

## Chapter 4.

### Declaring independence and religious freedom the Scottish way

Now that we have looked at the varying routes by which Jefferson was exposed to the politics and philosophy of the Ulster-Scots Enlightenment, this short chapter examines the two most important documents of Jefferson's political life before Paris: his draft of the Declaration of Independence and the Virginia Statute of Religious Freedom.

Garry Wills (1978) was of course right that what matters for understanding Mr Jefferson's enlightenment is his draft (in the Documentary Appendix), not the document agreed by Congress. The latter cut out a lot of Jefferson's material including his paradoxical section on slavery, which blamed the British both for introducing it and for encouraging slaves to join them against the American revolutionaries.

I follow Wills's method of highlighting certain key phrases from Jefferson's draft:

*equal & independant station to which the laws of nature & of nature's god entitle them*

The whole preamble to the Declaration, in which this phrase appears, is one of the finest examples of Jefferson's Ciceronian style. 'Nature's god' (not capitalized) is a very Enlightenment concept, and more specifically a Scottish Enlightenment one. All the Scottish thinkers we have reviewed, except Hume, were at least deists; Hutcheson and Reid were Christian believers. As they all wrote before Darwin, Mendel, and Hawking, they all believed that there had to be some prime mover to set the universe in motion. They were not outright

atheists, unlike some of the French thinkers whom Jefferson would meet in the next phase of his enlightenment. Nature's god is the Great Watchmaker (cf Paley 1802; Dawkins 1987) who wound up the universe and started the pendulum.

*We hold these truths to be sacred & undeniable / self-evident*

The provenance of the most famous phrase in the Declaration is not self-evident. Julian Boyd believed (Boyd 1945; *PTJ* 1: 427-8) that Jefferson made the change from 'sacred and undeniable' to 'self-evident' at a very late stage. They do not mean the same thing. Which better reflects Jefferson's thought? We will probably never know. Wills (1978: 181-92) sources 'self-evident' from Reid. But that hangs on a very slender thread, viz., that Jefferson included 'Reid on the human mind' in the now-notorious Skipwith list. However, he included Reid on the list (together with Smith's *Theory of Moral Sentiments*) under 'Criticism of the fine arts'. He included Kames (2005) under 'Religion'. And we know that he had read Kames, whereas we have no evidence that by 1776 he had read Reid or Smith. Case inconclusive.

Here I think that the traditional view is right, and Wills is wrong. This section, with its close copying of Locke's *Second Treatise*, derives from the English opposition Whigs Sidney and Locke (and would have derived from the Levellers and Putney Debates if Jefferson had known about them – see, e.g., Foxley 2013), rather than from the Scottish Enlightenment thinkers, who agreed with, but on this matter had nothing to add to, Locke and Sidney. The Scottish thinkers lived in a country where the consent of the governed was not sought, as post-1707 Scotland was ruled by a single minister. That happened to suit Hutcheson, Hume

and Kames as they developed their radical philosophies free from state persecution. Church persecution failed because the church evangelicals did not control the state.

*when a long train of abuses & usurpations, begun at a distinguished period, & pursuing invariably the same object, evinces a design to subject them to arbitrary power, it is their right, it is their duty, to throw off such government & to provide new guards for their future security.*

The odd phrase ‘begun at a distinguished period’ alerts the reader: this passage and the list of grievances is largely copied over from *A Summary View*. However, the remedy is different. In 1774 the grievances are attributed to the British Parliament, and the proposed remedy is to ask the king, “as yet the only mediatory power between the several states of the British empire”, to stop the British Parliament from purporting to override his equally sovereign parliaments in the colonies. The model is that of Great Britain between 1603 and 1707, when the monarch (when there was one) had separate executives, and separate parliaments, in England and Scotland. But that did not end well. By 1776, Jefferson has moved on. The same list of grievances are now presented as a list of grievances against the *king* and the notion of parliamentary sovereignty has gone, to be replaced by a Lockean notion that the *people* have the right to ‘throw off such a government’. Again, *contra* Wills, I see this as a product of English opposition Whiggery rather than of the Scottish Enlightenment. There are Scottish nationalists who claim that the idea of popular sovereignty in Scotland goes all the way back to 1320. In that year the Declaration of Arbroath, addressed to the Avignon pope, asks him to recognize the Scottish independence for which king Robert the Bruce had fought, and declares that if the king ceases to protect Scottish independence, the “community of the realm of Scotland” will depose him in favor of somebody who will (see, e.g., Barrow 2003). But

nobody that I have traced was making such a claim for popular sovereignty in 18<sup>th</sup> – century Scotland (McLean and McMillan 2005: 247).

*at this very time too they are permitting their chief magistrate to send over not only soldiers of our common blood, but Scotch & foreign mercenaries to invade & deluge us in blood*

This sounds odd from the mouth of the champion of religious freedom for the Ulster-Scots of Virginia. But there were two Scotlands in 1745: Lowland Scotland, where people spoke the Scots dialect of English, were mostly Presbyterians, and supported the Hanoverian succession and the Union; and Highland Scotland, itself divided, but containing clansmen who spoke the Gaelic language, who mostly knew no English, and whose chieftains called them to war in the final attempt to restore the Roman Catholic Stuarts ('Jacobites'). Jefferson was referring to the latter. The Hanoverian government had successfully turned Highland clans from the Jacobite rebellion of 1745-6 to fight on the other side, for the Hanoverian monarchy.

Highland settlement in North America was largely to Canada (Nova Scotia, New Brunswick, and Hudson's Bay), forming no part of Hackett Fischer's folkways. These largely non-English-speaking troops were anathema to the Presbyterian Ulster-Scots. Jefferson explained, much later, that the word "Scotch" in his draft had offended some colleagues (probably Witherspoon for one) and it disappeared from the final version (TJ, "Anecdotes of Dr Franklin", ca. Dec..4 1818: *PTJ: RS* 13: 463; Fetter 1980).

Jefferson's draft of the Declaration, then, is not as Scottish as Wills made it out to be, nor is it as English as earlier writers assumed. It is a confluence of both streams. What of the Virginia Statute for Religious Freedom? Jefferson drafted this in 1777-9, in his 'severest contest' and

in close collaboration with Madison. It was not enacted until 1786, when Jefferson was in Paris, but it is appropriate to consider it here, as it was a pre-Paris collaboration. It comprises an extremely long preamble followed by a brief enactment clause.

*Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion...*

The concept that the freedom of the mind derives from God's creation is Lockean. Jefferson's starting point is probably Locke's *Letter on toleration* (Locke 1689 / 2010; Waldron 2002), of which Jefferson acquired a 1790 edition. But he almost certainly already knew it in 1777, since he owned a 1751 collected edition of Locke's works, which appears in the 'Polygraphical' section of his library catalogues (Sowerby 1952: II, 44; V, 168).

Part of Locke's argument is highly congenial to Jefferson:

the Church it self is a thing absolutely separate and distinct from the Commonwealth. The Boundaries on both sides are fixed and immovable. He jumbles Heaven and Earth together, the things most remote and opposite, who mixes these Societies; which are in their Original, End, Business, and in every thing, perfectly distinct, and infinitely different from each other ....

Not even [Native] Americans, subjected unto a Christian Prince, are to be punished either in Body or Goods, for not imbracing our Faith and Worship. ....

Thus if Solemn Assemblies, Observations of Festivals, Publick Worship, be permitted to any one sort of Professors; all these things ought to be permitted to the *Presbyterians, Independents, Anabaptists, Arminians, Quakers*, and others, with the same liberty. Nay if we may openly speak the Truth and as becomes one Man to another; neither *Pagan*, nor *Mahumetan*, nor *Jew*, ought to be excluded from the Civil Rights of the Commonwealth, because of his Religion.

(Locke 1689/2010, at pp. 24, 39, 58-59)

Locke's reference to Native Americans, who also appear extensively in his *Second Treatise*, is apposite and relevant to Jefferson (see, e.g., Squadrito 1996). Locke was secretary to Anthony Ashley Cooper, later Lord Shaftesbury the Whig political theorist, one of the Proprietors of Carolina when the Fundamental Constitution of Carolina (1669) proposed a constitution for the royal colony comprising the modern Carolinas and Georgia. Locke had no qualms about the dispossession of Native Americans from their lands – arguing that nobody would lose if their lands were enclosed for agriculture rather than hunter-gathering. However, he did not believe that it was necessary to coerce them into Christian belief.

Jefferson and Madison went much further than Locke. The language of this part of the Virginia preamble sounds exclusively Christian, as it no doubt had to be in order to win a majority vote in the Virginia Assembly. But Jefferson records that an amendment to insert the words 'Jesus Christ' before 'holy author of our religion' "was rejected by a great majority", claiming that the majority understood that freedom of religion was for non-Christians as well (*PTJ: RS 17: 325*).

Jefferson and Madison moved well beyond Lockean toleration to a doctrine of strict separation. This is shown by the following:

*that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor*

As discussed above, this reflects the pair's campaign to disestablish the Episcopal church, which took Patrick Henry by surprise, and which reflected Madison's very Scottish - Smithian - line in his *Memorial and Remonstrance*. Although there was an established church in Scotland, its integration with political power was much less than in England or in colonial Virginia, and it had no friends among American intellectuals. Not Jefferson, with his hatred of church-state entanglement; nor Madison with his Smithian view that competition among sects is good for social and religious health; nor indeed Witherspoon, who had found himself on the wrong side of it when the Moderates took control of the General Assembly of the Church of Scotland.

*our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry*

Very Jeffersonian and pithily expressed also in the *Notes on Virginia*. The sentiment may descend from Locke (or Bacon, or Newton), but Jefferson spun it in his unique way.

*Be it enacted by General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities*

After the long, flowery, Ciceronian preamble, the actual enactment clause is short and to the point, and justifies Jefferson's boast that Virginia was the first jurisdiction in the world to grant such extensive religious freedom.

*And though we well know that this Assembly elected by the people for the ordinary purposes of Legislation only, have no power to restrain the acts of succeeding Assemblies constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare that the rights hereby asserted, are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right*

This is an interesting coda. It acknowledges that the General Assembly is not a constitutional convention, and pays lip-service to the English (Blackstonian) tradition of parliamentary sovereignty. For, as a later parliamentary sovereigntist, A. V. Dicey (1885) was to put it, a sovereign parliament can do anything *except bind its successor*. Jefferson and Madison therefore try to entrench their declaration of religious freedom by insisting that any countervailing statute would infringe natural rights. As we shall see, one of Jefferson's



complaints against the US Constitution as endorsed by the 1787 convention for ratification by the states was its inadequate protection of rights. Madison did not agree in 1787, but by 1789-90, for pragmatic and principled reasons, he became the floor leader in the House of Representatives for the addition of what became the Bill of Rights – the first ten amendments to the Constitution, out of 12 originally proposed. Of these, the First opens “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”. It did not then apply to the states, but was applied to them under the terms of the 14<sup>th</sup> Amendment in 1868. I discuss the history of Jefferson’s attitude to the First Amendment, and of numerous misrepresentations of it, below.