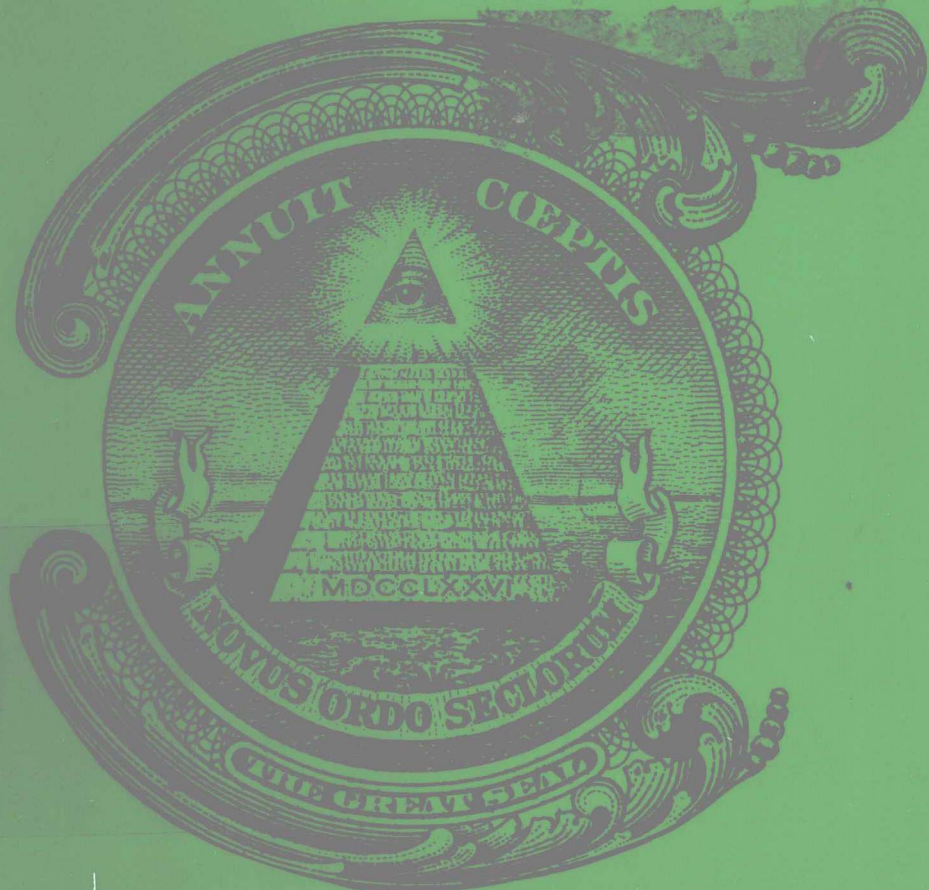


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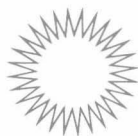


Forrest McDonald

NOVUS
ORDO
SECLORUM

THE
INTELLECTUAL
ORIGINS
OF THE
CONSTITUTION

FORREST McDONALD



University Press of Kansas

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Published by the University Press of Kansas (Lawrence, Kansas 66045), which was organized by the Kansas Board of Regents and is operated and funded by Emporia State University, Fort Hays State University, Kansas State University, Pittsburg State University, the University of Kansas, and Wichita State University

LIBRARY OF CONGRESS CATALOGING IN PUBLICATION DATA

McDonald, Forrest.

Novus ordo seclorum.

Bibliography: p.

Includes index.

1. Political science—United States—History—18th century.
 2. United States. Constitutional Convention (1787) I. Title.
- JA84.U5M43 1985 320'.0973 85-13544
ISBN 0-7006-0284-4 ISBN 0-7006-0311-5 (pbk.)

Printed in the United States of America

10 9 8 7 6

PREFACE

FASHIONS IN HISTORICAL INTER-pretation come and go. In 1958 I published a work called *We the People: The Economic Origins of the Constitution*, which was primarily concerned with testing Charles A. Beard's *Economic Interpretation of the Constitution*—then the prevailing version. Because the results of that test were essentially negative, I wrote in the preface that the purpose of my book was to "clear the decks" and that I intended to follow the volume with two more, "in which I shall attempt to write something meaningful about the making of the Constitution."

My timing in publishing *We the People* was fortunate: Robert E. Brown and several other scholars were just then attacking Beard's thesis, and the mood of the historical profession was ripe for something new. The result was that Beard's book was all-but-unanimously pronounced defunct. My timing (1965) in publishing the first of the two sequel volumes, *E Pluribus Unum*, was considerably less happy. That work focused upon the wheeling and dealing and the interplay between politics and economics which enabled hard-nosed practical men to establish the Constitution; several reviewers described it as "neo-Beardian." That sort of analysis was no longer in season: students of the Revolution and of the early national period, led by Bernard Bailyn and J. G. A. Pocock, had turned their attention to the role of ideology in the founding of the

nation. During the remainder of the sixties and through most of the seventies a host of works in the ideological vein appeared, and there emerged something of a consensus that neoclassical republican ideology, traceable from Machiavelli to the eighteenth-century English Opposition, underlay the founding.

I admire much of the work of the ideological school but find it ultimately unsatisfying. It fails to distinguish among the several kinds of republicanism that were espoused by various Americans, which by and large reflected regionally different social and economic norms. Those ideological historians who have concentrated on the tradition of civic humanism have all but left the influential Scots thinkers out of account, and in their eagerness to downplay the influence of John Locke—once greatly overrated—they have neglected the importance of theories of natural law and natural rights. They have largely disregarded the law and legal institutions. In the whole corpus of the ideological literature there is scarcely a mention of what used to be called social, political, and economic “reality,” or of such practical men of affairs as George Washington and Robert Morris, without whom, arguably, there might have been no founding. Finally, though the ideological historians have delineated the tensions between republican virtue and luxury/vice, they have inadequately addressed the counter-part tensions between communitarian consensus and possessive individualism and those between the concepts of liberty *to* participate in the governing process and liberty *from* unlimited government.

Because of these shortcomings, but also because the solid contributions of the ideological school provide indispensable building blocks, I have at last been moved to write this final volume in the series that I proposed long ago. There is another reason as well: I have become convinced that the late Douglass Adair was right when he opted to give *E Pluribus Unum* two cheers but not three. The cheers, he wrote, were for my “sophisticated picture of the dynamic interrelationships of avarice and American politics” at both the national and the state level; his reservation was

that I had left out the intellectual dimension and had failed to take into account the passion for fame among the founders. I hope that in this work I may win a posthumous third cheer from that great historian.

It could be, of course, that my timing is once again bad. The ideological school has come under attack from some quarters and is being ignored by the many who have gone on to psychohistory, family history, cliometrics, and other exotica. Nonetheless, it is now possible, as it was not a mere twenty-seven years ago, to make a reasonably comprehensive survey of the complex body of political thought (including history and law and political economy) that went into the framing of the Constitution, and I here venture to undertake it.

A few words regarding methodology seem germane. It is with reluctance that I have used the word *origins* in my subtitle, for tracking down the sources of an idea or the means by which it is transmitted is a tricky business. Let me illustrate the difficulties with one of the ideas contained in the Declaration of Independence. That the central argument of the Declaration is based mainly upon John Locke's *Second Treatise* is indisputable, I believe, whatever ancillary bodies of thought were also of influence; but Jefferson, as is well known, departed from Locke's trinity of "life, liberty, and estate" and substituted "the pursuit of happiness" for the third of these. Whence did he derive the concept, or did he think of it independently? It seems evident that the first eighteenth-century philosopher to have developed the idea was Jean Jacques Burlamaqui, but it is not certain that Jefferson had read Burlamaqui's *Principles of Natural and Politic Law*. Gilbert Chinard pointed out many years ago that Jefferson had copied into his commonplace book extensive extracts from James Wilson's 1774 pamphlet, *Considerations on the . . . Authority of the British Parliament*, and that that pamphlet draws heavily upon Burlamaqui. The phrase in question, however, was not among the passages that Jefferson copied from Wilson. Alternatively, Jefferson might have drawn the idea from Sir William Blackstone, whose treatment of natural law was based

upon Burlamaqui's work, or from Emmerich de Vattel, who studied under Burlamaqui at Geneva.¹ Again, Jefferson might have taken it from John Adams's *Thoughts on Government*, written in January of 1776 and circulated among the Virginians in Congress, or from the Virginia Declaration of Rights, drafted by George Mason and adopted on June 12, 1776. Jefferson might even have found it where Burlamaqui did—in Aristotle.

There are those who would regard all this as proof that any effort to understand a past intellectual world is inherently futile. I regard it as the opposite. It is true that we cannot be sure where Jefferson acquired the idea, or even that he did not conceive it on his own without reference to other thinkers. Yet we can say, with measured confidence, that here was an Aristotelian idea which had figured in no major way in the classical revival in seventeenth-century England but was popularized by Burlamaqui and his followers amidst the eighteenth-century enthusiasm for natural law. We can also say that it somehow spread rapidly in America and that it was, by 1776, in common currency among Patriots.

Some scholars, of course, regard such observations—and indeed the whole enterprise of intellectual history—as unverifiable “impressionistic” history and hold that we can never know how other people think or thought. That seems to me to violate common sense (in the twentieth-century signification of those words, not in the eighteenth), for we think in the patterns of others as a matter of daily routine. College students, for example, frequently encounter professors who teach from points of view that the students do not share; and when that happens, students in pursuit of grades are usually able and willing to write the essays and give the answers that the teacher wants to hear. What is involved is this: thinking takes places in symbolic codes or languages, and we can learn to think in languages that are

¹The foregoing is developed at length in Ray Forrest Harvey, *Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism* (Chapel Hill, N.C., 1937), 114–116, 123–124, and *passim*.

not native to us, whether these be Latin, music, mathematics, legalese, or eighteenth-century English.

In thinking in eighteenth-century English, I suggest three main guiding principles. First, one must pay close attention to meanings of even the most ordinary words, for these have changed in myriad ways. For instance, *discover* meant, not *uncover* or *find*, but *disclose* or *reveal*; *nervous* meant, not *worried* or *jittery*, but *strong* or *vigorous*; *awful* meant, not *extremely bad*, but *that which inspires to awe and reverence*; *natural* had many of its present meanings, but it also meant *discoverable by reason* as opposed to *revealed by God*, *illegitimate* as opposed to *legal*, and simply *an idiot*. Two necessary tools are Samuel Johnson's *Dictionary* and the *Oxford English Dictionary*, but these are insufficient if one is not sensitive to shades of meaning implicit in etymology, grammar, syntax, and context. In these regards, a rudimentary knowledge of Latin is highly useful; after all, every educated Englishman and American knew Latin, English words were generally closer in meaning to their Latin originals than they are today, and sometimes, as with the use of the subjunctive, it is apparent that an author is accustomed to formulating his thoughts in Latin. (Passages in Daniel Defoe's novels, for example, often read like literal translations from Latin.)

The second principle is that one must seek out the "buzz words" or "code words" that are identifiable with particular ideologies or bodies of thought. This point can perhaps best be illustrated with phrases employed in current political discourse. If one hears or reads the phrase "right to life" or the aphorism "If guns are outlawed, only outlaws will have guns" or the facetious remark "Nuke the whales," one is fairly safe in assuming that the speaker or writer did not vote for Walter Mondale in the 1984 presidential election. In similar fashion, clusters of words and ideas were, in the eighteenth century, sometimes shorthand clues to entire mind sets, and one can find them if one looks for them. There is nothing arcane about unraveling such clues. Any careful student of the period, upon encountering a speech or an article in which, for example, the

word *bloodsuckers* is used to describe traders in public securities, can fill in the rest of the piece, complete with undertones and overtones and harmonic variations.

Third, while one employs the most modern techniques of analysis, one must be cautious in bringing to bear concepts and information that were not available to the eighteenth-century subjects. Thus, in my judgment, it is a grave mistake to try to understand eighteenth-century Americans through Freudian or other twentieth-century modes of psychiatric analysis. They had their own models of normal and abnormal behavior, and if one is to pry into their psyches, those models alone are relevant. As for information, it is readily demonstrable that eighteenth-century Americans were sometimes uninformed or misinformed about the past, including their own past, but they acted on the basis of their own knowledge and understanding, not ours. A prime case in point concerns English law and legal history. Modern scholarship has demonstrated that Blackstone was mistaken on a number of counts, but few if any Americans knew that, and it was Blackstone whom they read on the subject. Accordingly, in discussing English legal practice, I have usually followed Blackstone, though I have occasionally pointed out instances in which modern scholars have shown that Blackstone was wrong.

One final comment. The American founders left an enormous quantity and variety of written materials, informing us from many points of view what they did, what they read, what they believed, and what they thought. It is a central part of the plan of this book that the notes be set at the foot of the page, so that the reader can see for himself just what a rich store of materials the founders bequeathed to us. To aid the reader further, I have included a list of delegates to the Constitutional Convention and a copy of the Constitution in appendixes.

I am grateful to Richard Ware and the Earhart Foundation for financial support; to A. Neil McLeod and Charles King of the Liberty Fund for encouragement and assistance in a variety of ways; to Professors Lance Banning, M. E. Bradford, Elizabeth Fox-Genovese, J. H. Hexter, Michael

Kammen, Harvey Mansfield, Jr., and Michael Mendle for keen critical readings of the manuscript; and to Ellen Shapiro McDonald, for everything.

Coker, Alabama
January 25, 1985

FORREST McDONALD

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I

THE PROBLEM

SORELY DIVIDED AS AMERICANS WERE IN regard to independence, the Patriots among them, at least in principle, were nearly unanimous in their understanding of what independence entailed. The short-range necessity was to win on the battlefield what they had proclaimed in the halls of Congress. The longer-term necessity, in the language of the Declaration, was "to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."

The latter task appeared, with some reason, to pose no difficulty. Almost to a man, Patriots were agreed that the proper ends of government were to protect people in their lives, liberty, and property and that these ends could best be obtained through a republican form. They had had abundant experience—probably more Americans had participated directly in government at one level or another than had any other people on earth—and if their experience turned out to be inadequate, enough of them were familiar with the theoretical works of Aristotle and Polybius, of Machiavelli and Harrington, of Locke and Hume and Montesquieu, to see them through.

But it proved to be far less simple than they had anticipated. In an article published in 1781, not long before the decisive battle at Yorktown, young Alexander Hamilton

(who, as General Washington's aide-de-camp, had witnessed the army's tribulations resulting from the "imbecility" of government) diagnosed what had gone awry. Most Americans who had had political experience beyond the local level, Hamilton wrote, had become Loyalists, and thus Americans "began this revolution with very vague and confined notions of the practical business of government." Accordingly, in the drafting of the Revolutionary state constitutions and the Articles of Confederation, as well as in the management of civil and military affairs, "there have been many false steps, many chimerical projects and utopian speculations." The nub of the problem, in Hamilton's view, was the "extreme jealousy of power" that is "the attendant on all popular revolutions, and has seldom been without its evils."¹

He elaborated this proposition at length. "History," he said, "is full of examples, where in contests for liberty, a jealousy of power has either defeated the attempts to recover or preserve it in the first instance, or has afterwards subverted it by clogging government with too great precautions for its security, or by leaving too wide a door for sedition and popular licentiousness." If liberty is to endure, as much attention must be paid to giving "a proper degree of authority, to make and execute the laws with vigour" as to "guarding against encroachments upon the rights of the community." An excess of power leads to despotism, whereas "too little leads to anarchy, and both eventually to the ruin of the people."²

The perception that energetic government is necessary to the security of liberty and property—for, as James Madison put it in the Constitutional Convention, "the more lax the band," the more easily can the strong devour the weak—was a crucial step toward becoming able to devise a viable system of free political institutions.³ Earlier,

¹"Continentalist No. I," July 12, 1781, in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett et al., 26 vols. (New York, 1961-1979), 2:649-650.

²*Ibid.*, 2:651.

³*The Records of the Federal Convention of 1787*, ed. Max Farrand, 4 vols. (New Haven, Conn., 1937), 1:448.

Patriots had tended to view the problem as having only one dimension, that of preventing oppression by government. Now they could see a second dimension. As Benjamin Rush said, "In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness."⁴ This was the perspective that the Framers brought to bear when they convened in 1787 to reconstitute the Union.

In the undertaking, they were guided as well as limited by four sets of considerations, none of which was so clear as subsequent (or even contemporary) writing would lead one to believe. The first was inherent in their purpose, that of providing protection for the lives, liberty, and property of the citizenry. They repeatedly voiced their agreement about their goals. Charles Pinckney declared that to extend "to its citizens all the blessings of civil & religious liberty . . . is the great end of Republican Establishments" and that "the landed interest . . . are and ought ever to be the governing spring in the system."⁵ Madison said that "we ought . . . to provide every guard to liberty that its preservation cd. require" and that "the primary objects of civil society are the security of property and public safety."⁶ Roger Sherman insisted that government was "instituted for those who live under it. It ought therefore to be so constituted as not to be dangerous to their liberties."⁷ Hamilton said that "one great objt. of Govt. is personal protection and the security of Property."⁸ George Mason and Luther Martin concurred.⁹

Only four delegates diverged from the consensus, three of them just slightly. Gouverneur Morris, John Rutledge,

⁴Rush, "An Address," Philadelphia, 1787, in *Principles and Acts of the Revolution in America*, ed. Hezekiah Niles (New York, 1876), 234. See also James Madison, *Federalist* number 51, in *The Federalist*, ed. Edward Mead Earle (New York, 1937), 337.

⁵Farrand, *Records*, June 25, 1:402.

⁶*Ibid.*, June 26, 1:423; Pierce's notes, June 6, 1:147.

⁷*Ibid.*, June 26, 1:423.

⁸*Ibid.*, June 18, 1:302.

⁹*Ibid.*, June 26, 1:428; June 27, 1:440.

and Rufus King put the protection of property ahead of liberty as the main object of society.¹⁰ James Wilson alone departed entirely from the consensus: rejecting the idea that the protection of property was "the sole or the primary" purpose of government, he asserted that "the cultivation & improvement of the human mind was the most noble object" of government and society.¹¹

All this—except for Wilson's comment—would at first glance appear to constitute an unambiguous set of aims; but though the concept of life was straightforward enough until the advent of modern medicine, the other two terms, *liberty* and *property*, were cloudy in the extreme. Indeed, the fact—rarely taken into account by scholars¹²—is that the vocabulary of political discourse was, during the eighteenth century, in a state of flux. Many pivotal words were new and not yet in general usage, and others had not even been coined. For example, *society*, in the sense of an abstract whole, had first been employed in the late seventeenth century and still most often connoted its earlier meaning of a narrow, specially constituted association of people with an identity and interest different from those of the whole. Similarly, the concept of an "economy" as an entity having a life of its own was just emerging; and though *capital*, in its economic meaning, had been in use for several decades, the word *capitalist* was novel and *capitalism* had not yet been minted. And thus, as we shall see, though virtually every American believed that *property* and *liberty* were both *natural* and *civil rights*, it transpired during the Constitutional Convention that delegates had different understandings of all five of the words set here in italics.

The same was true of the second governing and limiting consideration, the commitment to republicanism. A few of the Framers questioned the desirability of adhering to a republican form of government, thinking that form to be less compatible with liberty than limited monarchy was, but

¹⁰Ibid., July 5, 1:533, 534; July 6, 1:541.

¹¹Ibid., July 13, 1:605.

¹²Increasing numbers of scholars are studying eighteenth-century political vocabulary; see, e.g., the works of J. G. A. Pocock and Garry Wills.

none believed that any other form would be acceptable to the American electorate. And yet, though the Framers shared the commitment in the abstract, they were far from agreed as to what republicanism meant, apart from the absence of hereditary monarchy and hereditary aristocracy. For example, Hamilton, who had inherited almost nothing, was wont to define a republic as any government in which no one had a hereditary status; whereas his friend Madison, who had inherited the status of freeman amidst slavery and whose blacks had inherited their status as slaves, preferred a definition that would avoid the sticky question of status and merely considered as republican any system in which governmental power derived from the consent of the "public." Moreover, no matter how republicanism was defined, the concept—again as we shall see—carried with it a number of implications that were not entirely consonant with most Americans' ideas about liberty and property.

The third guiding and limiting factor was history, in several senses of the term. One concerned history in the conventional sense: most of the Framers were versed in the history of ancient Greece and Rome, of confederations and republics, and of England at least since Elizabethan times. Moreover, most of them thought historically and used references to history to support or illustrate their reasoning. During the first three weeks of the convention, for instance, delegates buttressed their arguments with historical examples at least twenty-three times, not counting references drawn from British or colonial or recent American history, inclusion of which would treble that total. John Dickinson, Pierce Butler, Benjamin Franklin, George Mason, James Madison, James Wilson, Alexander Hamilton, and Charles Pinckney delivered to their colleagues mini lectures and lectures that sometimes lasted for several hours on the lessons to be drawn from ancient or modern history.¹³

¹³Farrand, *Records*, Dickinson, June 2, 7, 1:87, 153; Butler, June 5, 11, 1:125, 204; Franklin, June 4, 1:103; Mason, June 4, 1:112; Madison, June 6, 7, 16, 19, 1:135, 151-152, 254, 317, 319; Wilson, June 6, 7, 18, 1:137 (143), 254, 305; Hamilton, June 18, 1:285, 290; Pinckney, June 25, 1:399, 401-402.

Another sense was that of history as legacy, which means mainly English political institutions and the common law as received and adapted selectively by the thirteen American political societies. Again considering just the first three weeks of the convention, on more than twenty separate occasions the delegates cited British constitutional practice as being instructive concerning the tasks at hand. Interestingly, in light of the vehemence with which Americans had rejected British "tyranny" in 1776, only a handful of delegates—Elbridge Gerry, James Wilson, Edmund Randolph, Pierce Butler—argued against using British constitutional practice as a guide, and for the most part these did so in regard to the relevance of the British constitution to an immediate question before the convention.¹⁴

The delegates were acutely conscious of history in yet another sense, that of their place in its ongoing flow. From the outset of the Revolution, public men in America had shared this awareness. "You and I, my dear friend," John Adams had written to Richard Henry Lee in 1777, "have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity of making election of government . . . for themselves or their children."¹⁵ By 1787 the joy that Adams had expressed had given way to a sense of urgency. It was "more than probable," Madison said in the convention, that the delegates "were now digesting a plan which in its operation wd. decide forever the fate of Republican Govt."¹⁶ Hamilton agreed, adding that "if we did not give to [the republican] form due stability and wisdom, it would be disgraced & lost among ourselves, disgraced & lost to mankind for ever."¹⁷ Franklin said that if the convention failed, "mankind may hereafter from this unfortunate instance, despair of establishing Governments by Human Wisdom and leave

¹⁴Ibid., May 31, June 1, 7, 13, 1:50, 65, 66, 153, 233.

¹⁵*Fame and the Founding Fathers: Essays by Douglass Adair*, ed. Trevor Colbourn (New York, 1974), 21; and *Letters of Members of the Continental Congress*, ed. Edmund C. Burnett, 8 vols. (Gloucester, Mass., 1963 reprint), 1:526, 2:67, 228.

¹⁶Farrand, *Records*, June 26, 1:423.

¹⁷Ibid., June 26, 1:424.