tions spring to mind. To find individuals who embody the strong notion of national sovereignty one looks to anti-heroes: perhaps J.R. Ewing.

Professor Feinberg is well aware of these arguments against his position. He uses similar arguments to cast doubt upon Kant's account of personal autonomy, which relies heavily on religious and military metaphors. The difficulty is to construct a strong virtue of personal independence that yields no hostages to those who would march down the slippery slope of paternalism. An account which treasures not pure individual choice, but some abstract virtue such as the rationality within the individual choice, leaves room for state intervention. If we value Kant's strong notion of rationality, we may interfere with the individual's choice if it fails to select the most rational alternative. National sovereignty values individual choice in its full arbitrariness, and so fits coherently with a rejection of paternalism, but I suspect that the analogy of national sovereignty, far from lending strength to the liberal case against paternalism, borrows credibility from the rejection of paternalism that it will never be able to repay.

NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION. By Forrest McDonald.[1] Lawrence, Kan.: Kansas University Press. 1985. Pp. xiii, 293. Cloth, $25.00; paper, $9.95.

Norman L. Rosenberg[2]

"When reflecting upon government," muses Professor Forrest McDonald, Americans have typically followed "the almost mystical habit of thinking of threes." Related to classical political theory and traditional social thought, this "habit may [also] have stemmed from the concept of the Holy Trinity . . . ." Is it something more than a historiographical fact, then, that *Novus Ordo Seclorum* is Professor McDonald's third book about the Constitution, our most sacred political document?

In line with the bicentennial spirit, McDonald waxes more reverential than in his earlier volumes. Both *We The People* (1958),

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which relentlessly trashed Charles Beard's classic *Economic Interpretation*, and *E Pluribus Unum* (1965), which advanced an alternative economic interpretation, highlighted the interplay between hard-nosed politics and economics. Displaying the highly individual, sometimes quirky style that defines his scholarly persona, McDonald's second volume seemed out-of-place among the refined intellectual histories, especially that of Gordon Wood, which lovingly cultivated the ideological groves of late eighteenth-century America.[3] Invoking, once again, the metaphor of threes, McDonald now concedes that his second book rated "two cheers but not three" because it failed to confront ideological issues, especially those related to "republican" thought. Subtitling this volume *The Intellectual Origins of the Constitution*, McDonald pursues that third, and presumably final, cheer.

Novus Ordo Seclorum curiously recalls McDonald's first book: while *We the People* challenged as too simplistic Beard's thesis that two rival economic coalitions battled over the Constitution of 1787, this book implicitly criticizes the view that two well-defined ideological structures, "republican" and "liberal," struggled to dominate the "intellectual origins" of constitution making. Drawing upon the vast post-1965 secondary literature and his own reading of diverse primary sources, McDonald emphasizes the many different, often confused, sometimes conflicting, strands in late eighteenth-century political discourse.

Much as he had done with economic structures two decades earlier, McDonald now gives readers a dazzling tour of various "systems of political theory." In addition to "republicanism"—something to which many people came "late and willy nilly, with neither a historical or philosophical understanding of what they were embracing"—he explores subtle variations on natural rights theory, the "country-oppositional ideology," and English common-law thought. Perhaps more important, he offers a highly original survey of "political economy," a mode of analysis that first emerged only in the late eighteenth century. Here, he shows special fondness for Alexander Hamilton's formulations and disdain for most of James Madison's ideas.[4]

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3. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969). For recent commentaries which acknowledge Wood's book as the dominant force in the field, see *Forum: The Creation of the American Republic, 1776-1787: A Symposium of Views and Reviews*, 44 WM. & MARY Q. 549 (1987). Meanwhile, though, the creation of different economic interpretations remains a thriving business. *See, e.g., The Constitution as an Economic Document: A Symposium Commemorating the Bicentennial of the United States Constitution*, 56 GEO. WASH. L. REV. 1 (1987).

4. McDonald also debunks the conventional wisdom that Madison was "the father of the Constitution." F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORI-

McDonald still invokes his earlier work by linking the political principles of the framers to various political, economic, and regional interests. For example, a "puritanical republicanism," which revolved around an almost "totalitarian" preoccupation with monitoring the "virtue" of individual citizens—i.e., their willingness to subordinate individual interests to the general public good—pervaded New England, while an "agrarian species of republicanism," which advocated a more limited view of government and the socially-created virtue of individual property holders, held sway in other parts, especially in tobacco-planting areas.

Given the complex tangle of "principles and interests" that criss-crossed both the new nation and the Philadelphia Convention, McDonald dismisses reductionist notions about original intent. "It should be obvious," he argues, "that it is meaningless to say that the Framers intended this or that the Framers intended that: their positions were diverse and, in many particulars, incompatible."[5] At times even they themselves might have wondered exactly what they intended. When discussing the commerce clause, "whose history is shrouded in mystery," for instance, McDonald notes that today's intention-seekers enjoy information, courtesy of modern scholarship, about the workings of the Convention's committee of style, which the delegates themselves probably did not possess.[6]

More important for serious students of the second United States Constitution, McDonald sees the "republicanism" versus "liberalism" debate, so prominent in recent historical and constitutional law scholarship,[7] as fatally simplistic. McDonald's multilayered arguments on this point defy easy summary. For example, Gordon Wood's now familiar thesis—that the fight over the Constitution of 1787 demarcated the end of classical-republican and the beginnings of modern, interest-group constitutionalism—draws some of McDonald's ire. For McDonald, this A-gives-way-to-B formulation, however elegantly elaborated, forgets that sophisti-

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GINS OF THE CONSTITUTION 205-09 (1985). *See also* Banning, *The Practicable Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 162 (R. Beeman, S. Botein & E. Carter eds. 1987) [hereinafter BEYOND CONFEDERATION] (emphasizing Madison's changing, but still central role); Hutson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. 411 (1987) (questioning Madison's influence and also the authenticity of his much-cited documentary record).

5. F. MCDONALD, *supra* note 4, at 224.

6. *Id.* at 271.

7. *See, e.g.*, Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). *See also* Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 20 (1986); Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3 (1986); Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473 (1986).

cated political leaders, especially George Washington, believed that the search for "fame" and the desire for a good reputation could preserve the old republican ideal of disinterested public service and perhaps even prevent the "baser passions of most men" from corrupting political life.[8]

A Federalist partisan himself, McDonald applauds the kind of political leader, epitomized by Washington and Hamilton, who triumphed at Philadelphia. Standing, in effect, amongst conflicting intellectual traditions and fierce political passions, this extraordinary group of hardheaded reformers "devised a new order out of materials prescribed by the ages" and wisely drew "their Constitution loosely enough so that it might live and breath and change with time."

How, then, should scholars evaluate the ideas behind and within the Constitution of 1787? Finding political-constitutional discourse itself undergoing rapid change, especially during the late 1780s, McDonald charts the quick-moving twists and turns, especially over the term "republican," occurring in public debates. When opponents of the Constitution attacked it as anti-republican, for instance, the Hamiltons and Madisons deftly countered by redefining "republicanism" in novel but convincing ways. Even though McDonald wants to underscore the ways in which the Constitution of 1787 retained traditional ideals, the people at Philadelphia, and those defending their efforts during the ratification struggles, ultimately "devised a *novus ordo seclorum*" and "rendered all previous vocabulary obsolete as it pertained to the government of the United States."

Too much constitutional scholarship, McDonald suggests, fails to appreciate the innovations of 1787. Montesquieuan ideals about separation of powers, for example, gave way to a novel system of checks and balances. In McDonald's view, the governmental structure envisioned in the Constitution contemplated a complex arrangement of governmental power, not simply between the central and state levels but among local juries and militia groups. In this sense, moreover, the Philadelphia document did not really rest upon liberal, individualist contract theory. "Rather, it was a compact among political societies; there was not a single republic, or even thirteen, but a multitude of them." With adoption of this new

8. For an interpretation that differs, in part, from McDonald's on this point, see G. WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT (1984). Gordon Wood, meanwhile, also now warns that the question of republicanism or liberalism is "badly put" and "assumes a sharp dichotomy between two clearly identifiable traditions that eighteenth-century reality will not support." Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 634 (1987).

constitutional structure, the United States became "a nation composed of several thousand insular communities, each of which exercised virtually absolute powers over its members through the traditional institutions of the jury and the militia." Thus, the framers' Constitution "defied categorization by any existing nomenclature . . . ."

Likewise, McDonald's own book sometimes defies familiar historiographical pigeonholes. A self-styled conservative, unlikely to attend a CLS summer camp, McDonald nonetheless relies upon Morton Horwitz's view of how the common law was reshaped in the service of capitalist interests.[9] And though McDonald draws upon the work of such celebrated intellectual historians as Gordon Wood and J.G.A. Pocock, he dissents from their emphasis upon the powerful grip of ideological paradigms. In contrast to Wood's view, that there is "no behavior without ideology" and that "ideas give meaning to our action," McDonald's approach to the relationship between constitutional rhetoric and politics sometimes recalls the legal realists of the 1930s. McDonald's framers are "politically multilingual," able to speak in whatever set of ideological symbols "seemed rhetorically appropriate to the particular argument at hand."

McDonald ignores much of the recent scholarship[10] linking constitutionalism to "the new social history." He offers no discussion, for example, on the "gendered meanings" of republicanism or the ways in which urban artisans tried to reshape the elitist republican heritage to their own historical experience. To McDonald, backcountry areas were not, as some social historians have argued, misgoverned; they were essentially ungovernable. And though he has "read virtually every line of virtually every extant American newspaper" and "a large body of personal correspondence," McDonald generally credits the perspectives of the Federalist elite, especially when dealing, much too briefly, with the ratification debates. If Madison and Hamilton, for example, were trying to reconstruct the discourse between 1787 and 1789, what about all of the opponents of the Constitution? Here too, McDonald tends to reject (or ignore) some of the recent scholarship, especially that which praises the Anti-Federalists of the late 1780s, the people who

9. *See* M. HORWITZ, TRANSFORMATION OF AMERICAN LAW (1977); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

10. *See, e.g.*, T. SLAUGHTER, THE WHISKEY REBELLION (1986) (favorable view of complaints of misgovernment by backcountry protestors); S. WILENTZ, CHANTS DEMOCRATIC 61-103 (1984) (sympathetic portrait of "artisan republicanism"); Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 SIGNS 37 (1987).

(according to Gordon Wood) "really belonged to the future."[11]

Yet McDonald is too good a historian not to acknowledge what the nineteenth century had in store for the United States, especially when his own acute analysis of political economy suggests some of the ways in which legal-constitutional discourse intersected with the rise of a nationwide, capitalist economy. Indeed, McDonald approaches the end of this book on a note of almost regretful nostalgia. The coming of "the Age of Liberalism, the Age of Capitalism and Democracy," a society of hyperindividualists, would have "neither room for nor need of the kind of virtuous public servants who so abundantly graced the public councils during the Founding Era." The "race of pygmies [who] came to infest the public councils" of later eras *might* even have destroyed the constitutional temple itself.

According to McDonald, though, the day of the locust never quite arrived, and he closes with appropriately fileopietistic, upbeat crescendos. He finds comfort in the earthly pull of cultural gravity, his firm conviction that a deeply-rooted "cultural conservatism" has helped to preserve the essential logic of the Constitution.[12] The wise men of Philadelphia, along with those almost as learned "*Optimates*" who immediately followed them, framed and then protected a constitutional order that became "firmly established and self-maintaining . . . ." After 200 years, "constitutional government had become part of the second nature of *homo politicus Americanus*."[13] McDonald ends with the Bismarckian line about a "special Providence" taking care of fools, drunks, and the United States. "Surely," he concludes, "the Founders believed the last of these."

People less committed to this triad—Hamiltonian Federalism, cultural conservatism, and divine Providence—will likely look beyond this book's vistas in order to explain even the "intellectual origins" of the Constitution.[14] But Forrest McDonald's well-

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11. *See, e.g.*, Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION, *supra* note 4, at 109. And on the importance of the ratification debates across a spectrum of views even wider than McDonald surveys, see Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3 (1988).

12. According to McDonald, the "principle of cultural conservatism, which describes a far greater stabilizing force than government is familiar to anthropologists; but historians commonly overlook it, concentrating upon politics and government." F. MCDONALD, *supra* note 4, at 161 n.34.

13. For an essay criticizing the view that the new constitution actually encouraged the *Optimates*, men of unique talent and vision to enter and remain in public office, something that was a clear goal of many Federalists of 1787, see Rakove, *The Structure of Politics at the Accession of George Washington*, in BEYOND CONFEDERATION, *supra* note 4, at 261. And for continual laments that people of talent have too often been absent from our public life, see N. ROSENBERG, PROTECTING THE BEST MEN 71-129 (1986).

14. *See, e.g., The Constitution and American Life: A Special Issue*, 74 J. AM. HIST. 661

crafted book both nicely completes a distinguished author's personal cycle and insightfully raises new questions for historical and constitutional debates.

THE COURT AND THE CONSTITUTION. By Archibald Cox.[1] Boston: Houghton Mifflin. 1987. Pp. 434. $19.95.

David P. Bryden[2]

Professor Archibald Cox's latest book is a popular history of constitutional law, from "Miracle at Philadelphia" to the Rehnquist Court. Part One ("Building a Nation") includes chapters on "Judicial Supremacy," "Federal Power and Supremacy," "Opening a National Market," and "One Nation Indivisible." Part Two ("From Laissez-Faire to the Welfare State") contains four chapters that bring the reader from the Civil War to "The Warren Court," which is the title of the introductory chapter in the third and final historical section of the book, covering "The Nonconformists" (religion), "National Security and the First Amendment," "Protection for the Accused," "School Desegregation," "Affirmative Action," "Political Equality," "Invidious Distinctions and Fundamental Rights," and "Abortion." In the last chapter, Professor Cox muses about "The Future of Judicial Review."

Although it does not purport to be very original, *The Court and the Constitution* is a useful addition to the overcrowded shelves of constitutional literature. It's much better written than most history books and would make excellent supplemental reading for law students, not only to supply historical perspective but also to provide a coherent point of view about the great cases and problems, an antidote to the confusion of class discussions and a foil—if that's not too condescending a word—for any contrasting ideas the professor has to offer.

As history, Cox's work can best be judged by historians. Of course, it isn't just history. Cox brings to his task a law professor's characteristic concerns, and the book is a series of didactic essays

(1987); *see esp.* Appleby, *The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987), an essay that essentially stands McDonald on his head. *See also* Nash, *Also There at the Creation: Going Beyond Gordon S. Wood*, 44 WM. & MARY Q. 602 (1987).

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