

## I

**Revolution in Thought and Social Organization***The Legal Hegemony of Jeffersonian  
Liberalism, 1776–1828*

Americans generally may think of their Revolution almost exclusively as a process of winning independence from Great Britain. In doing so, they vastly underestimate the transformative nature of the Revolution on American society. Americans expressed a widespread acceptance of natural rights, profoundly changing the nature of Americans' religious beliefs and restructuring the role of the individual in society, especially relative to the authority of the government and the churches.

The idea of natural rights derived from the Newtonian construct, an intellectual understanding of the world as governed by natural laws. Natural laws applied not only in the realms of physics and biology but also to all earthly activity. People, as inherently reasonable and rational and possessed of an innate benevolence permitting the formation of society, could discover and conform to the natural laws in shaping human laws and institutions. Natural law vested humanity with inherent rights. Creating a civil society that recognized and protected these rights required reconceptualizing the nature of the state and ultimately delineating public and private spheres, with the public or governmental sphere limited in its ability to interfere with the rights of individuals in the private sphere. Inevitably, the existence of the private sphere produced a more individualistic, even an atomistic society.

Thinkers during the intellectual age known as the Enlightenment (roughly the late 1600s to the early 1800s), though captivated by the exercise of their minds in scientific experimentation and discovery, also could accept dogmatic truths spawned entirely through intuitive reasoning and use those truths as bases for deducing governing principles consistent with them. Thomas Jefferson and the signatories to the Declaration of Independence could boldly assert that they held certain “truths to be self-evident,” needing no further elucidation or substantiation. The Revolution accordingly could be fought for both equality and individual freedom, with only a slight awareness of the tension that may exist between these two goals. Ultimately, adoption of free-enterprise capitalism, initially perceived as a means of achieving both goals, focused attention on the tension between them and simultaneously resolved it in favor of personal freedom, endorsing a high degree of individualism. Law, through its protection of private rights rather than the public welfare, limited the idea of equality to legal considerations, deeming social equality inconsistent with American ideas of liberty.

The Revolutionary era lasted almost twenty years, from the Stamp Act crisis in 1765 to the Treaty of Paris in 1783. This era marked a change in American attitudes from a classical republicanism to liberalism. Classical republicanism prioritized the commonwealth and accepted Whig conceptions of rights rooted in the English constitution. Liberalism prioritized freedom and accepted natural rights common to all humans. To some degree, this transition corresponds to a broader intellectual movement within Western culture from the Moderate Enlightenment to the Radical Enlightenment. The Moderate Enlightenment of the late 1600s and early 1700s integrated Protestantism with new scientific and philosophical ideas. Moderate Enlightenment figures such as John Locke defended Christianity, but by the late 1700s, the writings of Rousseau expressed little patience with religion.

The rise in people’s reliance on reason coincided with a sharp decline in religiosity. If “secularism” is used as a descriptor of observed behavior and not as a term defining a specific school of thought, the Revolutionary and Constitutional eras and the early republic constituted a secular age. In other words, relative to the time periods that preceded and followed it, Americans during this roughly sixty-year

period of time relied less on religion as a means of understanding the world and the place of humanity in it and less on Biblical prescriptions and proscriptions as determinants of how people should live on earth. Estimates of church membership during and immediately after the Revolution range from 4 to 14 percent, with approximately 70 percent of those members being women. As late as the early 1800s in Virginia, only 40 of 107 Episcopal parishes had churches and ministers. Even in New England, religion declined. In Vermont and New Hampshire, 140 Congregational parishes were without a minister at the time the Constitution was drafted, and while the population increased by 150 percent between 1780 and 1820, the number of Congregational churches increased by only 40 percent during the same period. Ministers of the time complained of what they saw as a “republic of atheism” born in the humanist ideology of the Enlightenment. Roger Sherman of Connecticut said that in the late 1700s, Christianity “was fearfully threatened with extermination.”<sup>1</sup>

The Revolutionary War constituted only the first stage of the transition from a hierarchical communitarian society governed by laws respecting Christian conceptions of truth and moral duty to an individualistic society in which laws respecting more liberal conceptions of rights reconceived of religion as a matter of personal conscience and considered truth limited to those matters provable by science and logically deducible from its principles. The war years encouraged Americans to think about the meaning of their Revolution and the ideals that supported it. This thinking process gained clarity through the constitutional era and produced a fulfillment of revolutionary ideals in the “second revolution” – the election of Thomas Jefferson to the presidency in 1800 – which marked popular rejection of an older republican model for a liberal mode of governance.

### Republicanism and a Usable Religion

Republicanism’s ultimate evolution into liberalism should minimize neither the importance nor the innovativeness of it as a political idea. However, the ability of republicanism, as a body of ideas

<sup>1</sup> Quoted in Sidney Earl Mead, *Nathaniel William Taylor, 1786–1858: A Connecticut Liberal* (Chicago: Archon Books, 1967, orig. 1942), 47.

that promotes a system of governance, to radically transform society was tempered by its assertion that democracy depended upon virtue. Virtue recognized both the need for a natural aristocracy of gifted men to selflessly devote themselves to governing and for the populace to respect the good of the whole as more instructive of voting behavior than self-interest. Most Americans at the time of the Revolution believed religion served a vital role in inculcating the virtue necessary for self-government. The reliance on virtue that underlay American republicanism during the Revolution mitigated efforts to separate church and state and even to recognize complete religious tolerance during the war years.

Revolutionary-era Americans struggled to reconcile relatively new understandings of individual rights and legal equality with life-long understandings of religion, churches, and ministers as authorities. Ministers generally supported the war, giving hundreds, if not thousands, of sermons in support of Revolution and holding days of prayer and fasting to solicit God's help in their cause. In these efforts they encouraged a cultural integration of political and religious goals. Dissenting ministers defined liberty as both a Christian and a political imperative and openly hoped that the Revolution would bring religious freedom that would topple all sectarian establishments.

More conceptually, republicanism, at least in the 1770s, continued to accept governance or leadership by an elite, albeit one arguably determined by merit rather than title or class, that knew best what was good for everyone. In this context, religion, and its message of deference and submission, could be a useful political tool to restrain excessive liberty. It continued to endorse a moral ethic that restrained the individualistic aspects of republicanism that frightened some of its more socially conservative proponents. However, republicanism's endorsement of Christianity as a tool for promoting virtue implicitly reversed the traditional order of religious deference and placed God in service to humanity, indicating the changing role of religion in society.

Religion itself was anything but immune from the influences of Enlightenment thought. Christianity became increasingly Arminian, embracing human determinism, after 1750. American beliefs in providence and trinitarianism declined, while liberal forms of religion, such as Deism and Universalist-Unitarianism, grew so rapidly during

the founding era that Jefferson believed they would form the religious beliefs of a majority of Americans within a generation. Deists believed in a “Creator” who, having once made the world, absented itself, leaving the world to be governed by natural laws. Universalists accepted God’s love as ensuring universal salvation, and Unitarians denied the divinity of Jesus and the efficacy of the Holy Spirit. Together these forms of liberal religion repudiated the Christian ideas of providence, a judgment day, and the Holy Trinity. Many, if not most, of the men regarded as the Founding Fathers adopted a form of liberal religion, rejecting both the mysticism of Christianity and its imposition of moral duties.

Liberal religionists and more secular humanists shared a commitment to individual autonomy that fostered a relativistic approach to religion. People living in Europe and the American colonies during the 1600s had generally accepted one or another form of Christian doctrine as true, thereby justifying public-sector endorsement of Christianity and its moral teachings. By the late 1700s, growing numbers of people harbored substantial doubt as to the truth of the espoused tenets of Christianity. Many late-eighteenth-century Americans came to see religion as concerning matters unknowable and therefore beyond the powers of any just government to impose on its citizens. At the same time, a new conception of rights as derived from natural law recognized an inherent freedom of individuals to think and believe for themselves. Together the conception of religion as concerning matters unknowable and the understanding of a right of individual conscience contributed to a new and radical conception of society in which religion and morality were left to the consciences of individuals.

The cultural embrace of individualism challenged the idea of public truths and promoted freethinking. The creation of a realm of civic debate in the eighteenth century constituted a radical departure from the ideal of social order that pervaded the *ancien regime* in Europe and colonial governing patterns in America. Arguments, differing opinions, and even divisiveness between citizens or groups of people became not only commonplace but also desirable. A growing cultural respect for each person as an equal, rational, and reasonable thinker arose contemporaneously with society’s appreciation of an open forum as a place for civic debate.

In no realm did an appreciation or respect for differences of opinion foster greater tolerance than that of religion. The works of John

Locke, written in the late seventeenth century, influenced American ideas on the nature of rights, government, and religion. In his *Essay Concerning Toleration*, Locke considered matters of doctrinal religious belief to be “purely speculative opinions” and the worship of any God to be a personal matter between each individual and his or her deity. Accordingly, he endorsed a tolerance of various religious beliefs and practices because “in religion men must in this necessarily follow what they themselves thought best.”<sup>2</sup> The more liberal-minded of the founders, such as James Madison, adopted Locke’s thinking in referring to religion as concerning “matters unknowable.” Conceiving of religion in this way complemented the growing recognition of a right of conscience.

The Reverend John Cotton could argue in 1624 that the Puritans in Massachusetts Bay should remove nonbelievers from their community because the official interpretation of Christianity served as a public truth. The law considered dissenters from that truth to be wrong or “in error.” Personal judgment or individual conscience, as Anne Hutchison, Roger Williams, and Mary Dyer learned, did not function as a basis for belief – ministers, speaking with the authority of the state, expressed the public truth of the scriptures that all within the community should believe. Conversely, once religious “truth” became a private matter of individual conscience, political leaders and laws could not prescribe beliefs or use them as bases for policy (see Figure 1.1).

Respect for religion as a private matter of personal conscience coincided with a growing understanding of good government serving a largely negative function. No better example of this thinking exists than the Declaration of Independence, in which Jefferson, writing “that in order to secure these rights, governments are instituted among men,” predicated the creation of government on the need to protect rights. Conceiving of government as serving negative functions to protect individual rights and a realm for their free expression raised major questions about the legitimacy not only of any public establishment of a religion, but also of basing laws on moral imperatives rooted in religious belief.

<sup>2</sup> John Locke, *An Essay Concerning Toleration* in *An Essay Concerning Toleration and Other Writings on Law and Politics, 1667–1683*, ed. by J. R. Milton and Philip Milton (Oxford: Clarendon Press, 2006), 303–4.

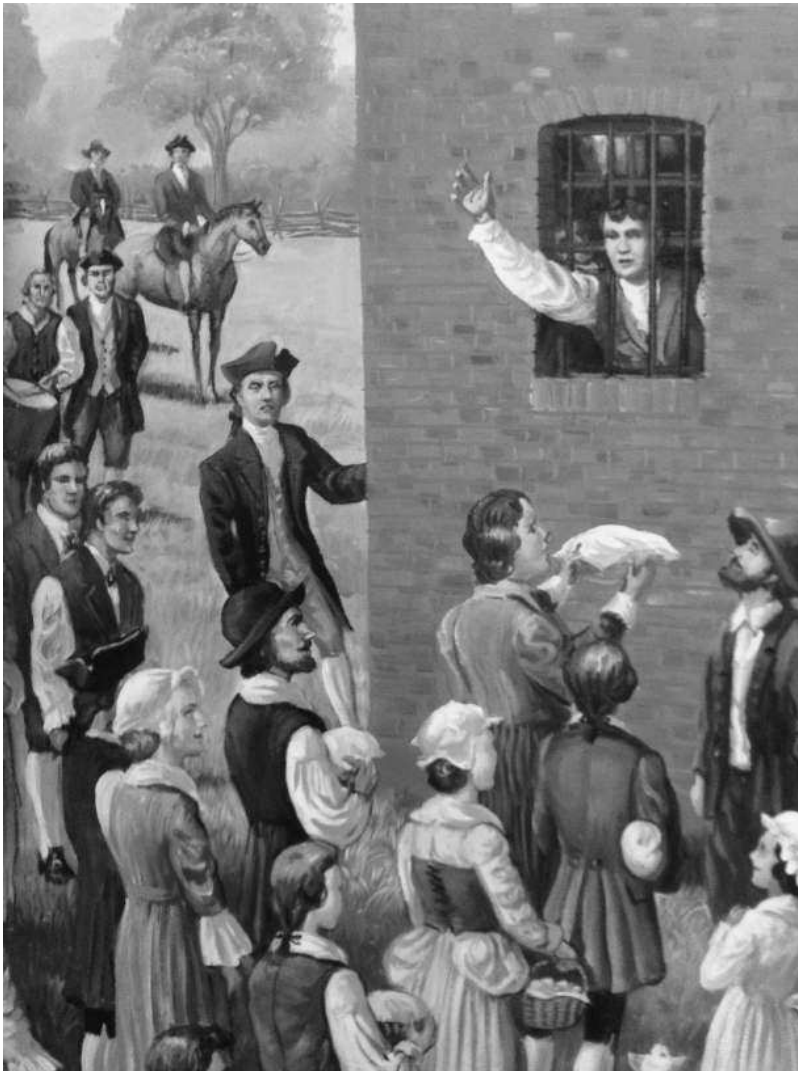


FIGURE 1.1 John Waller shown preaching from the jail window in Virginia, where he was imprisoned for unlawful preaching in August 1771. The scene shows local Baptists bringing food to feed the imprisoned preacher. Waller, an effective evangelist, was imprisoned in five Virginia jails for a total of some 180 days for preaching. He also received twenty-one lashes with a horsewhip for preaching in Caroline County, Virginia. Persecutions of dissenters continued in colonial America until laws respecting the right of conscience, during and after the Revolution, established religious toleration. These persecutions encouraged evangelical dissenters to align with Jeffersonian liberals to separate church and state. Painting by Sidney E. King from the Virginia Baptist Historical Society, Richmond, VA. Used by permission.



The late or Radical Enlightenment imposed its own moral understandings, eventually expressed in the new nation's laws that conceived of justice, addressing individual rights, as a public concern and morality as a personal concern. Adam Smith, in his *Theory of Moral Sentiments*, contrasted the use of the law to serve moral ends with its use to serve justice:

Beneficence 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. It may disappoint of the good which might reasonably have been expected, and upon that account it may justly excite dislike and disapprobation: it cannot, however, provoke any resentment which mankind will go along with....

There is, however, another virtue, of which the observance is not left to the freedom of our own wills, which may be extorted by force, and of which the violation exposes to resentment, and consequently to punishment. This virtue is justice: the violation of justice is injury: it does real and positive hurt to some particular persons, from motives which are naturally disapproved of....

[J]ustice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbor.

Smith bases the argument that society cannot impose moral duties on people on the recognition of their equality, implicitly asserting the right of each person to adopt his or her own moral code as a matter of conscience: "Even the most ordinary degree of kindness or beneficence, however, cannot, among equals, be extorted by force." Smith uses what has subsequently become a well-known allegory to clarify this Enlightenment-era conception of morality:

In the race for wealth, and honours, and preferments, he may run as hard as he can, and strain every nerve and every muscle, in order to outstrip all his competitors. But if he should jostle, or throw down any of them, the indulgence of the spectators is entirely at an end. It is a violation of fair play, which they cannot admit of. This man is to them, in every respect, as good as he.<sup>3</sup>

Even during the Revolution, Christian invocations to retain a communitarian ethic exposed tensions between a rights-oriented humanism,

<sup>3</sup> Adam Smith, *The Theory of Moral Sentiments*, ed. by D. D. Raphael and A. L. Macfie (Indianapolis, IN: Liberty Classics, 1982), 78–89, 82, 85.



advanced by thinkers such as Adam Smith, and the Christian message. Many communities experienced severe economic distress as Atlantic trade suffered and Congress raised funds for the war effort. Working men in Philadelphia proposed a form of moral economy, common in the colonial era, in which communities would oversee market relations in order to ensure everyone's well-being. In August 1779, the city imposed price fixing by a newly created Committee of Trade. The action had widespread support of ministers, and even its secular endorsers used Biblical references and invocations of Christian moral duties to secure passage of the program. However, by this time it appeared to many people as an outdated and unappealing idea. Revolutionary ideals recognized a legal equality that precluded a restraint of one person's freedom to aid another. Differences in wealth and social position were seen to derive from ability, effort, and intelligence. The freedom to pursue one's own desires implied the freedom also to enjoy the profits one's pursuits generated. Philadelphia's merchants asserted that in "placing individual gain first, ... the community as a whole would benefit," and that "the limitation of prices is in the principle unjust because it invades the laws of property."<sup>4</sup>

By the late 1770s, a division within the country surfaced regarding just how much individual freedom the Revolution actually meant to create. This division would subsequently be expressed in the rise of two political parties: the Federalists, espousing some restrictions on personal freedom justified by Christian faith and morals to serve the social good, and the Jeffersonian Republicans, who, in the words of their leader, recognized that no such thing as the social good ever existed other than through "each individual seeking his own good in his own way."<sup>5</sup> The first major battles between these antagonists arose in constitutional efforts to disestablish religion.

<sup>4</sup> Quoted in A. Kristen Foster, *Moral Visions and Material Ambitions: Philadelphia Struggles to Define the Republic, 1776–1836* (Lanham, MD: Lexington Books, 2004), 34.

<sup>5</sup> Quoted in Gordon S. Wood, "Interests and Disinterestedness in the Making of the Constitution," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. by Richard Beeman, Stephen Botein, and Edward C. Carter (Chapel Hill: University of North Carolina Press, 1987), 102.

## Considerations of Religion in the Federal and State Constitutions

### *Religion as a Matter of Conscience*

From 1776 until 1833, the various states and the nation created the first Western societies in well over a thousand years to separate religious beliefs, morals, and practices from law and public policy. By the end of that period, each state, with strong direction in some cases from federal law, had taken positive and decisive steps to disestablish religion, in the process not only endorsing religious freedom but also separating church and state. The law accomplished this task by defining two separate and distinct realms within society: (1) the public sector, which serves as the province of governmental action; and (2) the private sector, in which individual rights to think, act, and pursue dreams are protected from governmental interference as long as they do not impair another's equal rights. During this era, Americans placed religion in the private sector and protected each person's freedom of conscience from any governmental prescription or interference.

Locke's ideas had great currency during the founding era, and his language entered into debates regarding the role of religion in the new republic. During a debate on whether or not to require a Protestant test oath for state office holding in North Carolina, delegate Jacob Henry argued: "[T]he day, I trust, has long passed, when principles *merely speculative* were propagated by force."<sup>6</sup> James Madison expressed the same attitude in writing to his friend Thomas Jefferson concerning religious freedom: "I flatter myself [that] this country [has] extinguished forever the ambitious hope of making laws for the human mind."<sup>7</sup> As a product or concern of each individual's mind, religious belief, much like political opinion or taste in music, art, or beauty, had to be protected from the coercive authority of the state.

During the founding era, Americans generally recognized freedom of conscience as a broad right inclusive of religious judgment, defining it as "a freedom and exemption from human impositions, and

<sup>6</sup> Jacob Henry, "Speech in the North Carolina House of Democrats" (1809), reprinted in *Cornerstones of Religious Freedom in America*, ed. by Joseph L. Blau (Boston: Beacon Press, 1949), 93 (*italics added*).

<sup>7</sup> James Madison letter to Thomas Jefferson, January 22, 1786, in *The Writings of James Madison*, 9 vols., ed. by Gaillard Hunt (New York: G. P. Putnam's Sons, 1904), 2: 216.