

Just as nations “must adjust their policy on the prospect of war from abroad, they are equally bound to provide for the attainment of peace at home. But there is no peace in the absence of justice.”¹⁴⁷ Ferguson argued that the keystone of civil liberty is:

the statute which forces the secrets of every prison to be revealed, the cause of every commitment to be declared, and the person of the accused to be produced, that he may claim his enlargement, or his trial, within a limited time.¹⁴⁸

Thus, Ferguson called attention to the importance of personal liberties among public laws. The protection of personal liberties, of course, ultimately requires a corresponding restraint on government powers. In discussing the tendency of all governments toward corruption, Ferguson wrote:

It is no advantage to a prince, or other magistrate, to enjoy more power than is consistent with the good of mankind; nor is it of any benefit to a man to be unjust; But these maxims are a feeble security against the passions and follies of men.¹⁴⁹

Because the hope of a beneficent prince or magistrate is inadequate for the protection of liberty, it was, for Ferguson, incumbent upon the individual to guard against infringement of personal liberties:

Liberty is a right which every individual must be ready to vindicate for himself, and which he who pretends to bestow as a favour, has by that very act in reality denied. Even political establishments, though they appear to be independent of the will and arbitration of men, cannot be relied on for the preservation of freedom; they may nourish, but should not supersede that firm and resolute spirit, with which the liberal mind is always prepared to resist indignities, and to refer its safety to itself.¹⁵⁰

¹⁴⁵ Ferguson, *History of Civil Society*, 214-15.

¹⁴⁶ *Ibid.*, 274-75.

¹⁴⁷ *Ibid.*, 260.

¹⁴⁸ *Ibid.*, 279.

¹⁴⁹ *Ibid.*, 441-42.

¹⁵⁰ *Ibid.*, 444.

Furthermore, because legislative bodies are equally capable of repressing personal liberty, Ferguson recognized the need for checks and balances to be built into a constitutional form of government:

It is well known, that the constitutions framed for the preservation of liberty, must consist of many parts; and that senates, popular assemblies, courts of justice, magistrates of different orders, must combine to balance each other, while they exercise, sustain, or check the executive power.¹⁵¹

The need for such checks and balances, as recognized by Ferguson, would later become one of the key issues for debate in the Constitutional Convention of 1787.

Philosophy of Common Sense

Thomas Reid,¹⁵² described by MacCormick as the sternest of Hume's critics, rejected both the moral sense theory of Hutcheson and the sentimentalists themes of Smith and Hume in favor of a philosophy of common sense.¹⁵³ Reid is known as the father of common sense philosophy.¹⁵⁴ But Broadie argues that this title is misleading, suggesting that if someone deserved to be designated the founder of the "Scottish school of common sense philosophy" it would be Reid's teacher, George Turnbull.¹⁵⁵

Reid suggested that common sense, which he described as an "inward light or sense," is "given by Heaven to different persons in different degrees."¹⁵⁶ Nevertheless, Reid contended that "[t]here is a certain degree of it which is necessary to our being subjects of law and government, capable of managing our own affairs, and answerable for our conduct towards others."¹⁵⁷ Reid divided reason into two offices: the first "is to judge of things self-evident"; the second "to draw conclusions that are not self-evident from those that are."¹⁵⁸ The first of these, Reid said, "is the sole province, of common sense."¹⁵⁹

¹⁵¹ *Ibid.*, 446.

¹⁵² Thomas Reid was born in Strachan, Scotland, in 1710, attended Marischal College in Aberdeen, became the professor of moral philosophy at the University of Glasgow in 1764, and died in 1796. Broadie, *Scottish Enlightenment*, 801-802.

¹⁵³ MacCormick, "Law and Enlightenment," 159.

¹⁵⁴ Terence Cuneo and René van Woudenberg, eds., *Cambridge Companion to Thomas Reid*, 19.

¹⁵⁵ Broadie, "Reid in Context," 36.

¹⁵⁶ Thomas Reid, *Essays on the Intellectual Powers of Man* (Edinburgh: John Bell, 1785), 522.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, 530.

¹⁵⁹ *Ibid.*

According to Reid, “there are principles common to both [philosophers and the vulgar] which need no proof, and which do not admit of direct proof.”¹⁶⁰ Of such “principles taken for granted,” Reid concluded: “All men that have common understanding agree in such principles, and consider a man as lunatic or destitute of common sense, who denies, or calls them in question.”¹⁶¹

Reid contended that, while the intention of morals is to teach the duty of men, the intention of natural jurisprudence is to teach the rights of men.¹⁶² According to Reid, the “whole end and object of law is to protect the subjects in all that they may lawfully do, or possess, or demand.”¹⁶³ Reid designated as the threefold object of the law (1) the right of liberty, (2) the right of property; and (3) a personal right.¹⁶⁴ Reid rejected Hume’s argument that public utility is the only standard of justice.¹⁶⁵ Thus, Reid provided yet another uniquely Scottish perspective advancing liberty as a personal right worthy of protection, and he promoted the idea that every rational individual is equipped with the inherent ability to recognize basic truths upon which our liberty is founded.

Summary

There are, of course, a number of other key Enlightenment thinkers who made significant contributions to eighteenth-century Scotland. The thinkers and themes chosen for this introduction, however, are selected in anticipation of the discussion, in Chapters 2 and 3, of the intellectual origins of the United States Constitution. Francis Hutcheson’s moral sense, the utilitarian sentiment of David Hume, Adam Smith’s doctrine of sympathy, Adam Ferguson’s civil society, and Thomas Reid’s common sense each contributed to the notion that the self-evident truths proclaimed in the Declaration of Independence compelled the American colonists toward a republican constitution.

¹⁶⁰ *Ibid.*, 36.

¹⁶¹ *Ibid.*

¹⁶² Thomas Reid, *Essays on the Active Powers of the Human Mind* (Cambridge, MA: M.I.T. Press, 1969), 378.

¹⁶³ *Ibid.*, 379.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, 431.

Chapter 2

Enlightenment Theory in Colonial America

Having placed the Scottish Enlightenment within the context of the European Enlightenment and the historical setting of eighteenth century Scotland, attention is now given to an examination of the historical record revealing Scottish influence in colonial America.

During a period that J.G.A. Pocock refers to as the Machiavellian moment of the eighteenth century, Pocock contends that the *res publica* described in *Cato's Letters* was “what government was soon to appear in the political theory of David Hume: a device or mechanism for requiring men to take long views instead of short, to identify their private interests with the general good, to erect an edifice of reason and virtue on a foundation of passion; but rather more unequivocally than with Hume it is also a device for bringing men out of the cave into the sunlight, from a realm of fantasy into one of reality.”¹ According to Pocock, “Hume was prepared to accept duality and creative tension between reason and passion, authority and liberty” as well as “between the men of real property, who inherited liberty in the form of privilege and custom, and the men of mobile property, who affirmed it in the form of enlarged knowledge and expanding capacities.”² Pocock also noted that, by the time of Adam Smith, the division of labor and specialization was seen as the driving force behind the progression of society “from each phase of its economic history toward the next.”³ Pocock then points to a paradox recognized by Adam Ferguson: the premise that, as civilization progressed through “the division of labor and the specialization of personalities,” the individual “became more and more the dependent of those with whom he had contracted to perform specialized functions,” resulting in the personality being “impoverished even as it was enriched.”⁴ The question posed by John Millar was “whether, as society progresses to the point where men become capable of liberty and virtue, they do not become increasingly exposed to corruption.”⁵ Pocock concludes that, in the Scottish school, “[t]here was now a theory of history which showed how virtue was built up and

¹ J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), 472.

² *Ibid.*, 495.

³ *Ibid.*, 498-99.

⁴ *Ibid.*, 501-02.

⁵ *Ibid.*, 502-03.

demolished by the growth of society itself.”⁶ He denotes this as a Machiavellian moment based upon “Machiavelli’s belief that republics never became fully stable or fully virtuous, and the fact that political theory based on commerce increasingly showed society polarized into those enriched by progress and those impoverished by it, and justified government as a necessary evil in a world of specialization and class struggle.”⁷ Still, Pocock suggests that, although Rousseau insisted that the contradiction between personality and society was intolerable, “the Scottish school believed that the contradiction between virtue and culture might be managed by men in society with good hopes of reasonable success.”⁸ After following the Aristotelian and Machiavellian tradition through the Scottish school, Pocock concludes his work with the proposition that the political culture that took shape in eighteenth-century America was based upon neoclassical values and concepts of “a civil and patriot ideal in which the personality was founded in property, perfected in citizenship but perpetually threatened by corruption.”⁹ According to Pocock, “the theses and antithesis of virtue and corruption continued to be one of great importance in shaping American thought.”¹⁰ By examining the evidence of a Scottish influence upon American thought in colonial America, this chapter will begin to explore the competing themes of virtue and self-interest in the founding of a constitutional republic.

Scottish Immigration to America

According to David M. Walker, in the early eighteenth century, the expansion of the Glasgow tobacco trade, the presence of “small but influential colonies of Scottish merchants in every port between Florida and Nova Scotia,” and emigration from Scotland to America contributed to a “general interest in Scotland about America, and a flow of correspondence.”¹¹ Thus, it was not merely the exchange of goods in commerce, but the exchange of ideas that defined Scotland’s influence upon America in the eighteenth century.

Andrew Hook notes that Benjamin Franklin was indirectly involved in bringing the Scottish clergyman, John Witherspoon, to America to become President of the College of

⁶ *Ibid.*, 503.

⁷ *Ibid.*

⁸ *Ibid.*, 504.

⁹ *Ibid.*, 506-07.

¹⁰ *Ibid.*, 527.

¹¹ David M. Walker, “The Lawyers of the Scottish Enlightenment and Their Influence on the American Constitution,” *Juridical Review* 1988, no. 1 (1988): 4-5.

New Jersey.¹² According to Hook, Witherspoon made a significant contribution to “the introduction of Scottish philosophy to America.”¹³ Douglass G. Adair describes Witherspoon as “the most important early popularizer of the Scottish ‘common sense’ philosophy of Reid in the United States.”¹⁴ Witherspoon also taught a course on Moral Philosophy, which included citations to and quotations from Smith, Hutcheson, Hume, and Lord Kames, along with Montesquieu, Mandeville, and Locke.¹⁵ Stanley Elkins and Eric McKittrick contend that Witherspoon’s primary contribution to his students, including James Madison, was in teaching them, by his own example, to be selective in their adoption of Enlightenment ideas; for example, Witherspoon saw Hutcheson’s moral philosophy as deplorably superficial, and yet Witherspoon fully endorsed Hutcheson’s discussions of the conditions under which colonies and mother country ought to separate.¹⁶ Likewise, while Witherspoon was critical of Hume’s skepticism, in Witherspoon’s *Lectures on Eloquence* Hume received the highest praise.¹⁷ It seems that the part of the spirit of the Enlightenment that Witherspoon brought with him from Edinburgh was the principle, as Elkins and McKittrick note, that those who suspect a thing of being pernicious “ought to acquaint themselves with it, they must know what it is, if they mean to shew that it is false.”¹⁸ Indeed, David Fate Norton argues that the political philosophies of Hutcheson and Witherspoon seem inseparable, a point he relies upon as support for his claim that “Hutcheson’s teachings were a significant factor in the movement toward independence.”¹⁹ Significantly, Witherspoon was a signer of both the Declaration of Independence and the Articles of Confederation.²⁰ In addition to Madison, delegates to the Constitutional Convention of 1787 who studied under Witherspoon included William C. Houston and Jonathan Dayton of New Jersey, Gunning Bedford, Jr. of Delaware, and William R. Davie of North Carolina.²¹

¹² Andrew Hook, *Scotland and America: A Study of Cultural Relations: 1750-1835* (Glasgow: Blackie and Son, 1975), 26.

¹³ *Ibid.*, 37-38.

¹⁴ Douglass G. Adair, *The Intellectual Origins of Jeffersonian Democracy: Republicanism, the Class Struggle, and the Virtuous Farmer* (Lanham, MD: Lexington Books, 1964), 34.

¹⁵ *Ibid.*, 26.

¹⁶ Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800* (New York: Oxford University Press, 1993), 85.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 85-86.

¹⁹ David Fate Norton, “Francis Hutcheson in America,” *Studies on Voltaire and the Eighteenth Century* 154 (1976): 1552.

²⁰ Samuel Fleischacker, “The impact on America: Scottish philosophy and the American founding,” in *Cambridge Companion to the Scottish Enlightenment*, ed. Broadie, 317.

²¹ Alexander Leitch, *A Princeton Companion* (Princeton: Princeton University Press, 1978).

In 1755, Francis Alison was appointed Vice-Provost and Professor of Moral Philosophy at the newly-established College of Philadelphia.²² According to Norton, “Hutcheson’s views received their widest colonial hearing, and had the greatest impact” in Pennsylvania due to the influence of Alison, who had received an M.A. from Edinburgh in 1732, and may have studied with Hutcheson in Glasgow or, perhaps, Dublin.²³ Norton points out that student notes from Alison’s lectures on moral philosophy reflect extensive paraphrases of Hutcheson’s views on the design of human nature, the nature of virtue, and the operation of the moral sense.²⁴

James Wilson was an immigrant from Scotland who had been educated at St. Andrews, Edinburgh, and Glasgow.²⁵ Walker, who notes that Wilson was born at Carskerdo in Fife in 1742, and studied at St. Andrews in 1757-59, contends that the tradition that Wilson attended Glasgow University sometime between 1759 and 1763, and Edinburgh University from 1763 to 1765, has not been confirmed.²⁶ If true, however—as Walker points out—it is quite possible that Wilson attended lectures of Adam Smith, who was Professor of Moral Philosophy at Glasgow, and John Millar, who was Regius Professor of Law at Glasgow, during the relevant period.²⁷ Likewise, Adam Ferguson was Chair of Natural Philosophy, and later of Moral Philosophy, at Edinburgh when Wilson was said to have been in the college there.²⁸ William Ewald’s more recent research relies upon library borrowing records to confirm Wilson’s attendance at St. Andrews between 1757 and 1759 and at the University of Glasgow during the years 1764 to 1765.²⁹ In 1765, Wilson immigrated to America, became a Latin tutor at the College of Philadelphia, and read law in the office of John Dickinson.³⁰ After publishing a pamphlet entitled, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, which was widely read for the proposition that Parliament had no authority over the colonies, Wilson was elected to the Second Continental Congress and signed the Declaration of Independence.³¹ In 1782, Wilson was appointed as a delegate to the

²² Norton, “Hutcheson in America,” 1553.

²³ *Ibid.*, 1552-53.

²⁴ *Ibid.*, 1554.

²⁵ Gordon S. Wood, “The American Revolution,” in *The Cambridge History of Eighteenth-Century Political Thought*, eds. Mark Goldie and Robert Wolker (Cambridge: Cambridge University Press, 2006), 621.

²⁶ Walker, “Lawyers of the Scottish Enlightenment,” 12.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ William Ewald, “James Wilson and the Scottish Enlightenment,” *Journal of Constitutional Law* 12, no. 4 (2010): 1113-14.

³⁰ Walker, “Lawyers of the Scottish Enlightenment,” 16.

³¹ *Ibid.*

Confederation Congress, where he met Alexander Hamilton and James Madison.³² Wilson was one of the few men to sign both the Declaration of Independence and the Constitution.³³

Reading the Scottish Enlightenment

Mark G. Spencer notes that Hume's *Enquiries* circulated widely in colonial America.³⁴ Indeed, as recorded on an Invoice of Books for the Library Company of Philadelphia, sent from London in August 1752, to Benjamin Franklin, Hume's *Political Discourses* and *Enquiry Concerning the Principles of Morals* were included in one of America's earliest public libraries.³⁵ According to Spencer, although Hume's philosophy was as often the subject of censure as it was the subject of praise, there is no doubt that it was the subject of a "steady stream of debate" in early America.³⁶

In 1761, Franklin's efforts to share the literary works of Great Britain with the colonies was evidenced by an invoice and bill of lading sent to the treasurer of the Library Company of Philadelphia, for a collection of books ordered for the Philadelphia library.³⁷ The invoice included two works by Lord Kames: *Historical Law-Tracts* and *Principles of Equity*.³⁸

In January 1765, John Adams recorded in his diary that he had been invited to join a proposed law club, "a private association for the study of law and oratory."³⁹ Among the first works Adams read for discussion by the Sodalitas Club were Lord Kames' *Historical Law-Tracts* and *Essays Upon Several Subjects Concerning British Antiquities*.⁴⁰ On 21 February 1765, Adams noted that the club had given rise to his own thinking, which he would commit to writing, and which afterward would be published in the Boston Gazette as *A Dissertation on the Canon and Feudal Law*.⁴¹

³² William Ewald, "James Wilson and the Drafting of the Constitution," *Journal of Constitutional Law* 10, no. 5 (2008): 910.

³³ Fleischacker, "Scottish philosophy and the American founding," 317.

³⁴ Mark G. Spencer, ed., *Hume's Reception in Early America*, vol. 1 (Bristol, UK: Thoemmes Press, 2002), 81.

³⁵ William Strahan to Franklin, 26 August 1752, London, in Benjamin Franklin, *The Papers of Benjamin Franklin*, ed. Leonard W. Labaree, vol. 4 (New Haven: Yale University Press, 1961), 350-53.

³⁶ Spencer, *Hume's Reception in Early America*, 1:87.

³⁷ Franklin to Joseph Morris, 20 February 1761, London, in Benjamin Franklin, *The Papers of Benjamin Franklin*, ed. Leonard W. Labaree, vol. 9 (New Haven: Yale University Press, 1966), 274-75.

³⁸ *Ibid.*, 9:277.

³⁹ John Adams, *The Works of John Adams*, ed. Charles Francis Adams, vol. 2 (Boston: Charles C. Little and James Brown, 1850), 146.

⁴⁰ *Ibid.*, 2:147-49.

⁴¹ *Ibid.*, 2:150.

Hook identifies the library of Thomas Jefferson as the most notable colonial collection of works by the major figures of the Scottish Enlightenment, including Francis Hutcheson, David Hume, Adam Smith, Adam Ferguson, Dugald Stewart, Lord Kames, Hugh Blair, William Robertson, David Gregory, Colin Maclaurin, and William Cullen.⁴² Gary Wills notes that Jefferson included both Thomas Reid's *Inquiry into the Human Mind* and John Locke's *Conduct of the Mind* on a basic library list compiled in 1771 for a friend.⁴³ In his letter to Robert Skipwith, Jefferson wrote, "Of Politicks and Trade I have given you a few only of the best books, as you would probably chuse to be not unacquainted with those commercial principles which bring wealth into our country, and the constitutional security we have for the enjoyment of that wealth."⁴⁴ In addition to those identified by Wills, Jefferson also included, on the list of recommended reading, Smith's *Theory of Moral Sentiments*, Locke's *Essay Concerning Civil Government*, and Hume's *Essays and History of England*.⁴⁵

Jefferson was influenced by both Hutcheson and the Scottish Common Sense school of philosophy, which McDonald describes as holding "that all adult human beings are endowed with a moral sense—an innate knowledge of what is right and what is wrong, of what is good and what is evil—and a disposition to do good."⁴⁶ As a student at the College of William and Mary, Jefferson himself studied under William Small of Scotland, the Professor of Mathematics, and later the interim philosophical chair, whom Jefferson described as "a man profound in most of the useful branches of science, with a happy talent of communication, correct and gentlemanly manners, and an enlarged and liberal mind."⁴⁷ Years later, however, in August 1787, Jefferson advised his nephew, Peter Carr, a student at the College of William and Mary, not to waste his time attending lectures in moral philosophy.⁴⁸ According to Jefferson, because the "moral sense, or conscience, is as much a part of man as his leg or arm," if a moral case is stated "to a ploughman and a professor . . . [t]he former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules."⁴⁹ Wills notes that Jefferson's reference to a

⁴² Hook, *Scotland and America*, 41.

⁴³ Wills, *Inventing America*, 175, 182.

⁴⁴ Jefferson to Robert Skipwith, 3 August 1771, Monticello, in Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, vol. 1 (Princeton: Princeton University Press, 1950), 77.

⁴⁵ *Ibid.*, 1:78-80.

⁴⁶ Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 54-55.

⁴⁷ Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb, vol. 1 (Washington, D.C.: Thomas Jefferson Memorial Association, 1904), 3.

⁴⁸ Jefferson to Peter Carr, 10 August 1787, Paris, in Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, vol. 12 (Princeton: Princeton University Press, 1955), 14-15.

⁴⁹ *Ibid.*

“plowman and a professor” was reflective of Reid’s idea “of the moral sense that is equal in all men.”⁵⁰ On a list of recommended readings, accompanying Jefferson’s letter to Carr, he included Hume’s *History and Essays*, as well as Locke’s *Essays and Conduct of the Mind*.⁵¹ Though it is impossible to ascertain which Enlightenment thinker influenced Jefferson the most, a number of Scottish Enlightenment thinkers, including Lord Kames, Adam Smith, Thomas Reid, and David Hume, figured prominently in Jefferson’s *Commonplace Book*.⁵²

In October 1773, George Washington ordered materials for repairs and alterations to Mount Vernon, as well as “Books for the use of Mr Custis, to whom they are to be charged.”⁵³ The list of seventeen books for John Parke Custis’ studies included several significant works of the Scottish Enlightenment, including Hutcheson’s *Introduction to Moral Philosophy*, Reid’s *Inquiry into the Human Mind*, Ferguson’s *Institutes of Moral Philosophy*, George Turnbull’s *Principles of Moral Philosophy*, and Smith’s *Theory of Moral Sentiments*.⁵⁴ Samuel Fleischacker cites Washington’s purchase of these books as evidence that they were being used in the college curriculum of the day, based on the fact that they were to be sent to Custis at King’s College.⁵⁵

Benjamin Vaughn, writing from Essex on 27 January 1777, sent to Franklin in Paris a few maps and books, including Smith’s recently-published *Wealth of Nations*.⁵⁶ William Cushing returned two volumes of Hume’s *History* to John Adams in January 1777, with a request to borrow additional volumes.⁵⁷ Likewise, in April 1781 Alexander Hamilton asked to borrow a copy of Hume’s *Political Discourses* from Colonel Timothy Pickering.⁵⁸ In a letter to Robert Morris, dated April 30, 1781, discussing the need to restore the public credit, Hamilton quotes both Hume and Smith.⁵⁹

⁵⁰ Wills, *Inventing America*, 100.

⁵¹ Jefferson, *Papers of Thomas Jefferson*, 12:18-19.

⁵² Wills, *Inventing America*, 175-77.

⁵³ Washington to Robert Cary & Co., 6 October 1773, Mount Vernon, in George Washington, *The Papers of George Washington: Colonial Series*, eds. W. W. Abbott and Dorothy Twohig, vol. 9 (Charlottesville: University Press of Virginia, 1994), 343-344.

⁵⁴ *Ibid.*, 9:344-45.

⁵⁵ Samuel Fleischacker, “Adam Smith’s Reception among the American Founders, 1776-1790,” *William and Mary Quarterly, Third Series* 59, no. 4 (2002): 898, n.2.

⁵⁶ Benjamin Vaughn to Franklin, 27 January 1777, Essex, in Benjamin Franklin, *The Papers of Benjamin Franklin*, ed. William B. Willcox, vol. 23 (New Haven: Yale University Press, 1983), 242.

⁵⁷ William Cushing to Adams, 14 January 1777, Scituate, Massachusetts, in John Adams, *Papers of John Adams*, ed. Robert J. Taylor, vol. 5 (Cambridge, MA: Belknap Press, 1983), 71.

⁵⁸ Hamilton to Timothy Pickering, 20 April 1781, New Windsor, New York, in Alexander Hamilton, *The Papers of Alexander Hamilton*, ed. Harold C. Syrett, vol. 2 (New York: Columbia University Press, 1961), 595.

⁵⁹ Hamilton to Robert Morris, 30 April 1781, De Peyster’s Point, New York, *Ibid.*, 2:608.

In 1783, James Madison presented the report of a congressional committee appointed to prepare a list of books to be imported for the use of Congress.⁶⁰ Although many of the books on the list of about 550 titles concerned American topics, Hook identifies about a dozen works representing the Scottish Enlightenment, including Hutcheson's *A System of Moral Philosophy*; Ferguson's *Institutes of Moral Philosophy* and his *Essay on the History of Civil Society*; Hume's *History of England* and *Essays and Treatises on Several Subjects*; Millar's *The Origin of the Distinctions of Ranks*; and Smith's *Wealth of Nations*.⁶¹

In May 1783, John Adams wrote to his son, advising him "to have a Book of Amusement, to read, along with your Severe Studies and laborious Exercises," and recommended as such, "Books of Morals," including the writings of Francis Hutcheson.⁶²

Travel and Correspondence

Hook begins his study of cultural relations between America and Scotland with a 1759 visit by Benjamin Franklin to Scotland.⁶³ At St. Andrews, Franklin was made a Guild Brother of the town and given a formal reception by the university faculty.⁶⁴ In February 1759, St. Andrews University awarded Franklin an honorary Doctor of Laws degree for his work with electricity.⁶⁵ In Edinburgh, Franklin met and was entertained by David Hume; Henry Home, Lord Kames; Adam Ferguson; and others, including Adam Smith.⁶⁶ Hook notes that Franklin was subsequently influential in sponsoring a number of American medical students in their studies at Edinburgh, and to a lesser degree, the awarding of honorary Doctor of Divinity degrees by Scottish Universities to several American ministers.⁶⁷

In 1760, Franklin wrote Lord Kames to report that he was reading "with great Pleasure and Improvement," Kames' *Principles of Equity*, which Franklin noted would be of great advantage to the judges in the Colonies.⁶⁸ Also in 1760, Franklin wrote to Hume, saying he was pleased "to hear of your Change of Sentiments in some particulars relating

⁶⁰ James Madison, *The Papers of James Madison*, eds. William T. Hutchinson and William M. E. Rachel, vol. 6 (Chicago: University of Chicago Press, 1969), 62-115.

⁶¹ Hook, *Scotland and America*, 42.

⁶² Adams to John Quincy Adams, 19 May 1783, Paris, in Richard Alan Ryerson, ed., *Adams Family Correspondence*, vol. 5 (Cambridge, MA: Belknap Press, 1993), 162-63.

⁶³ Hook, *Scotland and America*, 18.

⁶⁴ *Ibid.*, 19-20.

⁶⁵ Walker, "Lawyers of the Scottish Enlightenment," 10.

⁶⁶ Hook, *Scotland and America*, 19.

⁶⁷ *Ibid.*, 25-26.

⁶⁸ Franklin to Lord Kames, 3 May 1790, London, in Franklin, *Papers of Benjamin Franklin*, 9: 103.

to America; because I think it of Importance to our general Welfare that the People of this Nation should have right Notions of us, and I know no one that has it more in his Power to rectify their Notions, than Mr. Hume.”⁶⁹ Franklin’s correspondence revealed his recognition that the colonies benefitted not only from the receipt of knowledge and ideas from the great thinkers of Scotland, but also from the favorable influence his correspondents might have in Great Britain with respect to the American colonies.

In 1762, Franklin wrote a letter to Hume, which was subsequently published by the Philosophical Society of Edinburgh, regarding the method of preserving buildings from damage by lightning.⁷⁰ In response, Hume commented that, though America had sent gold, silver, sugar, tobacco, and indigo to Scotland, Franklin was “the first Philosopher, and indeed the first Great Man of Letters for whom we are beholden to her.”⁷¹

Franklin visited Scotland again in 1771.⁷² In January 1772, Franklin wrote to his son about his visit to Scotland, during which he “spent 5 days with Lord Kaims . . . two or three Days at Glasgow, two Days at Carron Iron Works, and the rest of the Month in and about Edinburgh, lodging at David Hume’s, who entertain’d me with the greatest of Kindness and Hospitality, as did Lord Kaims and his Lady.”⁷³ Walker notes that Franklin met with Hume, Kames, and Ferguson in Edinburgh and with Millar in Glasgow.⁷⁴

Scottish Influence on Colonial American Writings

In *A Dissertation on the Canon and Feudal Law*, published in 1765, Adams was critical of the feudal system as “inconsistent with the constitution of human nature.”⁷⁵ In noting that many “celebrated modern writers in Europe have espoused the same sentiments,” Adams quoted Lord Kames’ *British Antiquities*: “Lord Kaims, a Scottish writer of great reputation, whose authority in this case ought to have the more weight, as his countrymen have not the most worthy ideas of liberty, speaking of the feudal law, says,

⁶⁹ Franklin to David Hume, 27 September 1760, Coventry, *Ibid.*, 9:229.

⁷⁰ Franklin to Hume, 21 January 1762, London, in Benjamin Franklin, *The Papers of Benjamin Franklin*, ed. Leonard W. Labaree, vol. 10 (New Haven: Yale University Press, 1966), 17-23.

⁷¹ Hume to Franklin, 10 May 1762, Edinburgh, *Ibid.*, 10:80-82.

⁷² Walker, “Lawyers of the Scottish Enlightenment,” 10.

⁷³ Franklin to William Franklin, 30 January 1772, London, in Benjamin Franklin, *The Papers of Benjamin Franklin*, ed. William B. Willcox, vol. 19 (New Haven: Yale University Press, 1975), 50.

⁷⁴ Walker, “Lawyers of the Scottish Enlightenment,” 10.

⁷⁵ John Adams, *Papers of John Adams*, ed. Robert J. Taylor, vol. 1 (Cambridge, MA: Belknap Press, 1977), 117.

‘A constitution so contradictory to all the principles which govern mankind, can never be brought about, one should imagine, but by foreign conquest or native usurpations.’⁷⁶

In *The Farmer Refuted*, Alexander Hamilton quoted Hume—referring to him only as a “celebrated author.”⁷⁷ Hamilton noted, as an established maxim that:

in contriving any system of government, and fixing the several checks and controuls of the constitution, *every man* ought to be supposed a *knave*; and to have no other end in his actions, but *private interest*. By this interest, we must govern him, and by means of it, *make him co-operate to public good*, notwithstanding his insatiable avarice and ambition. Without this, we shall in vain boast of the advantages of *any constitution*, and shall find in the end, that we have no security for our liberties and possessions, except the *good will* of our rulers; that is, we should have *no security at all*.⁷⁸

Hamilton also cited Hume for the proposition that “the authority of the British Parliament over America, would, in all probability, be a more intolerable and excessive species of despotism than an absolute monarchy.”⁷⁹ According to Henry May, Hume’s skeptical view that men are far more influenced by their passions than their reason played an important role in the political theory of Hamilton, whom May describes as the most skeptical of American major statesmen.⁸⁰

Hamilton subsequently argued, in *The Continentalist No. V*, that Hume’s essay, *Of the Jealousy of Trade*, had been misapprehended by those who opposed all regulation of trade.⁸¹ Hamilton contended that Hume’s “object was to combat that excessive jealousy on this head,” but that it “was no part of his design to insinuate that the regulating hand of government was either useless, or hurtful.”⁸² Hamilton argued that “to militate against all interference by the sovereign [is] an extreme as little reconcilable with experience, or common sense, as the practice it was first framed to discredit.”⁸³

⁷⁶ *Ibid.*

⁷⁷ Spencer, *Hume’s Reception in Early America*, 1:25.

⁷⁸ Alexander Hamilton, *The Papers of Alexander Hamilton*, ed. Harold C. Syrett, vol. 1 (New York: Columbia University Press, 1961), 94-95.

⁷⁹ *Ibid.*, 1:100.

⁸⁰ Henry May, *The Enlightenment in America* (New York: Oxford University Press, 1976), 120.

⁸¹ Alexander Hamilton, *The Papers of Alexander Hamilton*, ed. Harold C. Syrett, vol. 3 (New York: Columbia University Press, 1962), 77.

⁸² *Ibid.*

⁸³ *Ibid.*, 3:76-77.

Chapter 3

An Enlightened Path to a Constitutional Republic

This chapter examines the philosophical debates from the Declaration of Independence through the Confederation and the drafting of the Constitution.

Declaration of Independence

According to Caroline Robbins, for an explicit statement of “when it is that colonies may turn independent,” one must turn to the work of Francis Hutcheson.¹ Robbins notes that Hutcheson believed in an extensive religious liberty, wished for reform of representative institutions to insure a proper relation between the individual and the state, and sought a measure of economic liberty within the just bounds of general welfare.² Robbins points out that Hutcheson applied the criterion of the greatest good in defining just and unjust war in his *System of Moral Philosophy*: “In short in foreign as in colonial policy that is best which considers most fully the welfare of all mankind.”³ As Norton puts it, “Hutcheson insists that there are clear limits to [the] powers of the state, and that citizens have always the right to resist the excesses of a government of any form, and even the right to overthrow and replace a government.”⁴ More specifically, Hutcheson considered the rights of mother countries over colonies: “There is something so unnatural in supposing a large society, sufficient for all the good purposes of an independent political union, remaining subject to the direction and government of a distant body of men who know not sufficiently the circumstances and exigencies of this society; or in supposing this society obliged to be governed solely for the benefit of a distant country; that it is not easy to imagine there can be any foundation for it in justice or equity.”⁵

In *Inventing America*, Gary Wills looks for evidence of the Scottish Enlightenment in Thomas Jefferson’s draft of the Declaration of Independence. Wills sees shades of Hume and Hutcheson in Jefferson’s invocation of the words “course” and “event,” respectively,

¹ Caroline Robbins, “‘When It Is That Colonies May Turn Independent:’ An Analysis of the Environment and Politics of Francis Hutcheson (1694-1746),” *William and Mary Quarterly, Third Series* 11, no. 2 (1954): 214.

² *Ibid.*, 231.

³ *Ibid.*, 251.

⁴ Norton, “Hutcheson in America,” 1560.

⁵ Francis Hutcheson, *A System of Moral Philosophy*, vol. 2 (Glasgow: R. and A. Foulis, Printers to the University, 1755), 309.

in the opening line of the Declaration.⁶ Notwithstanding the longstanding association of Jefferson with Locke, and indeed early accusations that Jefferson plagiarized Locke in his draft of the Declaration, Wills contends that there are more echoes of Montesquieu than Locke in the Declaration of Independence.⁷ As a specific example of Wills' thesis that Locke's influence has been overrated, Wills argues that the "self-evident truth" that "all men are created equal" is of the kind that "can be arrived at by certain evidence"; and is, thus, not self-evident in the Lockean sense.⁸ According to Wills, Jefferson thought that equality of the moral sense was a scientifically observable fact.⁹ Moreover, Wills points to Jefferson's statement—that his aim in writing the Declaration was "to place before mankind the common sense of the subject"—as evidence that Jefferson was using "self-evident" in Reid's sense.¹⁰ As support, Wills quotes Reid as saying, "Moral truths, therefore, may be divided into two classes, to wit: such as are self-evident to every man whose understanding and moral faculty are ripe, and such as are deduced by reasoning from those that are self-evident."¹¹ Wills then finds common ground in Jefferson's and Hutcheson's understanding that all men are equal in their exercise of the moral sense as man's highest faculty.¹²

Samuel Fleischacker contends that "the debate between the Scottish and the Hobbesian-Lockean view of the founders is part of a larger controversy over whether the political philosophy expressed in the American Declaration of Independence is primarily a 'liberal' or a 'civil republican' one."¹³ Fleischacker agrees with Wills that, on the occasions when Jefferson wrote on moral philosophy, he seems to identify himself with Hutcheson's moral sense doctrine.¹⁴ With regard to the Declaration of Independence, however, Fleischacker maintains that Jefferson was quoting Locke.¹⁵ According to Fleischacker, Wills exaggerates the distance between Hutcheson's and Locke's political philosophy: "Hutcheson, Hume and Smith all begin with Locke, if only to disagree with him, when they discuss property, the state of nature, the functions of government and the

⁶ Wills, *Inventing America*, 93-94.

⁷ *Ibid.*, 172-73. Jefferson himself disputed Richard Henry Lee's charge that the Declaration was copied from Locke's treatise on government, noting that, though he did not know whether he had gathered his ideas from reading or reflecting, he had turned to neither book nor pamphlet while writing it. See Jefferson to James Madison, 30 August 1823, Monticello, in Thomas Jefferson, *The Works of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 12 (New York: G.P. Putnam's Sons, 1905), 306-09.

⁸ Wills, *Inventing America*, 181-82.

⁹ *Ibid.*, 227.

¹⁰ *Ibid.*, 190.

¹¹ *Ibid.*, 181.

¹² *Ibid.*, 211.

¹³ Fleischacker, "Scottish philosophy and the American founding," 316.

¹⁴ *Ibid.*, 320.

¹⁵ *Ibid.*, 318-19.

right to resistance. All three, moreover, accept Locke's conclusion, as against Hobbes, that resistance to government is sometimes legitimate, although Hume rejects Locke's reasoning for that conclusion and offers his own alternative."¹⁶

Morton White argues that Jefferson held "that it may be discovered by reason that all men are created equal in the sense of having been given the same nature and advantages."¹⁷ But White also acknowledged the "impact of what is called the doctrine of moral sense on American thought in the revolutionary period."¹⁸ As White noted, Locke "regarded logical demonstration from self-evident principles as the way in which a philosopher would show them to be true. And it was this insistence on seeking final support from reason so conceived that made Locke's rationalism unacceptable to the most radical advocates of the doctrine of moral sense."¹⁹

Andrew Reck notes that Jefferson's enumeration of rights—"Life, Liberty, and the pursuit of Happiness"—rather than the life, liberty, and property, was a movement away from Locke's theory of rights, which would have given property first priority, in favor of Hutcheson's theory of perfect natural rights, which "underscores the freedom of the individual to live as he chooses as long as he does not harm others."²⁰ For Reck, however, the choice of happiness over property was not an outright rejection of Locke—who, Reck notes, "taught that Happiness alone 'moves desire' and introduced the phrase 'pursuit of happiness'"—but simply a reflection of Thomas Jefferson's and Benjamin Franklin's view that property was a civil right rather than a natural right.²¹ Reck concludes more broadly that "[i]n style and substance the Declaration of Independence stands out as a document of Enlightenment thought and political action."²²

Forrest McDonald contends that, by the time they had declared their independence, many Americans had become reasonably well versed in republican principles of political theory, studying as college students the history of the ancient republics, Montesquieu's analysis of republic principles, and, in particular, David Hume's argument that England

¹⁶ *Ibid.*, 321.

¹⁷ Morton White, *The Philosophy of the American Revolution* (New York: Oxford University Press, 1978), 94.

¹⁸ *Ibid.*, 97.

¹⁹ *Ibid.*, 99-100.

²⁰ Andrew J. Reck, "The Enlightenment in American Law I: The Declaration of Independence," *Review of Metaphysics* 44, no. 3 (1991): 555.

²¹ *Ibid.*, 561.

²² *Ibid.*, 557.

was closer to a republic than an absolute monarchy.²³ McDonald divides American schools of republican thought (to the extent such principles are subject to systematic categorization) into two categories: puritan and agrarian.²⁴ Either way, says McDonald, the common principle of republics was *public virtue*.²⁵ Puritanical republicanism “sought a moral solution to the problem of the mortality of republics (make better people).”²⁶ When viewed from the puritan perspective, republican liberty was totalitarian: “one was free to do that, and only that, which was in the interest of the public, the liberty of the individual being subsumed in the freedom or independence of his political community.”²⁷ According to McDonald, agrarian republicanism “believed in a socio-economic-political solution (make better arrangements).”²⁸

Revolutionary War and the Confederation

Bernard Bailyn notes that “[m]ost conspicuous in the writings of the Revolutionary period was the heritage of classical antiquity.”²⁹ According to Bailyn, however, the learning behind “this elaborate display of classical authors” was often superficial.³⁰ While, to Bailyn, the classics of ancient thought were illustrative of thought, more “directly influential in shaping the thought of the Revolutionary generation were the ideas and attitudes associated with the writings of Enlightenment rationalism.”³¹

Although Adam Ferguson himself journeyed to America in 1778 as the secretary of Lord Carlisle’s Peace Commission, he was not received by Congress,³² and the Commissioners’ offer of “self-rule” was rejected as “a combination of fraud, falsehood, insidious offers, and abuse of France, Concluding with a denial of Independence.”³³

John Adams quoted Hume extensively in his *Defense of the Constitutions of Government of the United States*, published in 1787, particularly with regard to the need to

²³ McDonald, *Novus Ordo Seclorum*, 66.

²⁴ *Ibid.*, 70.

²⁵ *Ibid.*

²⁶ *Ibid.*, 71.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1967), 23.

³⁰ *Ibid.*, 24.

³¹ *Ibid.*, 26.

³² George Washington to Adam Ferguson, 9 June 1778, Valley Forge, in George Washington, *The Papers of George Washington: Revolutionary War Series*, ed. Edward G. Lengel, vol. 15 (Charlottesville: University of Virginia Press, 2006), 363.

³³ Richard Henry Lee to Jefferson, 16 June 1778, York, Pennsylvania, in Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, vol. 2 (Princeton: Princeton University Press, 1950), 200.

achieve a balance of power between the rich and the poor.³⁴ Adams, however, was critical of Hume's "Idea of a Perfect Commonwealth" as a complicated aristocracy.³⁵ In his chapter summarizing the "Opinions of Historians," Adams introduced Hume's "Idea of a Perfect Commonwealth" as follows:

Americans in this age are too enlightened to be bubbled out of their liberties, even by such mighty names as Locke, Milton, Turgot, or Hume; they know that popular elections of one essential branch of the legislature, frequently repeated, are the only possible means of forming a free constitution, or of preserving the government of laws from the domination of men, or of preserving their lives, liberties, or properties in security; they know, though Locke and Milton did not, that when popular elections are given up, liberty and free government must be given up. Upon this principle, they cannot approve the plan of Mr. Hume, in his "*Idea of a Perfect Commonwealth*."³⁶

After quoting Hume's plan for town elections of county representatives; the subsequent election, by the county representatives, of county magistrates and a senator; wherein the senators would possess the whole executive power and the representatives would possess the whole legislative power, but requiring all new laws to first be debated in the senate before being sent to the representatives; and where the senate would chose a protector and executive council, Adams concluded:

If you compare this plan, as well as those of Locke and Milton, with the principles and examples, you will soon form a judgment of them; it is not my design to enlarge upon them. That of Hume is a complicated aristocracy, and would soon behave like all other aristocracies.³⁷

Rather than vest the whole executive power in a senate as Hume had proposed, Adams suggested that a preferable improvement to the English constitution would be proportional representation of small districts in a House of Commons as "a guardian of natural liberty."³⁸

Constitutional Convention

The Confederation Congress adopted a resolution on 21 February 1787, calling for a convention to establish a "firm national government" that would render the federal

³⁴ Adair, *Intellectual Origins of Jeffersonian Democracy*, 60-61.

³⁵ Spencer, *Hume's Reception in Early America*, 1:36.

³⁶ John Adams, *The Works of John Adams*, ed. Charles Francis Adams, vol. 4 (Boston: Charles C. Little and James Brown, 1851), 466.

³⁷ *Ibid.*, 4:467.

³⁸ *Ibid.*, 4:468.

constitution adequate to the exigencies of government and the preservation of the Union.³⁹ On 25 May 1787, a quorum of seven states convened in Philadelphia and organized a Constitutional Convention, which remained in session until 17 September 1787.⁴⁰

A significant concern leading up to the Constitutional Convention was whether the American public possessed sufficient virtue to sustain a republic.⁴¹ According to McDonald, advocates of several competing positions were present at the Convention: (1) those who would “give up on republicanism and restore a more authoritative form of government, monarchical or otherwise”; (2) those who sought to “create a more virtuous public by means of education, by setting good examples, or by making it the interest of individuals to strive for the public good”; or (3) those who preferred “to establish republican government upon principles other than virtue, upon the assumption that most men, most of the time, would act out of motives of self-interest rather than of the public interest.”⁴²

An influential group of delegates to the Constitutional Convention, which McDonald describes as the “court-party nationalists,” were “in agreement that in framing a constitution, it was prudent to act on the assumption that most men in government would put their own interests ahead of the public interest much of the time.”⁴³ McDonald includes among the court-party nationalists such patriots as George Washington of Virginia, Nathaniel Gorham and Rufus King of Massachusetts, Alexander Hamilton of New York, and Gouverneur Morris and James Wilson of Pennsylvania.⁴⁴ McDonald also identifies some “probable” candidates for inclusion on his list of court-party nationalists, including, most notably, Benjamin Franklin of Pennsylvania.⁴⁵ James Madison of Virginia and Charles Pinckney of South Carolina agreed with the nationalists on many points, but McDonald would put them in a class by themselves.⁴⁶

What McDonald describes as a “country party” of “republican ideologues” consisted of those delegates to the Convention who, as McDonald puts it, “shrank with horror at the

³⁹ Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution*, vol. 1 (Madison: State Historical Society of Wisconsin, 1976), 187.

⁴⁰ Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 1 (New Haven: Yale University Press, 1911), xi.

⁴¹ McDonald, *Novus Ordo Seclorum*, 179.

⁴² *Ibid.*

⁴³ *Ibid.*, 187-88.

⁴⁴ *Ibid.*, 186.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 187.

prospect of admitting the baser passions as operating principles of government.”⁴⁷ McDonald notes that Montesquieu had “warned against entrusting people with power if it was to their personal advantage to abuse it” whereas “Hume, by contrast, had contended that corruption in the form of the power to manage Parliament by passing out lucrative offices was necessary to the balance of the British constitution.”⁴⁸ McDonald assigns those delegates, including (among others) George Mason of Virginia, Robert Yates of New York, Roger Sherman of Connecticut, and Elbridge Gerry of Massachusetts—who “insisted upon the absolute exclusion of congressmen from other offices during and for a time after their service in Congress”—as corresponding to the country party in England.⁴⁹

Between the court-party nationalists and republican ideologues, as McDonald describes them, there stood a few delegates, like James Madison of Virginia, who were willing to propose a compromise.⁵⁰ In *To Begin the World Anew*, Bailyn quotes Madison as saying both that, “If men were angels, no government would be necessary,” and that if there “[i]s no virtue among us . . . [n]o theoretical checks—no form of Government, can render us secure.”⁵¹ Indeed McDonald argues that the Convention resulted, not in a resolution of these questions of political theory, so much as a series of pragmatic compromises of the large-state/small-state differences and the competing economic interests between the North and South.⁵²

Stephen A. Conrad would, perhaps, take issue with McDonald placing James Wilson squarely in the “court party,” as distinguished from the “country party.” According to Conrad, Wilson’s vision encompassed a “reconciliation” of the “two republican ideals so often supposed to be at odds with one another.”⁵³ For Wilson, “there can be no real incompatibility between the discharge of one’s publick, and that of his private duty.”⁵⁴ Wilson was also the delegate to the Constitutional Convention who proposed the solution to the anti-federalist objection to the plan to divide sovereignty between the national and state governments—seemingly an impossibility under the political theory of the day.⁵⁵ On 19 June 1787, Wilson observed “that by a Natl. Govt. he did not mean one that would

⁴⁷ *Ibid.*, 199.

⁴⁸ *Ibid.*, 199-200.

⁴⁹ *Ibid.*, 200.

⁵⁰ *Ibid.*, 203.

⁵¹ Bernard Bailyn, *To Begin the World Anew* (New York: Alfred A. Knopf, 2003).

⁵² McDonald, *Novus Ordo Seclorum*, 234-35.

⁵³ Stephen A. Conrad, “Citizenship and Common Sense in James Wilson’s Republican Theory,” *The Supreme Court Review* 1984 (1984): 369.

⁵⁴ *Ibid.*, 384.

⁵⁵ Wood, “The American Revolution,” 621.

swallow up the State Govts. as seemed to be wished by some gentlemen.”⁵⁶ During a debate (on 25 June 1787) regarding the election of senators, Wilson explained his opposition to an election by state legislatures by observing “the twofold relation” in which the people would stand: first, as citizens of the general government, and second, as citizens of their particular state—both were derived from the people and, therefore, “ought to be regulated on the same principles.”⁵⁷

Although McDonald identifies Elbridge Gerry—because of his support for a strict ban on members of Congress serving in any public office for a period of time after their service in Congress—as a country party republican, there are times when Gerry’s arguments sounded more like those of a court-party skeptic. When, for example, the question of whether the members of the first branch of the legislature ought to be elected by the people of the several states was taken up on 31 May 1787, Gerry, a delegate from Massachusetts, argued for their election by the state legislatures. As an example of why popular elections were not reliable as a source of sound governance, Gerry cited what he apparently viewed to be an uninformed and misled popular clamor in Massachusetts to reduce the salaries of government administrators: “The evils we experience flow from the excess of democracy. The people do not want virtue; but are the dupes of pretended patriots.”⁵⁸ It appears that Gerry recognized the limitations of virtue as a basis for government, and the need, through adequate pay, to motivate public servants by appealing to their self-interests. In passing, however, Gerry’s comments also revealed his lack of confidence in the competence of the people to govern themselves.

On 2 June 1787, Benjamin Franklin (through a written speech read by Wilson) advanced an opinion that no salaries should be allowed public officers, which reflected Hume’s sentiment on ambition and avarice⁵⁹:

Sir, there are two passions which have a powerful influence on the affairs of men. These are ambition and avarice; the love of power, and the love of money. Separately each of these has great force in prompting men to action; but when united in view of the same object, they have in many minds the most violent effects. Place before the eyes of such men a post of *honour* that shall at the same time be a place of *profit*, and they will move heaven and earth to obtain it.⁶⁰

⁵⁶ Farrand, *Records of the Federal Convention*, 1:322.

⁵⁷ *Ibid.*, 1:405-06.

⁵⁸ Farrand, *Records of the Federal Convention*, 1:48.

⁵⁹ Hume, “Principles of Morals,” 273.

⁶⁰ Farrand, *Records of the Federal Convention*, 1:82.

Thus, Doctor Franklin, even in arguing a position contrary to that presented by Gerry, likewise acknowledged in the early days of the Convention the need to account for the influence of human passions in formulating a system of government. Incidentally, Franklin's speech is an example, as McDonald contends, of the Convention delegates' frequent reliance upon political theorists without attribution; noting as an example that delegates often quoted or paraphrased Hume without acknowledging that they were doing so.⁶¹

Contrary to Gerry's argument for election of the first branch of the legislature by the state legislatures, Wilson supported the popular election of at least one branch of the legislature. Wilson observed: "There is no danger of improper elections if made by large districts. Bad elections proceed from the smallness of the districts which give an opportunity to bad men to intrigue themselves into office."⁶² Madison also advanced the idea of an extended republic to protect the minority from oppression by a majority of a small district.⁶³ But, as William Ewald points out, Madison, particularly in the early days of the Convention, was more interested in granting the Senate with an absolute negative on the laws of the states to strike down unjust and inequitable laws, whereas Wilson relied upon "a principle of dividing and balancing the respective spheres of authority so that the settled popular will can find expression in the actions of the government."⁶⁴

Alexander Hamilton addressed the Convention on 22 June 1787, regarding the question of barring members of Congress from executive office during their membership and for one year thereafter. In recognizing the "inconveniences on both sides" of the issue, Hamilton, as recorded by Madison, stated that, "if we expect him to serve the public [we] must interest his passions in doing so. A reliance on pure patriotism had been the source of many of our errors."⁶⁵ Thus, Hamilton did not seek to avoid any opportunity for passions to influence government, but, instead, to place competing passions in balance to maintain an equilibrium. Robert Yates reported these comments by Hamilton on corruption as follows: "Hume's opinion of the British constitution confirms the remark, that there is always a body of firm patriots, who often shake a corrupt administration. Take mankind as they are, and what are they governed by? Their passions."⁶⁶ According to McDonald, however, it is a mistake to assume that Hamilton, or the court-party nationalists, "cynically

⁶¹ McDonald, *Novus Ordo Seclorum*, 7.

⁶² Farrand, *Records of the Federal Convention*, 1:133.

⁶³ *Ibid.*, 1:134-36.

⁶⁴ Ewald, "James Wilson and the Drafting of the Constitution," 968, 970.

⁶⁵ *Ibid.*, 1:376.

⁶⁶ *Ibid.*, 1:381-82.

abandoned the whole notion of virtue in the republic and opted to substitute crass self-interest in its stead.”⁶⁷ Instead, the court-party nationalists, says McDonald, sought to err on the side of prudence by preparing for the worst, while expecting something better from the statesmen who would govern a republic.⁶⁸

On 7 August 1787, Franklin argued against a motion by Gouverneur Morris to limit the right of suffrage to freeholders for the purpose of electing members of the House of Representatives: “It is of great consequence that we shd. not depress the virtue & public spirit of our common people; of which they displayed a great deal during the war, and which contributed principally to the favorable issue of it.”⁶⁹ The motion to impose a freeholder requirement failed.⁷⁰

Just two days later (on 9 August 1787), Morris, having been rebuffed by Franklin’s appeal to reason (rather than prejudice) on the issue of popular suffrage, himself appealed to reason in his failed attempt to increase the citizenship requirement for Senators to fourteen years: “The lesson we are taught is that we should be governed as much by our reason, and as little by our feelings as possible.”⁷¹

On 20 August 1787, after the Committee on Detail presented its report to the Convention, Charles Pinckney submitted various propositions, including the proposed protections of the writ of habeas corpus and liberty of the press.⁷² On 12 September 1787, when the Committee on Style presented the draft Constitution, Hugh Williamson of North Carolina observed that no provision had been made for juries in civil cases and suggested the necessity of such a guarantee.⁷³ Gerry proposed that the Committee be “directed to provide a clause for securing the trial by Juries.”⁷⁴ This prompted George Mason to say that he “wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.”⁷⁵ Gerry moved for a committee to prepare a bill of rights, which Mason seconded as promised.⁷⁶ Roger Sherman objected:

⁶⁷ McDonald, *Novus Ordo Seclorum*, 189.

⁶⁸ *Ibid.*, 189-90.

⁶⁹ Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 2 (New Haven: Yale University Press, 1911), 204-05.

⁷⁰ *Ibid.*, 2:207.

⁷¹ *Ibid.*, 2:237.

⁷² *Ibid.*, 2:341-42.

⁷³ *Ibid.*, 2:587.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, 2:587-88.

⁷⁶ *Ibid.*, 2:588.

“The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.”⁷⁷ Notwithstanding Mason’s admonition that “[t]he Laws of the U.S. are to be paramount to State Bills of Rights,” the Convention voted unanimously (with Massachusetts absent) against the motion.⁷⁸

On 14 September 1787, Pinckney and Gerry again moved to insert a declaration “that the liberty of the Press should be inviolably observed,” but it was again defeated, this time by a vote of seven to four.⁷⁹ On 15 September 1787, Mason once more objected, without success, to the Constitution on the ground that there was no declaration of rights.⁸⁰ Thus, the seeds of popular support for what would become the Bill of Rights were planted during the last days of the Constitutional Convention.

According to May, the Constitution framed at the Convention reflects all the virtues of what he describes as the Moderate Enlightenment, and also one of its faults: “the belief that *everything* can be settled by compromise.”⁸¹ As May put it, “One of the Convention’s sets of compromises turned out to be not only immoral but unworkable,” referring to the slave trade clause, which was intended to lay the foundation for banishing slavery, but deferred, until 1808, congressional prohibition of only the importation of slaves.⁸²

Enlightenment Influences on the Framers of the Proposed Constitution

Eighteenth-century American political philosophy posed, and attempted to answer, many of the same questions considered by the key figures of the Scottish Enlightenment. To be sure, the Americans were also influenced by other, non-Scottish thinkers of the Enlightenment period, as well as by classical philosophers. Yet the exchange of both commerce and ideas between Scotland and America should not be ignored. From the extensive travels of Benjamin Franklin in Scotland, to the reading of and citation to Hume by Alexander Hamilton, to the instruction received by the Framers who studied at the College of New Jersey under the leadership of the Scottish-educated John Witherspoon, the generation of Americans who were sent to the Philadelphia convention to “render the federal constitution adequate to the exigencies of government and the preservation of the

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, 2:617-18.

⁸⁰ *Ibid.*, 2:637.

⁸¹ May, *Enlightenment in America*, 99.

⁸² *Ibid.*

Union” was broadly familiar with the political ideas and debate that had emerged from the Scottish Enlightenment.

Framers like Elbridge Gerry understood that it was human nature to be motivated by ambition as well as virtue. Thus, Gerry warned the other Convention delegates to guard against corruption in public service by making adequate provision for those employed in the administration of government. Gerry sought to advance the public interest by appealing to the self-interest of public servants. Benjamin Franklin, on the contrary, argued that no salaries should be paid to public officials to remove the passion of avarice as a motivation for government service. While the Convention debates do not suggest that the delegates sought to resolve this question as a matter of political theory, they ultimately made a decision, which was practical as much as it was philosophical, that senators and representatives, the president, and judges shall receive compensation for their services.⁸³

Gerry’s lack of confidence in popular elections, however, was not persuasive to a majority of the state delegations at the Constitutional Convention. In this instance, the Convention reached a pragmatic compromise by delegating the election of two senators from each state to the legislature thereof. But in authorizing the direct election of representatives (the number of which were apportioned among the states according to population) and providing an option to the states for the direct election of presidential electors, the Framers consciously judged the people of the new republic competent to participate in self-governance. Indeed, Reid’s uniquely Scottish perspective of liberty as a personal right worthy of protection and the idea that every rational individual is equipped with the inherent ability to recognize basic truths upon which liberty is founded were among the first principles upon which the foundation of the American constitutional republic was built. James Wilson, like Reid, contended that government “should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”⁸⁴ Moreover, Wilson’s plan of dual sovereignty was based upon the concept that both the federal government and the state government were derived from the people.

⁸³ U.S. Const. art. I, § 6; art. II, § 1; art. III, § 1.

⁸⁴ James Wilson, *The Works of James Wilson*, ed. Robert Green McCloskey, vol. 2 (Cambridge, Massachusetts: Belknap Press, 1967), 592.

Late in life, Jefferson wrote a letter to Henry Lee discussing both the object of the Declaration of Independence and the intellectual authorities relied upon in preparing his draft:

When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. *Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.*⁸⁵

(emphasis added). Thus, Jefferson did not claim to be advancing an entirely new philosophy in the Declaration of Independence. The same can be said of the Constitution proposed by the Constitutional Convention and the constitutional republic founded with its adoption. The true genius of the founding documents lay in its synthesis of often competing ideas. Like the literati of the Scottish Enlightenment, the Founders were able to debate these competing ideas and find truth wherever it existed, regardless of party label or prior loyalties. Thus, the Constitution was a written charter crafted by a small group of diverse, yet wise, individuals, “in Order to form a more perfect Union.” Both the debate over its continued imperfections and efforts to make it even more perfect will be examined in the next chapter.

⁸⁵ Jefferson to Henry Lee, 8 May 1825, Monticello, in Jefferson, *Works of Thomas Jefferson*, 12:409.

Chapter 4

Ratification of the Constitution

When the proposed Constitution was presented to the states for ratification by the people, assembled in state conventions, many of the same themes debated at the Constitutional Convention entered the popular debate, through speeches delivered and distributed in printed form prior to the state conventions, through widely-circulated political pamphlets (including, most notably, *The Federalist Papers*), and through deliberations at the state conventions.

Proposed Constitution Presented to the States

On 17 September 1787, the Convention resolved that the “Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification”¹ The proposed Constitution was received by Congress on 20 September 1787.² Congress adopted a resolution on 28 September 1787 that the report of the Convention be transmitted to the state legislatures “in order to be submitted to a convention of delegates chosen in each state by the people thereof.”³

Ratification Debates

Power of the People

Following the Constitutional Convention, James Wilson delivered an address to a Meeting of the Citizens of Philadelphia, “to elucidate and explain the principles and arrangements of the constitution that has been submitted to the consideration of the United States.”⁴ Wilson’s speech, delivered on 6 October 1787, came to be known as the “State House Yard Speech” and was widely distributed throughout the United States.⁵ Wilson

¹ Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution*, vol. 1 (Madison: State Historical Society of Wisconsin, 1976), 317-18.

² *Ibid.*, 1:325.

³ *Ibid.*, 1:340.

⁴ Paul Leicester Ford, ed., *Pamphlets on the Constitution of the United States* (New York: Burt Franklin, 1888), 155.

⁵ Ewald, “James Wilson and the Drafting of the Constitution,” 913.

described what he called “the leading discrimination between the state constitutions, and the constitution of the United States.”⁶ According to Wilson:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating foederal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given, is reserved.⁷

Thus, Wilson assumed an early and significant role in promoting the concept of limited, enumerated powers for the proposed national government, both at the Constitutional Convention and during ratification.

At the Pennsylvania Ratifying Convention, Wilson also addressed what, for Wilson, was likely the most American feature of the proposed government: the notion that the principle of representation was not confined to the lower house of the legislature, as with the House of Commons, but was diffused “through all the constituent parts of government”—legislative, executive, and judicial.⁸

On 4 December 1787, Wilson again rose at his state’s ratifying convention to respond to critics of the proposed Constitution, who argued that, because there cannot be two sovereign powers, the sovereignty of the states could not be preserved.⁹ In this instance, Wilson cited Locke in arguing that “the supreme, absolute, and uncontrollable authority *remains* with the people.”¹⁰ On 11 December 1787, Wilson further argued at the ratifying convention that the proposed government was founded, not upon a compact, but upon the power of the people.¹¹ According to Wilson:

The greatest part of governments have been founded on conquest: perhaps a few early ones may have had their origin in paternal authority. Sometimes a family united, and that family afterwards extended itself into a community. But the greatest governments which have appeared on the face of

⁶ James Wilson, *Collected Works of James Wilson*, eds. Kermit L. Hall and Mark David Hall, vol. 1 (Indianapolis: Liberty Fund, 2007), 171.

⁷ *Ibid.*, 1:171-72.

⁸ Wilson, *Works of James Wilson*, 2:763.

⁹ Wilson, *Collected Works of James Wilson*, 1:213.

¹⁰ *Ibid.*

¹¹ *Ibid.*, 1:254.

the globe have been founded in conquest. The great empires of Assyria, Persia, Macedonia, and Rome, were all of this kind. I know well that in Great Britain, since the revolution, it has become a principle that the constitution is founded in contract; but the form and time of that contract, no writer has yet attempted to discover.¹²

Wilson's contention that most governments have been founded on conquest rather than contract is a reflection of Hume's argument in "Of the Original Contract."¹³ Indeed, it was necessary for Wilson to distance himself from Locke's social contract theory of government to avoid anti-federalist criticism that, under the Articles of Confederation, only the state legislatures, acting unanimously, had the authority to alter the existing Confederation. To Wilson, the social contract theory was both impractical and antithetical to the notion that the authority of government derived from the power of the people:

This Constitution may be found to have defects in it; hence amendments may become necessary; but the idea of a government founded on contract destroys the means of improvement. We hear it every time the gentlemen are up, "Shall we violate the Confederation, which directs every alteration that is thought necessary to be established by the state legislatures only!" Sir, those gentlemen must ascend to a higher source: the people fetter themselves by no contract. If your state legislatures have cramped themselves by compact, it was done without the authority of the people, who alone possess the supreme power.¹⁴

The delegates to the Constitutional Convention had recognized that, notwithstanding the Articles of Confederation, a Constitution purporting to be the act of "We the People," must be ratified by the people in specially called conventions representative of the people of each state.

As James Madison noted in *The Federalist* No. 49, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived . . ."¹⁵ Andrew Reck notes that the opening phrase of the Constitution—"We, the People"—establishes the founding of government on the consent of the people.¹⁶ Reck also points out that Hume, in rejecting the contractarian theory as a basis for all government, did not exclude "the consent of the people from being one just foundation of government."¹⁷ Indeed Wilson

¹² *Ibid.*, 1:254-55.

¹³ Hume, "Of the Original Contract," 279.

¹⁴ Wilson, *Collected Works of James Wilson*, 1:254-55.

¹⁵ *The Federalist* Number 49, 2 February 1788, in James Madison, *The Papers of James Madison*, eds. Robert A. Rutland and Charles F. Hobson, vol. 10 (Chicago: University of Chicago Press, 1977), 461.

¹⁶ Andrew J. Reck, "The Enlightenment in American Law II: The Constitution," *Review of Metaphysics* 44, no. 4 (1991): 732-33.

¹⁷ *Ibid.*, 732.

viewed the necessity of seeking the consent of the people as superseding any contract previously adopted by the state legislatures. Thus, the Constitutional Convention called for, and Wilson advocated, ratification of the proposed Constitution by popular conventions rather than in accordance with the previously adopted provisions for amending the Articles of Confederation.

Political Factions and an Extended Republic

According to Stanley Elkins and Eric McKittrick, a basic premise shared by Hume, Smith, and Ferguson was that “the behavior of people in society occurs in patterns that are more or less uniform in virtually all times and places, and that human nature itself is not subject to very great change State-making and the forming of commonwealths must thus be guided by the scientific reading of history’s lessons”¹⁸ Madison’s *The Federalist* No. 10 is viewed as such a scientific reading of Hume’s *Essays*.¹⁹ In the opening sentence of No. 10, Madison introduced the proposition that “[a]mong the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”²⁰ Madison observed that there were two methods of removing the causes of faction: “The one by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.”²¹ Of course, as Madison put it, the first cure was worse than the disease and the second was just as impracticable.²² Thus, Madison concluded that “the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*.”²³ According to Madison, by extending the sphere of a republic, “you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”²⁴ Madison continued the theme in *The Federalist* No. 14, where he noted that, while a democracy “must be confined to a small spot . . . [a] republic may be extended over a large region.”²⁵

¹⁸ Elkins and McKittrick, *Age of Federalism*, 86.

¹⁹ *Ibid.*, 86-87.

²⁰ *The Federalist* Number 10, 22 November 1787, in Madison, *Papers of James Madison*, 10:263-64.

²¹ *Ibid.*, 10:264-65.

²² *Ibid.*

²³ *Ibid.*, 10:266.

²⁴ *Ibid.*, 10:269.

²⁵ *The Federalist* Number 14, 30 November 1787, in Madison, *Papers of James Madison*, 10:285.

As Knud Haakonssen puts it: “In their search for principles in the light of which they could understand their problems and justify their solutions, the North American colonists were particularly receptive to the neo-republican and anti-court ideas of the country opposition in the mother country. But among the problems they faced after independence was the classical dogma that a republican form of government could exist only in a small country.”²⁶ Haakonssen argues that the solution to this problem, as outlined by Madison in *The Federalist No. 10*, was directly inspired by Hume’s speculative “Idea of a Perfect Commonwealth.”²⁷ In particular, Madison seized on Hume’s contention that, contrary to Montesquieu’s small-republic theory, a republican government, once established, would facilitate the preservation of stability, safe from the effects of faction, in an extensive country.²⁸ As Forrest McDonald points out, Madison developed Hume’s notion that it was possible to minimize the mischievous effects of factions by spreading the republic over a large and diverse territory.²⁹

Douglas Adair also recognizes that Madison’s concern about political factions was stimulated by Hume’s speculations on the “Idea of a Perfect Commonwealth.”³⁰ As Adair notes, Hume’s analysis “had turned the small-territory republic theory upside down: *if* a free state could once be established in a large area, it would be stable and safe from the effects of faction.”³¹ Thus, Adair argues that “the germ for Madison’s theory of the extended republic” lay in Hume’s *Essays*.³²

Samuel Fleischacker notes that Madison’s theory for controlling political factions, as articulated in *Federalist No. 10* was similar to Smith’s idea that a multitude of religious sects competing freely with one another would produce greater civil moderation and respect than a single sect, or even two or three great sects.³³ Fleischacker further argues that, because “Smith expressed more trust in ordinary people than any of his contemporaries . . . Federalists such as Fisher Ames and Alexander Hamilton tended to be suspicious of Smith, while Republicans such as [Thomas] Jefferson and John Taylor of Caroline were fond of him.”³⁴ According to Gordon Wood, “Madison was willing to allow

²⁶ Haakonssen, “The Structure of Hume’s Political Theory,” 213.

²⁷ *Ibid.*

²⁸ Adair, *Intellectual Origins of Jeffersonian Democracy*, 130-32.

²⁹ McDonald, *Novus Ordo Seclorum*, 165.

³⁰ Adair, *Intellectual Origins of Jeffersonian Democracy*, 130.

³¹ Douglass G. Adair, “‘That Politics May Be Reduced to a Science’: David Hume, James Madison, and the Tenth Federalist,” *Huntington Library Quarterly* 20, no. 4 (1957): 351.

³² *Ibid.*, 353.

³³ Fleischacker, “Adam Smith’s Reception,” 907, 909-10.

³⁴ *Ibid.*, 923.

ordinary people to pursue their partial selfish interests in the expectation that they would be so diverse and clashing that they would rarely be able to combine and enter into the government as tyrannical majorities.”³⁵

Mark G. Spencer suggests, however, that it is necessary to read Hume’s political essays in conjunction with his *History of England*.³⁶ Spencer notes that, in *History of England*, “extreme factions are criticized, but moderate party affiliation is shown to be innocuous and even praiseworthy.”³⁷ According to Spencer, “Hume did not consider all factions to be harmful—only extreme ones.”³⁸ Spencer argues that Madison’s definition of factions, in *The Federalist* No. 10—as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”³⁹—was Humean in the sense that it “denoted only parties that were destructive of the wider community.”⁴⁰ Spencer concludes that Madison, like Hume, stressed the dangers of polarization.⁴¹ And as Spencer observes, Madison was worried about the factional polarization that was being propagated under the Articles of Confederation.⁴² The answer, Madison believed, was to be found in a large republic. As Madison wrote to Jefferson after the Constitutional Convention:

In a large Society, the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole.⁴³

In his introductory remarks to the Pennsylvania Ratifying Convention, Wilson addressed the perceived limitations of an extended republic, citing Montesquieu’s *The Spirit of Laws*.⁴⁴ Wilson acknowledged the conventional wisdom “that the natural property of small states is, to be governed as a republic; of middling ones, to be subject to a monarch; and of large empires, to be swayed by a despotick prince.”⁴⁵ As Wilson pointed

³⁵ Wood, “American Revolution,” 620.

³⁶ Mark G. Spencer, “Hume and Madison on Faction,” *William and Mary Quarterly, Third Series* 59, no. 4 (2002): 878-79.

³⁷ *Ibid.*, 881.

³⁸ *Ibid.*

³⁹ *The Federalist* Number 10, in Madison, *Papers of James Madison*, 10:264.

⁴⁰ Spencer, “Hume and Madison on Faction,” 884.

⁴¹ *Ibid.*, 885.

⁴² *Ibid.*, 886.

⁴³ Madison to Thomas Jefferson, 24 October 1787, New York, in Madison, *Papers of James Madison*, 10: 214.

⁴⁴ Speech Delivered on 26th November 1787, in the Convention of Pennsylvania, in Wilson, *Works of James Wilson*, 2:761.

⁴⁵ *Ibid.*

out, “the United States contain an immense extent of territory,” but the citizens of the United States “would reject, with indignation, the fetters of despotism.”⁴⁶ Thus, arose the idea of a confederate republic, which Wilson argued “is peculiarly fitted for the United States, the greatest part of whose territory is yet uncultivated.”⁴⁷

Political Economy

As Adair points out, the agrarian theory with which Jefferson and Madison have been so closely identified was one of the most common political doctrines of the Enlightenment.⁴⁸ According to McDonald, Madison saw an inherent flaw in the idea that political economies automatically progressed through various stages (as discussed in Chapter 1).⁴⁹ If the vital principle of republics was virtue, then a republic would be inherently self-destructive. Madison’s solution was for government to intervene “to arrest the evolution of the stages of progress at the commercial agricultural stage, so that America might enjoy the refinements but not be subject to corruption.”⁵⁰ Of course, Hamilton, whom McDonald characterizes as the “principal architect of the first national system of political economy,” had a different method: “to make it convenient and advantageous for all people to conduct their economic activity in ways that would lend strength and stability to the national government and to make it difficult, if not impossible, to conduct their affairs in detrimental ways.”⁵¹

The popular, if not at times superficial, reliance upon classical philosophers and Enlightenment writers continued into the ratification debates. Indeed, Fisher Ames accused Madison of adopting “his maxims as he finds them in books, and with too little regard to the actual state of things.”⁵² According to Ames, one of Madison’s first speeches “in regard to protecting commerce, was taken out of Smith’s *Wealth of Nations*. The principles of the book are excellent, but the application of them to America requires caution.”⁵³ For his part, Ames was “satisfied, and could state some reasons to evince, that commerce and

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Adair, *Intellectual Origins of Jeffersonian Democracy*, 1.

⁴⁹ McDonald, *Novus Ordo Seclorum*, 134.

⁵⁰ *Ibid.*, 134.

⁵¹ *Ibid.*, 135-37.

⁵² Ames to George Richards Minot, 29 May 1789, New York, in Fisher Ames, *Works of Fisher Ames*, ed. W. B. Allen, vol. 1 (Indianapolis: Liberty Classics, 1983), 638.

⁵³ *Ibid.*

manufactures merit legislative interference in this country, much more than would be proper in England.”⁵⁴

Nevertheless, Hamilton also turned to Hume’s economic writings for an understanding of the incentives that produced economic development.⁵⁵ In *The Federalist* No. 85, Hamilton addressed the additional securities to republican government, to liberty, and to property that will be derived from the constitution as a result of “the restraints which the preservation of the union will impose on local factions and insurrections, and on the ambition of powerful individuals in single states”⁵⁶ In light of these benefits, Hamilton urged ratification of the Constitution as “the best which our political situation, habits and opinions will admit, and superior to any the revolution has produced.”⁵⁷ In response to attempts to amend the proposed Constitution prior to its establishment, Hamilton relied heavily on Hume: “To balance a large state or society (says he) whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work: EXPERIENCE must guide their labour: Time must bring it to perfection: And the FEELING of inconveniences must correct the mistakes which they *inevitably* fall into, in their first trials and experiments.”⁵⁸ Because seven of the thirteen states had already ratified the proposed Constitution, Hamilton urged the other states to move forward with ratification, and seek amendments later to correct the “mistakes,” or perhaps omissions, in the original.⁵⁹ This spirit of compromise, which was characteristic of the Enlightenment in America, led to ratification of the Constitution.⁶⁰

Virtue and Ambition

In *The Federalist* No. 51, Madison addressed the need to control the abuses of government: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”⁶¹ As Hume put it, “[a] constitution is only

⁵⁴ *Ibid.*

⁵⁵ Elkins and McKittrick, *Age of Federalism*, 107.

⁵⁶ *The Federalist* No. 85, 28 May 1788, in Alexander Hamilton, *The Papers of Alexander Hamilton*, ed. Harold C. Syrett, vol. 4 (New York: Columbia University Press, 1962), 715.

⁵⁷ *Ibid.*, 4:717.

⁵⁸ *Ibid.*, 4:720-21.

⁵⁹ *Ibid.*, 4:721.

⁶⁰ May, *Enlightenment in America*, 99.

⁶¹ *The Federalist* Number 51, 6 February 1788, in Madison, *Papers of James Madison*, 10:477.

so far good, as it provides a remedy against mal-administration.”⁶² Madison argued that the greatest security against a concentration of powers in a single department of government was “in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”⁶³ According to Madison, “[a]mbition must be made to counteract ambition.”⁶⁴

Demand for a Declaration of Rights

The popular debate over virtue and ambition, and the need to control the abuses of government, culminated in an intense popular demand for a declaration of rights—an issue that had only briefly been addressed, and then dismissed as unnecessary, during the closing days of the Constitutional Convention. But the arguments advanced at the Constitutional Convention to rebut concerns regarding the omission of a declaration of rights proved to be unsatisfactory to the people considering adoption of the proposed Constitution.

In a letter forwarding a copy of the report of the Convention to Jefferson, John Adams noted that the proposed Constitution “seems to be admirably calculated to preserve the Union, to increase Affection, and to bring us all to the same mode of thinking,” but he expressed concern about the lack of a bill of rights: “What think you of a Declaration of Rights? Should not such a Thing have preceded the Model?”⁶⁵

At the outset of his State House Yard Speech, Wilson explained that, because the delegation of federal powers was based upon a “positive grant, expressed in the instrument of union,” the omission of a bill of rights was not a defect in the proposed Constitution.⁶⁶ When, on 28 November 1787, Wilson addressed the omission of a bill of rights at the Pennsylvania Ratifying Convention, he continued to advance the argument that a bill of rights was not necessary. According to Wilson, “In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous . . . [and] highly imprudent.”⁶⁷ Wilson argued that, because a bill of rights annexed to a constitution would be an enumeration of the powers reserved to the people, everything that was not enumerated would be presumed to be given to the government.⁶⁸

⁶² Hume, “That Politics May Be Reduced to a Science,” 23.

⁶³ *The Federalist* Number 51, 6 February 1788, in Madison, *Papers of James Madison*, 10:477.

⁶⁴ *Ibid.*

⁶⁵ John Adams to Thomas Jefferson, 10 November 1787, London, in Jefferson, *Papers of Thomas Jefferson*, 12:334-35.

⁶⁶ Ford, *Pamphlets on the Constitution*, 156.

⁶⁷ Wilson, *Collected Works of James Wilson*, 1:194-95.

⁶⁸ *Ibid.*, 1:195.

In a letter to Madison, Jefferson outlined things that he liked about the proposed Constitution, followed by things that he did not like:

First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the laws of Nations.⁶⁹

Madison acknowledged, in *The Federalist* No. 38, the objection of some to the “want of a bill of rights” in the proposed Constitution, but noted that others argued that “a bill of rights of any sort would be superfluous and misplaced.”⁷⁰ Indeed, Madison asked whether a bill of rights was essential to liberty, pointing out that the Articles of Confederation had no bill of rights.⁷¹

In *The Federalist* No. 84, Hamilton described the lack of a bill of rights as the “most considerable” of the remaining objections to the Constitution.⁷² Hamilton argued that a bill of rights was “not only unnecessary in the proposed constitution, but would even be dangerous.”⁷³ According to Hamilton, a bill of rights “would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted.”⁷⁴

On 17 October 1788, Madison advised Jefferson that the states that had adopted the Constitution were “all proceeding to the arrangements for putting it into action in March next.”⁷⁵ At the same time, Madison forwarded a pamphlet to Jefferson to give him “a collective view of the alterations which have been proposed for the new Constitution.”⁷⁶ Although Madison did not view the omission of a bill of rights from the Constitution to be a material defect, by this point in time he was in favor of a bill of rights, “provided it be so framed as not to imply powers not meant to be included in the enumeration.”⁷⁷ In response, Jefferson “weighed with great satisfaction” Madison’s thoughts “on the subject of the

⁶⁹ Thomas Jefferson to James Madison, 20 December 1787, Paris, in Madison, *Papers of James Madison*, 10:336.

⁷⁰ *The Federalist* Number 38, 12 January 1788, *Ibid.*, 10:367-68.

⁷¹ *Ibid.*, 10:370.

⁷² *The Federalist* Number 84, 28 May 1788, in Hamilton, *Papers of Alexander Hamilton*, 4:702-03.

⁷³ *Ibid.*, 4:706.

⁷⁴ *Ibid.*

⁷⁵ Madison to Jefferson, 17 October 1788, New York, in James Madison, *The Papers of James Madison*, eds. Robert A. Rutland and Charles F. Hobson, vol. 11 (Charlottesville: University of Virginia Press, 1977), 296.

⁷⁶ *Ibid.*, 11:297.

⁷⁷ *Ibid.*

Declaration of right,” but noted: “In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary.”⁷⁸

Ratification by New Hampshire—the Ninth State

Article VII of the Constitution provides: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”⁷⁹ On June 21, 1788, New Hampshire became the ninth state to ratify the Constitution.⁸⁰ The New Hampshire Ratifying Convention recommended amendments to the Constitution and, though it did not condition ratification upon the adoption of such amendments, enjoined “it upon their Representatives in Congress, at all Times until the alterations and provisions aforesaid have been Considered agreeably to the fifth Article of the said Constitution to exert all their Influence & use all reasonable & Legal methods to obtain a ratification of the said alterations & Provisions, in such manner as is provided in the said article.”⁸¹

Confederation Congress Calls for First National Elections

On 2 July 1788, the Confederation Congress received notice of the ratification by New Hampshire and referred the matter to a committee “to examine the same and report an Act to Congress for putting the said constitution into operation in pursuance of the resolutions of the late federal Convention.”⁸² On 8 July 1788, the committee confirmed ratification of the Constitution by Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, and New Hampshire, and resolved that “it is expedient that proceedings do commence thereon as early as may be.”⁸³ Finally, on 13 September 1788, Congress passed a resolution establishing a schedule for appointing Electors in the several states, for assembling electors in their respective states to vote for a president, and for the commencement of proceedings under the Constitution.⁸⁴ The establishment of the new national government of the United States will be taken up in the next chapter.

⁷⁸ Jefferson to Madison, 15 March 1789, Paris, in Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, vol. 14 (Princeton: Princeton University Press, 1958), 659.

⁷⁹ U.S. Const. art. VII.

⁸⁰ United States Department of State, *Documentary History of the Constitution of the United States of America*, vol. 2 (Washington: Department of State, 1894), 141-44.

⁸¹ *Ibid.*, 2:144.

⁸² *Ibid.*, 2:161-63.

⁸³ *Ibid.*, 2:170-71.

⁸⁴ *Ibid.*, 2:262-64.

Virtue and Liberty

According to Gertrude Himmelfarb, the “usual traits” associated with the Enlightenment were “reason, rights, nature, liberty, equality, tolerance, science, [and] progress”—with reason at the top of the list.⁸⁵ For the British, however, “social virtues,” by which Himmelfarb means compassion, benevolence, and sympathy, took precedence over reason.⁸⁶ While, in Britain, social virtues were in the forefront; in America, Himmelfarb says, “they were in the background, the necessary but not sufficient condition.”⁸⁷ Himmelfarb further contends that, in America, the driving force was not reason but political liberty.⁸⁸ As Himmelfarb puts it, “reason was an instrument for the attainment of the larger social end, not the end itself.”⁸⁹ Himmelfarb argues that the relationship between social virtue and political liberty “was at the heart of the quarrel between the Federalists and the Anti-Federalists.”⁹⁰ According to Himmelfarb, “Virtue was the principal concern of the Anti-Federalists, and corruption (the kind they saw in England) was their principle worry.”⁹¹ Himmelfarb contends that the Federalists sought a surrogate for public virtue in the political institutions that fostered a multiplicity and diversity of interests, and they found it in the separation of powers and checks and balances.⁹² Nevertheless, Federalists assumed that virtue and wisdom would be found in the representatives of the people who were virtuous and wise enough to choose them.⁹³ Of course, the Federalists prevailed in achieving ratification of the Constitution, but the Anti-Federalists also secured the promise of a declaration of rights to further protect citizens from potential corruption of the new national government. Perhaps the greatest test of the civic virtue of the representatives chosen by the people to represent them in the First Congress of the United States was whether they would be able to fulfill that promise by proposing, as amendments to the Constitution, a declaration or bill of rights. The Bill of Rights will be taken up, along with the establishment of the new government, in the next chapter.

⁸⁵ Gertrude Himmelfarb, *The Road to Modernity: The British, French, and American Enlightenments* (New York: Alfred A. Knopf, 2005), 5.

⁸⁶ *Ibid.*, 5-6.

⁸⁷ *Ibid.*, 191.

⁸⁸ *Ibid.*, 19, 191.

⁸⁹ *Ibid.*, 19.

⁹⁰ *Ibid.*, 198-99.

⁹¹ *Ibid.*, 199.

⁹² *Ibid.*, 201.

⁹³ *Ibid.*, 203.

Chapter 5

The Constitution Established

Early Days of the Republic

Formation of the Government

The House of Representatives convened on Wednesday, 4 March 1789, at the city of New York—“pursuant to a resolution of the late Congress”—but, in the absence of a quorum, adjourned from day to day until a quorum was first present on 1 April 1789.¹ Likewise, the Senate convened on 4 March 1789, but a quorum did not arrive in that chamber until 6 April 1789.²

One of the first orders of business before the Congress was to count the votes of the Electors for President and Vice President of the United States. The Senate and House of Representatives met in joint session on 6 April 1789, and declared that George Washington was unanimously elected President and that John Adams was duly elected Vice President.³

On 24 September 1789, President Washington signed “*An Act to establish the Judicial Courts of the United States,*” and nominated John Jay of New York as Chief Justice of the United States, together with five associate justices, who were all confirmed by the Senate two days later.⁴ The first session of the Supreme Court was scheduled to commence on the first Monday of February 1790, but in the absence of a quorum on 1 February 1790, the Court adjourned and opened on the following day—2 February 1790—with Chief Justice John Jay and Associate Justices William Cushing, James Wilson, and John Blair in attendance.⁵

Adoption of the Bill of Rights

On the motion of James Madison, the House of Representatives, on 4 May 1789, ordered that the fourth Monday in May be assigned for “the consideration of the exercise

¹ Linda Grant De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America*, vol. 3 (Baltimore: Johns Hopkins University Press, 1977), 3, 7.

² Linda Grant De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America*, vol. 1 (Baltimore: Johns Hopkins University Press, 1972), 3, 7.

³ De Pauw, *Documentary History of the First Federal Congress*, 1:8.

⁴ Maeva Marcus and James R. Perry, eds., *The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 1 (New York: Columbia University Press, 1985), 9-10.

⁵ *Ibid.*, 1:171.

of the powers vested in Congress by the 5th article of the constitution, relative to amendments.”⁶ After a short delay to permit Congress to tend to the pressing business of organizing a government, on 8 June 1789, Madison presented a resolution proposing various amendments to the Constitution, which was, after a lengthy discussion, referred to a committee of the whole on the state of the union.⁷

On 30 June 1789, Madison forwarded to Thomas Jefferson in Paris a copy of the Sundry Amendments to the Constitution which Madison had presented to the House of Representatives on 8 June 1789.⁸ Jefferson responded, “I like it as far as it goes; but I should have been for going further.”⁹

On 12 July 1789, Madison’s resolution was referred to a select committee consisting of one member from each state, with instructions that the committee would not be bound by the amendments proposed by some of the adopting states.¹⁰ The House finally went into a committee of the whole on 13 August 1789, to take up the select committee report.¹¹ The proposed amendments were debated by the House from 13 August until 24 August, when a resolution of amendments was agreed to and referred to the Senate.¹² After the Senate proposed further amendments to the House resolution, the matter was referred to a conference committee, and both houses finally agreed to the conference committee report on 24 September 1789.¹³

Thus, on 28 September 1789, the First Congress of the United States proposed twelve amendments to the Constitution, noting that the conventions of a number of the states, at the time of their adopting the Constitution, had “expressed a desire, in order to

⁶ Charlene Bangs Bickford, Kenneth R. Bowling, and Helen E. Veit, eds., *Documentary History of the First Federal Congress of the United States of America*, vol. 10 (Baltimore: Johns Hopkins University Press, 1992), 409.

⁷ Charlene Bangs Bickford, Kenneth R. Bowling, and Helen E. Veit, eds., *Documentary History of the First Federal Congress of the United States of America*, vol. 11 (Baltimore: Johns Hopkins University Press, 1992), 803, 804, 805, 811.

⁸ James Madison to Thomas Jefferson, 30 June 1789, New York, in Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, vol. 15 (Princeton: Princeton University Press, 1958), 229.

⁹ Jefferson to Madison, 28 August 1789, Paris, *Ibid.*, 15:367.

¹⁰ Bickford, Bowling, and Veit, *Documentary History of the First Federal Congress*, 11:1157-58, 1163.

¹¹ *Ibid.*, 11:1207-08.

¹² Charlene Bangs Bickford and Helen E. Veit, eds., *Documentary History of the First Federal Congress of the United States of America*, vol. 4 (Baltimore: Johns Hopkins University Press, 1986), 5-7.

¹³ *Ibid.*, 4:7-9.

prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added.”¹⁴

When, in 1791, Virginia became the eleventh state to ratify articles III through XII of the proposed “articles in addition to, and amendment of the Constitution of the United States of America,” what came to be known as the Bill of Rights became part of the Constitution.¹⁵

Impact of Scottish Enlightenment on Separation of Powers

In a letter to his cousin, Samuel Adams, Vice President John Adams expressed a desire for developing political institutions which would make up for the lack of knowledge and society “sufficiently general for the security of society.”¹⁶ John Adams further noted: “I am not often satisfied with the opinions of Hume; but in this he seems well founded, that all projects of government, founded in the supposition or expectation of extraordinary degrees of virtue, are evidently chimerical.”¹⁷

Vice President Adams, in revealing his skepticism of human nature, also argued that they must guard against use of the term *republican*, in referring to a form of government, to mean anything other than “a government in which the people have collectively, or by representation, an essential share in the sovereignty,” and which consists of “a mixture of three powers, forming a mutual balance.”¹⁸ In response, Samuel Adams argued that the *whole* sovereignty is in the people and that the “American legislatures are nicely balanced,” with each branch having a check on the other, which together are balanced by a third power—the veto power of the chief executive.¹⁹ Responding more generally to John Adams’ skepticism, Samuel Adams contends that, “without knowledge and benevolence, men would neither have been capable nor disposed to search for the principles or form the system” of good government.²⁰ According to Samuel Adams, “Mr. Hume may call this a ‘chimerical project, [but] I am far from thinking the people can be deceived, by urging

¹⁴ Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore: Johns Hopkins University Press, 1991), 3.

¹⁵ *Ibid.*, xvii.

¹⁶ John Adams to Samuel Adams, 18 October 1790, New York, in John Adams, *The Works of John Adams*, ed. Charles Francis Adams, vol. 6 (Boston: Charles C. Little and James Brown, 1851), 415.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 6:415-16.

¹⁹ Samuel Adams to John Adams, 20 November 1790, Boston, *Ibid.*, 6:420-21.

²⁰ *Ibid.*, 6:422.

upon them a dependence on the more general prevalence of knowledge and virtue.”²¹ Thus, the philosophical debates among the most enlightened minds of Scotland were taken up by leaders of the new republic in America.

In July 1793, Secretary of State Thomas Jefferson made a request of the first Chief Justice of the United States at the behest of President Washington. As a result of the war among European powers, there arose questions of “considerable difficulty, and of greater importance to the peace of the United States” that “depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land,” but which “are often presented under circumstances *which do not give a cognisance of them to the tribunals of the country.*”²² According to Jefferson, President Washington wanted to know if he might “refer questions of this description to the opinions of the judges of the Supreme Court of the United States.”²³ After Chief Justice John Jay and the Associate Justices had an opportunity to consider the question regarding “the lines of separation drawn by the Constitution between the three departments of the government,” Jay responded:

These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* department.²⁴

Thus, notwithstanding Washington’s own experience presiding over the Constitutional Convention, which had laid out the structure of government and the powers of its respective branches, it took an international crisis to test the bounds of each branch’s authority.

In addition to President Washington, twenty-one members of the First Congress and three of the six members of the first Supreme Court had also served as delegates to the Constitutional Convention. But it is the work of Associate Justice James Wilson, the Scottish-born lawyer who spoke frequently at both the Constitutional Convention and the Philadelphia Ratifying Convention, which provides the most insight into how the Scottish Enlightenment shaped the establishment of the constitutional republic. In addition to his

²¹ *Ibid.*, 6:423.

²² Jefferson to Jay, 18 July 1793, Philadelphia, in John Jay, *The Correspondence and Public Papers of John Jay*, ed. Henry P. Johnston, vol. 3 (New York: Burt Franklin, 1890), 486.

²³ *Ibid.*, 3:486-87.

²⁴ Jay to Washington, 8 August 1793, Philadelphia, *Ibid.*, 3:488-89.

contribution to constitutional jurisprudence in the few cases that came before the Supreme Court during his eight-year tenure as Associate Justice, Wilson attempted to codify American jurisprudence in his *Lectures on Law*.

May notes that Wilson “devoted considerable time in his famous lectures on the law to praising the principles of Reid, and contrasting them to those of Blackstone and even Locke. In the republic, he insisted, the law must be grounded not in custom or tradition but in moral obligation, understood through the method of Common Sense.”²⁵ Mark David Hall points out that Wilson is quoting Reid’s *Intellectual Powers*, in writing: “The Author of our existence intended us to be social beings; and has, for that end, given us social intellectual powers.”²⁶ And Geoffrey Seed also noted that Reid’s common sense philosophy was directly relevant to Wilson’s view of government.²⁷ Wilson’s *Lectures on Law*²⁸ provide a useful outline for a discussion of the executive, legislative, and judicial branches of government set out in the next three sections of this chapter. Perhaps the most significant contribution Wilson made to the structure of government was the notion that the principle of representation was not confined to the lower house of the legislature—as in the House of Commons, but were diffused “through all the constituent parts of government.”²⁹

Article I — A Bicameral Legislature

In his lecture on the legislative department, Wilson noted that the constitutional principle of representation of the people “draws along with it” the principle of free and equal elections.³⁰ According to Wilson, “[t]o vote for members of a legislature, is to perform an act of original sovereignty.”³¹ Wilson argued that every citizen whose circumstances did not render him necessarily dependent on the will of another should possess the right to vote for his representative.³² Furthermore, Wilson said that, though the supreme power of the state resided in the people, it would be unwise to infer, by the people’s delegation of the choice of senators to the state legislatures, that either the dignity

²⁵ May, *Enlightenment in America*, 348-49.

²⁶ Mark David Hall, *The Political and Legal Philosophy of James Wilson* (Columbia: University of Missouri Press, 1997), 83.

²⁷ Geoffrey Seed, *James Wilson* (Millwood, New York: KTO Press, 1978), 17.

²⁸ James Wilson’s *Lectures on Law*, published by his son, Bird Wilson, in 1804, were delivered by James Wilson upon his appointment to the law professorship in the College of Philadelphia during the winter of 1790-91 and the winter of 1791-92. James Wilson, *The Works of James Wilson*, ed. Robert Green McCloskey, vol. 1 (Cambridge, Massachusetts: Belknap Press, 1967), 59.

²⁹ *Ibid.*, 2:763.

³⁰ *Ibid.*, 1:402.

³¹ *Ibid.*, 1:406.

³² *Ibid.*, 1:407.

or the importance of the Senate was inferior to the dignity or the importance of the House of Representatives.³³

Garry Wills notes that, at the Constitutional Convention at least, Madison “was an advocate for the policy of refining the popular appointments by successive filtrations” as proposed by Hume.³⁴ By contrast, Shannon C. Stimson contends that Wilson was a revolutionary advocate of “supreme, absolute and uncontrollable” sovereignty residing in the people.³⁵ According to Stimson, Wilson’s “consistent support at the Constitutional Convention for proportional representation and the direct election of the president and the members of the national House and Senate, certainly outstripped the popular impulse of Madison.”³⁶

Wilson noted that when citizens fulfill their duty of researching, investigating, and discussing with candor concerning the manners and characters of proper persons to represent them, likely candidates would be improved and impassioned by the “hope of becoming the object of well founded and distinguishing applause.”³⁷

Wilson reflected on the need to check human passions as justifying a bicameral legislature: “If one of them should depart, or attempt to depart from the principles of the constitution; it will be drawn back by the other.”³⁸ Indeed, Wilson suggested that “[t]he very apprehension of the event will prevent the departure or the attempt.”³⁹ In addition, Wilson applauded the “double source of information, precision, and sagacity in planning, digesting, composing, comparing, and finishing the laws, both in form and substance” afforded by a bicameral legislature.⁴⁰

Wilson cited to Millar’s *An Historical View of the English Constitution* as background to his explanation of “much concerning the laws, and rules, and powers of the two houses of the congress of the United States,” including the historical reason for assigning the power of trying impeachments to the upper house, while the power of

³³ *Ibid.*, 1:414.

³⁴ Garry Wills, *Explaining America: The Federalist* (Garden City, New York: Doubleday & Company, 1981), 228.

³⁵ Shannon C. Stimson, “‘A Jury of the Country’: Common Sense Philosophy and the Jurisprudence of James Wilson,” in *Scotland and America in the Age of Enlightenment*, eds. Richard B. Sher and Jeffrey R. Smitten (Edinburgh: Edinburgh University Press, 1990), 193.

³⁶ *Ibid.*

³⁷ Wilson, *Works of James Wilson*, 1:404-05.

³⁸ *Ibid.*, 1:291-92.

³⁹ *Ibid.*, 1:292.

⁴⁰ *Ibid.*, 1:414-15.

conducting the prosecution should belong to the lower house.⁴¹ Furthermore, both in pointing out that, under Article I, all bills for raising revenue shall originate in the House of Representatives, and in suggesting that, over time, each of the two houses would develop their own unique characteristics, Wilson cited Millar’s observations regarding the two houses of Parliament: “each of them came to be possessed of certain peculiar privileges; which, although probably the object of little attention in the beginning, have since risen to great political importance.”⁴²

Wilson also cited Millar’s *An Historical View* to highlight a British practice that the Framers sought to avoid in Article I. Rather than the sole right of convening, adjourning, and dissolving Parliament being vested in the crown, in the United States the legislature “has a right to sit upon its own adjournments.”⁴³ The President, as Hamilton pointed out in *The Federalist* No. 69, can only adjourn the national legislature in the single case of disagreement about the time of adjournment.⁴⁴ In addition, the power of declaring war, and the other powers naturally connected with it, were vested in the Congress, whereas, at that time, the king had the sole power of making war in Great Britain. According to Wilson, the Constitution of the United States renewed a principle of government, as they were told by Millar—“a well informed writer”—followed by the Anglo-Saxon government before the Conquest, in which the power of making peace and war was “invariably possessed by the wittenagemote.”⁴⁵

Article II — A Unified Executive

Wilson noted that the executive branch of government, as well as the legislative power, ought to be restrained.⁴⁶ But unlike the legislative branch, which must be divided to be restrained, “the executive power, in order to be restrained, should be *one*.”⁴⁷ As Wilson put it, because the restraints on the executive power were necessarily external, they would be applied “with greatest certainty, and with greatest efficacy, when the object of restraint is clearly ascertained,” which is best done when one distinguished and responsible person “is conspicuously held up to the view and examination of the publick.”⁴⁸

⁴¹ *Ibid.*, 1:426.

⁴² *Ibid.*, 1:415, 424.

⁴³ *Ibid.*, 1:420.

⁴⁴ *The Federalist* Number 69, 14 March 1788, in Hamilton, *Papers of Alexander Hamilton*, 4:495.

⁴⁵ Wilson, *Works of James Wilson*, 1:433.

⁴⁶ *Ibid.*, 1:293.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 1:293-94.

With no precedent in the British constitution for an elected chief executive officer, it is not surprising that Wilson had less to say about the office of the President, and made no references to writers of the Scottish Enlightenment with respect to the executive branch.

Article II, Section 2, of the Constitution names the President as Commander and Chief of the armed forces.⁴⁹ Samuel Fleischacker credits Smith's statement in *Wealth of Nations*—that a standing army was dangerous to liberty “wherever the interest of the general and that of the principal officers are not necessarily connected with the support of the constitution of the state”⁵⁰—as influencing this constitutional provision designed, Fleischacker says, to tie the material interests of the general to the state.⁵¹

Article III — An Independent Judiciary

Wilson cited Hume's *Essays and Treatises on Several Subjects* in promoting the independence of the judiciary: “As all controversies respecting life, liberty, reputation, and property, must be influenced by their judgments; and as their judgments ought to be calculated not only to do justice, but also to give general satisfaction . . . they ought to be placed in such a situation, as not only to be, but likewise to appear superiour to every extrinsick circumstance, which can be supposed to have the smallest operation upon their understandings or their inclinations.”⁵²

Article III, section 2, extended the judicial power of the United States to specific classifications of cases “in Law and Equity.”⁵³ Wilson pointed to Lord Bacon as preferring that jurisdiction of law and equity be divided, while Lord Kames thought they should be united—attributing this natural distinction to their own respective judicial experiences.⁵⁴ Both Bacon and Kames agreed, however, that the boundary between equity and common law be clearly ascertained.⁵⁵

Alexander Hamilton discussed the judiciary department in *The Federalist* No. 78, dated 28 May 1788.⁵⁶ According to Hamilton, “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution;

⁴⁹ U.S. Const. art. II, § 2.

⁵⁰ Smith, *Wealth of Nations*, 2:706.

⁵¹ Fleischacker, “Adam Smith's Reception,” 904.

⁵² Wilson, *Works of James Wilson*, 1:297.

⁵³ U.S. Const. art. III, § 2.

⁵⁴ Wilson, *Works of James Wilson*, 2:484-85.

⁵⁵ *Ibid.*, 2:485.

⁵⁶ *The Federalist* Number 78 in Hamilton, *Papers of Alexander Hamilton*, 4:655.

because it will be least in a capacity to annoy or injure them.”⁵⁷ Indeed, Hamilton cited Montesquieu in stating that “the judiciary is beyond comparison the weakest of the three departments of power.”⁵⁸ Hamilton noted that the authority of the courts to pronounce legislative acts void, because they are contrary to the constitution, does not suppose a superiority of the judicial to the legislative power; but only that the power of the people is superior to both.⁵⁹ Nevertheless, Hamilton argued that the independence of judges was necessary “to guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”⁶⁰

Likewise, Wilson advocated the power of judicial review, which he described as a “noble guard against legislative despotism!”⁶¹ According to Wilson, “[i]t does not confer upon the judicial department a power superiour, in its general nature, to that of the legislature; but it confers upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superiour power of the constitution—the supreme law of the land.”⁶²

From the earliest days, the Court took a firm position on the separation of powers. In *Hayburn’s Case*, Edmond Randolph, the first Attorney General of the United States, sought a writ of mandamus commanding the Circuit Court for the District of Pennsylvania to proceed in a petition of William Hayburn, who had applied to be put on the pension list of the United States as an invalid pensioner.⁶³ The Invalid Pensioners Act, passed by Congress on 23 March 1792, charged circuit judges with the task of hearing claims of veterans injured in the Revolutionary War to determine their eligibility for benefits under the Act. On 18 April 1792, the Circuit Court for the District of Pennsylvania, consisting of Justices James Wilson and John Blair, along with District Judge Richard Peters, wrote a letter to President Washington outlining the constitutional provisions establishing the separation of powers doctrine and noted: “It is a principle important to freedom that in

⁵⁷ *Ibid.*, 4:656.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 4:657-58.

⁶⁰ *Ibid.*, 4:660.

⁶¹ Wilson, *Works of James Wilson*, 1:330.

⁶² *Ibid.*

⁶³ *Hayburn’s Case*, 2 U.S. Dallas 409 (1792).

government, the judicial should be distinct from and independent of the legislative department.”⁶⁴ Regarding the Act to regulate the claims to invalid pensions, the Pennsylvania Circuit Court concluded: “Upon due consideration, we have been unanimously of opinion that under this act, the circuit court held for the Pennsylvania District could not proceed” because “the business directed by this act is not of a judicial nature” and, if the court had proceeded, its judgments might, under the same act, “have been revised and controlled by the legislature, and by an officer in the executive department.”⁶⁵ Likewise, the Circuit Court for the District of North Carolina, consisting of Justice James Iredell and District Judge John Sitgreaves, made similar observations in a letter to President Washington on 8 June 1792.⁶⁶ The Circuit Court for the District of New York, consisting of Chief Justice John Jay, Justice William Cushing, and District Judge James Duane, also concluded that the duties assigned to the circuit courts were not properly judicial, but were of the opinion that “the act can only be considered as appointing commissioners for the purposes mentioned in it by official instead of personal descriptions”—in other words, the judges of the court would adjourn the court and proceed in the capacity of commissioners to avoid an infringement on the separation of powers.⁶⁷ Before the full Supreme Court could act on Attorney General Randolph’s application for writ of mandamus, Congress amended the Act and the case became moot. Madison commented on the circuit court opinion by noting that “[t]he judges have also called the attention of the [Public] to Legislative fallibility, by pronouncing a law providing for Invalid Pensioners, unconstitutional & void.”⁶⁸

In *Chisholm v. Georgia*, the first significant Supreme Court decision, Associate Justice Wilson posed the question before the Court as: whether the State of Georgia, claiming to be sovereign, “is amenable to the jurisdiction of the Supreme Court of the United States.”⁶⁹ Wilson argued that this question “may, perhaps, be ultimately resolved into one, no less radical than this ‘do the people of the United States form a Nation.’”⁷⁰ Wilson first examined principles of general jurisprudence, an inquiry that began with a quote from Thomas Reid’s *An Inquiry into the Human Mind, on the Principles of Common Sense*: “. . . It is hardly possible to make any innovation in our philosophy concerning the

⁶⁴ *Ibid.*, 411.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, 412-13.

⁶⁷ *Ibid.*, 414.

⁶⁸ James Madison to Richard Henry Lee, 15 April 1792, Philadelphia, in James Madison, *The Papers of James Madison*, eds. Robert A. Rutland and Thomas A. Mason, vol. 14 (Charlottesville: University of Virginia Press, 1983), 287-88.

⁶⁹ *Chisholm v. Georgia*, 2 U.S. 419, 453 (1793).

⁷⁰ *Ibid.*

mind and its operations, without using new words or phrases, or giving a different meaning to those that are received.”⁷¹ Although the term *sovereign* was, as Wilson put it, totally unknown in the Constitution of the United States, there was, according to Wilson, only one place in the Constitution where the term could have been used with propriety—the people could have announced themselves in the Preamble as the “Sovereign” People of the United States.⁷² Indeed, Wilson, who disapproved the purposes for which the terms *sovereign* and *state* were frequently used, defined *state*, as “a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others.”⁷³ According to Wilson, a state was an artificial person—distinct from, yet subordinate to its people—that may acquire property, incur debts, and be bound by contracts.⁷⁴ Thus, Wilson concluded that a dishonest state, like a dishonest merchant, which willfully refused to discharge its contracts, was amenable to a Court of Justice.⁷⁵ Wilson’s conclusion that the sovereign “must be found in the man” was based upon the principle that “laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require.”⁷⁶ Because the citizens of Georgia, “when they acted upon the large scale of the Union, as part of the ‘People of the United States,’” consented to the judicial power of the United States being vested in the Supreme Court, Wilson did not find anything in the principles of jurisprudence that evidenced “an exemption of the State of Georgia, from the jurisdiction on the Court.”⁷⁷ Based upon the explicit declaration of the Constitution itself, Wilson held that the State of Georgia was amenable to the jurisdiction of the Supreme Court, which extended to controversies between a state and citizens of another State—even when the state was named as a defendant.⁷⁸ In finding that sovereignty derives from the consent of the people, Wilson, like Chief Justice Jay, rejected the feudal system, which considered the Prince as the sovereign.⁷⁹

According to Robin Paul Malloy, who conducted an exhaustive survey of federal court references to Adam Smith, “[i]n the early years of the Constitution and just following the Civil War, the federal courts were concerned with a number of issues, but the ones that made the strongest references to Smith were regarding the proper interpretation of the

⁷¹ *Ibid.*, 454.

⁷² *Ibid.*

⁷³ *Ibid.*, 454-55.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, 456.

⁷⁶ *Ibid.*, 458.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, 466.

⁷⁹ *Ibid.*, 458, 471.

government's power to tax.”⁸⁰ Indeed, in *Hylton v. United States*—the first case challenging the constitutionality of an act of Congress to come before the Supreme Court—Associate Justice William Paterson quoted Adam Smith’s distinction, in *Wealth of Nations*, between a direct tax on revenue and an indirect tax on expenses by taxing consumable commodities upon which such expense is incurred.⁸¹ Paterson ruled, along with the majority of the Court, that a tax on carriages was an indirect tax on expenses or consumption and, thus, did not violate the constitutional provision restricting direct taxes to those laid in proportion to the census.⁸²

In a recent article entitled, “Article III and the Scottish Courts,” James Pfander and Daniel Birk argue that the legal system of Scotland provided an important—yet previously overlooked—“model for the creation of Article III’s one Supreme Court, with jurisdiction in law, equity, and admiralty, protection from legislative control, and a hierarchical superiority over inferior courts.”⁸³ Pfander and Birk point out that Scottish legal writers, including Lord Kames, emphasized “the importance of the supremacy of the Court of Session, its power to supervise and correct the decisions of inferior tribunals, and the hierarchical relationship between the supreme court and subordinate courts.”⁸⁴ In addition, they point to a similarity of language between Article III of the U.S. Constitution and Article 19 of the Acts of Union of 1707, particularly with respect to “their use of supremacy, inferiority, and qualified legislative power to secure a hierarchical judicial system.”⁸⁵ Pfander and Birk further note:

Just as Articles I and III allow Congress to ordain, establish, and constitute only courts and tribunals that remain inferior to the one Supreme Court, so too do the Acts of Union specify that inferior courts must remain “Subordinate” to the Scottish supreme court. Just as Article III contemplates finality, so too do the Acts of Union foreclose judicial review of the decisions of the Court of Session.⁸⁶

While acknowledging the inherent difficulty in attributing specific constitutional principles to Scottish influence, Pfander and Birk do find it significant that “the Exceptions and Regulations Clause first appeared in an August 1787 Committee of Detail draft written by

⁸⁰ Robin Paul Malloy, “Adam Smith in the Courts of the United States,” *Loyola Law Review* 56 (2010): 50.

⁸¹ *Hylton v. United States*, 3 U.S. 171, 180 (1796).

⁸² U.S. Const. art. I, § 9.

⁸³ James E. Pfander and Daniel D. Birk, “Article III and the Scottish Judiciary,” *Harvard Law Review* 124, no. 7 (2011): 1615.

⁸⁴ *Ibid.*, 1616.

⁸⁵ *Ibid.*, 1618, 1623, 1626 n.57.

⁸⁶ *Ibid.*, 1621-22.

the Scottish-born James Wilson.”⁸⁷ As Pfander and Birk further point out, “In the Introduction to his widely read *Principles of Equity*, Kames made an extensive case for the unitary model of his own court.”⁸⁸ In addition, Kames’ *Historical Law-Tracts* “provided the most complete exposition of the correlative relationship of supreme and inferior courts available at the time of the Framing.”⁸⁹ According to Pfander and Birk, the Court of Session exercised supervisory authority—to protect the hierarchical relationship of the judiciary specified in the Acts of Union—in many situations in which parliament had restricted the appellate jurisdiction of the Court of Session.⁹⁰ In light of the Framers’ familiarity with the Scottish model of a unitary judicial system, which was quite different from the English model of multiplicity, Pfander and Birk offer a view of the Exceptions and Regulations Clause that might otherwise have been forgotten to history:

Just as the Acts of Union protected the privileges and authority of the Court of Session from parliamentary remodeling, so too did Article III secure the judicial power and jurisdiction of the Supreme Court. Just as the Acts of Union contemplated that Parliament would make routine housekeeping regulations, so too did Article III authorize exceptions and regulations to the Court’s appellate jurisdiction to provide for the more convenient administration of justice. Just as the Session’s power to supervise inferior courts was understood to survive any parliamentary restrictions on its appellate jurisdiction, so too does the Supreme Court’s spot-checking supervisory authority necessarily survive any congressional exceptions to its as of right appellate jurisdiction.⁹¹

Virtue as an Inadequate Protector of Liberty

When virtue alone was found by the people to be an inadequate assurance that individual liberties would be protected in the new republic, several of the state ratifying conventions demanded the adoption of a bill of rights. As noted above, ten amendments proposed by the First Congress became part of the Constitution upon ratification by the State of Virginia in December 1791. Because a review of all ten amendments would be beyond the scope of this thesis, the first two are briefly examined against the backdrop of the Scottish Enlightenment.

First Amendment — First Freedoms

Francis Hutcheson presented an early form of religious toleration in his *System of Moral Philosophy*. For Hutcheson, the magistrate retained an important role in providing

⁸⁷ *Ibid.*, 1624.

⁸⁸ *Ibid.*, 1667.

⁸⁹ *Ibid.*, 1674.

⁹⁰ *Ibid.*, 1679-82.

⁹¹ *Ibid.*, 1685.

“proper instruction for all, especially for young minds, about the existence, goodness, and providence of God, and all the social duties of life, and the motives to them.”⁹² Nevertheless, Hutcheson taught that “[e]very rational creature has a right to judge for itself in these matters; and as men must assent according to the evidence that appears to them, and cannot command their own assent in opposition to it, this right is plainly unalienable; it cannot be matter of contract; nor can there be any right of compulsion as to opinions, conveyed to or vested in any magistrate.”⁹³ Likewise, Hutcheson advocated a limited freedom of expression: “the magistrate can have no right to punish any for publishing their sentiments, how false soever he may think them, if they are not hurtful to society.”⁹⁴ Here it should be noted that Hutcheson viewed atheism and the teaching of “principles directly immoral” to be hurtful to society, and, thus, punishable by the magistrate.⁹⁵

In his essay, “Of the Liberty of the Press,” David Hume observed in 1741, “Nothing is more apt to surprise a foreigner than the extreme liberty, which we enjoy in this country, of communicating whatever we please to the public, and of openly censuring every measure, entered into by the king or his ministers.”⁹⁶ According to Hume, “[t]he spirit of the people must frequently be roused, in order to curb the ambition of the court; and the dread of rousing this spirit must be employed to prevent that ambition.”⁹⁷ Hume viewed freedom of the press as being of importance to the preservation of a republican form of government.⁹⁸

Adam Smith expressed his views of religious liberty in practical terms:

In a country where the law favoured the teachers of no one religion more than those of another, it would not be necessary that any of them should have any particular or immediate dependency upon the sovereign or executive power; or that he should have any thing to do, either in appointing, or in dismissing them from their offices. In such a situation he would have no occasion to give himself any concern about them, further than to keep the peace among them, in the same manner as among the rest of his subjects; that is, to hinder them from persecuting, abusing, or oppressing one another.⁹⁹

⁹² Hutcheson, *A System of Moral Philosophy*, 2:311.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, 2:312-13.

⁹⁵ *Ibid.*, 2:313.

⁹⁶ David Hume, “Of the Liberty of the Press,” in *Essays: Moral Political and Literary*, ed. Eugene F. Miller (Indianapolis: Liberty Fund, 1987), 9.

⁹⁷ *Ibid.*, 12.

⁹⁸ *Ibid.*, 13.

⁹⁹ Smith, *Wealth of Nations*, 2:797.

Second Amendment — Right to Keep and Bear Arms

Adam Ferguson described as a “fatal refinement” the policy of civilized and commercial nations to sometimes form a distinction between civil and military professions.¹⁰⁰ Ferguson observed that “[w]hen a people is accustomed to arms, it is difficult for a part to subdue the whole,” but that, with the establishment of disciplined armies, it was no longer difficult for a usurper to govern the many by the help of a few.¹⁰¹ Ferguson further argued that “[a] people who are disarmed in compliance with this *fatal refinement*, have rested their safety on the pleadings of reason and of justice at the tribunal of ambition and of force. In such an extremity laws are quoted, and senators are assembled in vain.”¹⁰²

According to Richard B. Sher, whereas Adam Smith promoted the positive aspects of the division of labor and economic growth generally, Ferguson’s focus was on the dangers posed by the division of labor.¹⁰³ While civic humanist tradition demanded militias rather than standing armies, Sher suggests that, “because militias were considered necessary for reinforcing and protecting liberty,” advocates of militias during the Scottish Enlightenment “subtly moved the focus of the debate from constitutional liberty to civic virtue.”¹⁰⁴ Thus, Sher argues, one contribution of the Scottish Enlightenment was “to situate the problem of national defense within the wider framework of political economy and moral philosophy.”¹⁰⁵ After the British militia act of 1757 deliberately excluded Scotland, Ferguson became a prominent spokesman for an unsuccessful campaign, during 1759-60 and in 1762, to enact a Scots militia bill in Parliament.¹⁰⁶

Sher further points to Ferguson’s notes of his Edinburgh lectures on moral philosophy, dated 9 April 1776, regarding the advantages offered by nonprofessionals defending their homeland:

The Husbandman, the Labourer, and the Country Gentleman may in the use of arms and discipline be inferior to the Professional Soldier. But there is no reason why he should be inferior to what a Citizen may be made. He has the advantage of Affection and Principle over the Mercenary Soldier.¹⁰⁷

¹⁰⁰ Ferguson, *History of Civil Society*, 452.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Richard B. Sher, “Adam Ferguson, Adam Smith, and the Problem of National Defense,” *The Journal of Modern History* 61, no. 2 (1989): 242.

¹⁰⁴ *Ibid.*, 242-43.

¹⁰⁵ *Ibid.*, 243.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 256.

Ferguson's yearning, as Sher puts it, "for the classical ideal of the independent citizen who demonstrates his patriotism and civic virtue by bearing arms,"¹⁰⁸ is reflected in the Second Amendment: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."¹⁰⁹

Scottish Enlightenment Ideas Reflected in the New Republic

Gordon Wood observed that "[b]oth Americans and Scots were provincial peoples living on the edges of the metropolitan English world."¹¹⁰ As Wood put it:

Both the Scots and the North Americans were acutely aware of the contrast between civilization and the nearby barbarism of the Highland clans and the North American Indian tribes. Both were keenly aware too of the degrees of civilization and spent much time writing and reading essays on the stages of social progress from rudeness to refinement. They knew that they lived in cruder and more simple societies than the English and that England was well along in the fourth and final stage of social development—commercial society—and had much to offer them in the ways of politeness and refinement.¹¹¹

At the same time, Woods notes, "both the Scots and Americans knew only too well that the polite and sophisticated metropolitan center of the empire was steeped in luxury and corruption."¹¹²

John Clive and Bernard Bailyn contend that the "similarities in social origins between the Scottish and American literati" were attributable, not only to trade, migration, and cultural exchanges, but by "the profound fact that Scotland and America were provinces, cultural as well as political and economic, of the English-speaking world whose center was London."¹¹³ Clive and Bailyn argue that, although a "sense of inferiority pervaded the culture of the two regions," the "complexity of the provincial's image of the world and of himself made demands upon him unlike those felt by the equivalent Englishmen."¹¹⁴ Thus, Clive and Bailyn conclude that this shared provincialism "may help us to understand the conditions which fostered in such men the originality and creative

¹⁰⁸ *Ibid.*, 268.

¹⁰⁹ U.S. Const. amend. II.

¹¹⁰ Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* (New York: Penguin Press, 2006), 20.

¹¹¹ *Ibid.*, 20-21.

¹¹² *Ibid.*, 21.

¹¹³ John Clive and Bernard Bailyn, "England's Cultural Provinces: Scotland and America," *William and Mary Quarterly, Third Series* 11, no. 2 (1954): 207.

¹¹⁴ *Ibid.*, 209, 213.

imagination that we associate with the highest achievements of the Enlightenment in Scotland and America.”¹¹⁵

In an effort to identify a specifically Scottish contribution to America, Andrew Hook examines the eighteenth century cultural parallels between Philadelphia and Edinburgh.¹¹⁶ Hook describes both Philadelphia and Edinburgh as provincial cities that “aimed to create a society that was modern and progressive, at least in the eyes of significant sections of their controlling élites, rather than provincial and backward—a society that might in the end command the approval, rather than the disdain, of the metropolitan capital that remained the standard of a mature and civilised culture.”¹¹⁷ According to Hook, the pattern in both cities was for the same range of individuals to be involved in a variety of intellectual and cultural activities, as evidenced by the prevalence of clubs, societies, and institutions that promoted the advancement of “the kinds of progressive change that signal the spread of Enlightenment values.”¹¹⁸ Hook notes that these clubs and societies, in both Philadelphia and Edinburgh, rather than pursuing knowledge for its own sake, placed “a strong emphasis on the practical, social benefits of progress and improvement.”¹¹⁹ Against this backdrop, Hook poses the question: “why should Philadelphians have been open to influence from the Scottish dimension of the European Enlightenment?”¹²⁰ Hook acknowledges the Clive and Bailyn thesis discussed above, but argues that a shared sense of “cultural provincialism” could only have been a single dimension of the factors that “ensured a Philadelphian interest in Scottish cultural progress.”¹²¹ Hook contends that the most relevant factors were the influence of Scottish educators who were present in Philadelphia and the number of Philadelphians travelling to Scotland for education.¹²² Hook concludes that a precise assessment of “Philadelphia’s overall debt to Scottish intellectual life” cannot be achieved.¹²³ But Hook does suggest that the pattern of education in Philadelphia revealed that Philadelphians “continued to be attracted to the most powerful, modern and progressive, but broadly conservative ideology available, that of the Scottish Enlightenment in its post-Humean, common sense phase.”¹²⁴

¹¹⁵ *Ibid.*, 213.

¹¹⁶ Andrew Hook, “Philadelphia, Edinburgh and the Scottish Enlightenment,” in *Scotland and America in the Age of Enlightenment*, eds. Richard B. Sher and Jeffrey R. Smitten (Edinburgh: Edinburgh University Press, 1990), 229.

¹¹⁷ *Ibid.*, 230.

¹¹⁸ *Ibid.*, 230-31.

¹¹⁹ *Ibid.*, 231.

¹²⁰ *Ibid.*, 232.

¹²¹ *Ibid.*, 232-33.

¹²² *Ibid.*, 233.

¹²³ *Ibid.*, 237.

¹²⁴ *Ibid.*, 239.

One of those Scottish educators in Philadelphia, James Wilson, was an advocate of Reid's common sense philosophy. Shannon Stimson contends that "[a]ll the democratic elements implicit in Reid's common sense epistemology and moral sense judgement are explicitly developed in Wilson's work, particularly in his *Lectures on Law*."¹²⁵ According to Stimson:

Four Reidian elements are central to Wilson's democratic thought: (1) the rejection of skepticism; (2) the preference for an ordinary language conflation of sense, judgement and reason; (3) the interaction of feeling and intellect in judgement; (4) the social resolution of the problems of error.¹²⁶

As Stimson concludes, Wilson's "common sense epistemology underpins an argument for the widest possible implementation of popular sovereignty in the form of constitutional government, direct and actual representation, widespread suffrage and majority rule by the 'people.'"¹²⁷ For Wilson, absolute sovereignty resided in the people, which made the American constitution "materially different" from that of the British.¹²⁸ Thus, in the best tradition of the Scottish Enlightenment, Wilson was able to adapt a philosophical principle imported from the Scottish Enlightenment and apply it in the development of the uniquely American doctrine of popular sovereignty.

Stephen A. Conrad argues that Wilson developed, in his *Lectures on Law*, an argument implying that it was the politeness of the general citizenry, and not the exceptional talent, virtue, or knowledge of public leaders, that "would be the social *materia* of the democratic republic that Wilson envisioned."¹²⁹ According to Conrad, Wilson saw two principal threats to the fortunes of republicanism: one from "the orthodox legal theory predicated on the 'despotick' conception of law as 'a command from superior to inferiour'"; and the other from "the fashionable 'metaphysicks' of the day that seemed to indicate a skeptical denial of the possibility of knowledge itself."¹³⁰ Wilson challenged William Blackstone as the "leading advocate of this 'despotick' theory of law, and therefore as the chief enemy of the legitimate 'science of government.'"¹³¹ With regard to "metaphysicks," Wilson singled out "the clever skeptic David Hume . . . as the most

¹²⁵ Stimson, "'A Jury of the Country': Common Sense Philosophy and the Jurisprudence of James Wilson," 198.

¹²⁶ *Ibid.*, 198.

¹²⁷ *Ibid.*, 201.

¹²⁸ Wilson, *Works of James Wilson*, 1:77.

¹²⁹ Conrad, "James Wilson's Republican Theory," 375.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

insidious enemy of ‘all . . . sound philosophy.’”¹³² On the other hand, Wilson warmly embraced the Scottish philosophy of Common Sense, “and extolled Reid above all other modern philosophers.”¹³³ In particular, Wilson turned to “common sense” principles as taking precedence over “conclusions of nicely reasoned logic.”¹³⁴ Significantly, Conrad notes, Wilson believed “in the ability of the moral sense to reconcile the operations of man’s will with those of his understanding, and especially with man’s ultimate judgments on common matters of fundamental importance.”¹³⁵ According to Conrad, Wilson concluded that “in any well-contrived republic where the citizens cultivated the enlightening and socializing routines of politeness, there would be good reason to expect the development of both a genuine community of ‘uniform interest’ and a sound community of ‘deliberate’ wills, with both based on a fundamental community of ‘discursive knowledge.’”¹³⁶

One area in which the community of the new republic had a common interest was in the improvement of agricultural techniques. Roy Branson points to James Madison’s address before the Agricultural Society of Albemarle, Virginia, as an example of Madison’s tendency to employ both the concepts and terminology of key thinkers of the Scottish Enlightenment.¹³⁷ Madison invoked Adam Smith and John Millar in his summary of the four stages theory of societal development: “the hunter becoming the herdsman; the latter a follower of the plough; and the last repairing to the manufactory or the workshop.”¹³⁸ Branson further notes that, in the same address, “Madison went on to articulate [Adam] Ferguson’s concern at society’s devolution, even incorporating his term ‘savage’ into the discussion.”¹³⁹ Even in the United States, Madison feared, the “bent of human nature” was such that the “manufacturer readily exchanges the loom for the plough, in opposition often, to his own interest, as well as to that of his country.”¹⁴⁰ In the midst of Madison’s extensive discussion of population, prosperity, and the need to improve agricultural practices, Madison noted that the “enviable condition of the people of the United States” was due, in no small part, “to the fertile activity of a free people, and the

¹³² *Ibid.*

¹³³ *Ibid.*, 377.

¹³⁴ *Ibid.*, 379.

¹³⁵ *Ibid.*, 383.

¹³⁶ *Ibid.*, 385.

¹³⁷ Roy Branson, “James Madison and the Scottish Enlightenment,” *Journal of the History of Ideas* 40, no. 2 (1979): 241.

¹³⁸ Address to the Agricultural Society of Albemarle, 12 May 1818, in James Madison, *The Papers of James Madison, Retirement Series*, eds. David B. Mattern, J. C. A. Stagg, Mary Parke Johnson, and Anne Mandeville Colony, vol. 1 (Charlottesville: University of Virginia Press, 2009), 262.

¹³⁹ Branson, “James Madison and the Scottish Enlightenment,” 241.

¹⁴⁰ Madison, *Papers of James Madison, Retirement Series*, 1:262.

benign influence of a responsible government.”¹⁴¹ Branson concludes that “Madison’s particular achievement was that as he refined forms of the United States government he recognized the importance of the non-governmental parts of the nation.”¹⁴² According to Branson, “Madison was able to synthesize the Lockean rationalistic understanding of contractual majorities dominating governmental action with the Scottish historical-developmental view of society full of active occupational, political, and commercial groups achieving moderate reforms.”¹⁴³ Following the Scottish example of societies for progress and improvement, Madison promoted patriotic societies such as the Agricultural Society of Albemarle as “the best agents for effecting” agricultural reform among a self-governed people.¹⁴⁴

¹⁴¹ *Ibid.*, 1:269.

¹⁴² Branson, “James Madison and the Scottish Enlightenment,” 250.

¹⁴³ *Ibid.*

¹⁴⁴ Madison, *Papers of James Madison, Retirement Series*, 1:270.

Chapter 6

Concluding Remarks

Some have suggested that the exchange of ideas between Scotland and America came to an abrupt halt with the beginning of the American Revolution.¹ Even if trade and transportation with Great Britain were temporarily interrupted during the war, the free flow of ideas inspired by the Scottish Enlightenment continued among the American states. Moreover, Hook contends that the Scottish contribution to the Enlightenment in America was larger and became more enduring in the period after independence.²

On 20 March 1794 (New York), Chief Justice Jay wrote to Dugald Stewart, Professor of Moral Philosophy in Edinburgh, thanking him for “the ingenious work which you were so obliging as to send me.”³ Chief Justice Jay went on to say:

It is much to be wished that nothing may occur to prevent your finishing the analysis of the intellectual powers, and extending your speculations to man considered as an active and moral being, and as the member of a political society. There is reason to doubt whether this field of science has, as yet, received the highest cultivation of which it is capable. The republic of letters is under many obligations to your country. May those obligations be increased.⁴

And indeed, the transcendent ideas of the key figures of the Scottish Enlightenment would continue to permeate American philosophical discourse well into the nineteenth century. For example, Robin Paul Malloy suggests that “Adam Smith is no longer just a man who wrote a very important set of books, he is a transcendent idea, and this idea is central to ongoing debates concerning the proper relationship among individuals, the community, and the state.”⁵

The purpose of this thesis has been to examine how the Scottish Enlightenment influenced the drafting of the United States Constitution and the establishment of a constitutional republic. This examination has revealed a very definite, though certainly not exclusive, Scottish influence. In 1790, Thomas Jefferson commended Thomas Mann

¹ See e.g., Ian Charles Cargill Graham, *Colonists from Scotland: emigration to North America, 1707-1783* (Ithaca, N.Y.: Cornell University Press, 1956), 148-49.

² Andrew Hook, “Scottish Contributions to the American Enlightenment,” *Texas Studies in Literature and Language* 8, no. 4 (1967): 522.

³ Jay to Dugald Stewart, 20 March 1794, New York, in John Jay, *The Correspondence and Public Papers of John Jay*, ed. Henry P. Johnston, vol. 4 (New York: Burt Franklin, 1890), 1.

⁴ *Ibid.*, 4:1-2.

⁵ Malloy, “Adam Smith in the Courts of the United States,” 49, n.68.

Randolph, Jr. in his decision to “apply to the study of law” as “the most certain stepping stone to preferment in the political line.”⁶ Jefferson recommended, Smith’s *Wealth of Nations* as the “best book extant . . . [i]n political oeconomy.”⁷ Jefferson suggested that, in the science of government, Montesquieu’s *Spirit of Laws* “is generally recommended,” but also advised Randolph that it “contains indeed a great number of political truths; but almost an equal number of political heresies.”⁸ Jefferson also noted that “Locke’s little book on government is perfect as far as it goes” and that “[s]everal of Hume’s political essays are good also.”⁹ Like the other Founders, Jefferson took the best ideas of Locke as well as Hume, of Montesquieu as well as Smith.

Gertrude Himmelfarb notes that Locke’s assertion of the natural inequality of man “stands in dramatic contrast to the pronouncements of Smith and Hume, who made a point of minimizing the natural differences, and thus the natural inequality, of men.”¹⁰ Yet, suggests Himmelfarb, “[t]he conflation of Lockean and Scottish views, as if they were entirely compatible, was so common at the time that it defies the attempts of historians to characterize the American Enlightenment as either Lockean or Scottish.”¹¹ Himmelfarb’s insight, pointing to an undeniable synthesis of the competing philosophical ideas of the day, reveals the very uniqueness of the Founders’ contribution to American society. Samuel Fleischacker’s conclusion is that one of the great legacies of the Scottish Enlightenment “was the model of an intellectual community made up of people who could learn from one another, and remain friends, amid vehement disagreement.”¹²

Although the most famous example of such friendships was interrupted by a decade of passionate political disagreement that threatened irreparable harm to their relationship, John Adams and Thomas Jefferson’s eventual reconciliation is documented in a fifteen-year long exchange of letters following Jefferson’s retirement as the third president of the United States. In their letters, Adams and Jefferson continued to debate the philosophical issues that had enlightened their youth. In a letter to Adams, dated 14 October 1816, Jefferson wrote of Hobbes’ principle that justice is founded in contract solely:

⁶ Jefferson to Thomas Mann Randolph, Jr., 30 May 1790, New York, in Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, vol. 16 (Princeton: Princeton University Press, 1961), 449.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Himmelfarb, *The Road to Modernity*, 69-70.

¹¹ *Ibid.*, 200.

¹² Fleischacker, “Scottish philosophy and the American founding,” 333.

I believe, on the contrary, that it is instinct and innate, that the moral sense is as much a part of our constitution as that of feeling, seeing, or hearing; as a wise creator must have seen to be necessary in an animal destined to live in society; that every human mind feels pleasure in doing good to another¹³

Adams responded, “I agree perfectly with you that ‘the moral sense is as much a part of our condition as that of feeling,’ and in all that you say upon this subject.”¹⁴

While it would be an overstatement to suggest that Scottish views were the preeminent ideological force motivating the Framers of the United States Constitution, the distinctively Scottish contributions to the shaping of the constitutional republic should not be overlooked, as they had been during most of the nineteenth century. From Francis Hutcheson’s moral sense to the common sense theory of Thomas Reid, the ideas of the Scottish Enlightenment endured in the United States, at least throughout the lifetime of the Founders.

As was true of the development of competing Enlightenment ideas in Scotland, the private deliberations at the Constitutional Convention, the public pamphlet campaign waged by Federalists who supported the proposed Constitution and Anti-Federalists who opposed it, and the successive decisions by state ratifying conventions to adopt the Constitution were all characterized by vigorous debates about reason and passion, virtue and ambition, and authority and liberty. Ultimately, it was this courageous spirit of reasoned public discourse, as much as the developing themes of liberty, which the Scottish Enlightenment contributed to the constitutional debates in the emerging United States.

¹³ Jefferson to John Adams, 14 October 1816, Monticello, in Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb, vol. 15 (Washington, D.C.: Thomas Jefferson Memorial Association, 1904), 76.

¹⁴ John Adams to Jefferson, 4 November 1816, Quincy, in John Adams, *The Works of John Adams*, ed. Charles Francis Adams, vol. 10 (Boston: Charles C. Little and James Brown, 1856), 229.

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