

Preface

The eminent American historian Forrest McDonald is perhaps best known for his powerful rebuttal of Charles A. Beard's 1913 book, *An Economic Interpretation of the Constitution of the United States*. But McDonald's work also contemplates an exploration of the intellectual origins of the American Constitution. It is not surprising, therefore, that the Appendix to his recent *Memoir* is styled 'The Intellectual World of the Founding Fathers'. For McDonald, 'the formation of the Republic was a product of America's Golden Age, the likes of which we shall not see again'. He attributes the 'Golden Age' to Americans' ability to 'pick and choose among the institutions of the mother country', to their 'habit of reading', to their 'understanding of history', to their study of 'the newly devised "science"' of political economy, to their 'understanding of the workings of the human psyche' – informed, in part, by the work of 'the Scottish Common Sense philosophers' – and to their understanding that 'The vital – which is to say life-giving – principle of republics was *public virtue*'.

While each of these ideas finds expression in the argument developed below, I emphasize that, for McDonald and, I should say, for me, 'The Constitution is primarily a *structural* and *procedural* document, specifying who is to exercise what powers and how. It is a body of law, designed to govern, not the people, but government itself' (McDonald, 2004, p. 185; emphasis mine).

My title, *Morality, Political Economy and American Constitutionalism*, is stimulated by the idea that the Founders' republican self-government project (Chapters 1 and 2) was animated by a Smithian/Kantian conception of the two-person self. *Inter alia*, the Founders understood that man, as a social creature, is 'formed by society' and that, whereas he possesses what Jefferson, like Adam Smith, called a 'moral sense or conscience', respect for the moral law must be cultivated. From the Founders' perspective, respect for the imperative to treat others impartially, a *sine qua non* for self-government, is contingent upon a reciprocal relationship between morality and society's institutional structure. On this logic, the perspective of the 'impartial spectator', the first-person self, can be achieved only by the agent's, the third-person self's, immersion in a 'web of social attachments'. So it is that examples of 'sympathy and benevolence', and of impartial fundamental and statutory law, can both reflect and cultivate the perspective that Madison and Jefferson urged. For Madison, because 'the perfect equality of mankind ... is an absolute truth', it follows that 'that alone is a *just*

government which *impartially* secures to every man, whatever is his *own*'. For his part, Jefferson averred that, 'Whenever you are to do a thing, though it can never be known but to yourself, ask yourself how you would act were all the world looking at you, and act accordingly.'

Given their prior ethical commitment to a conception of the right, the moral equivalence of persons, the Founders were not, and could not be, utilitarians (Chapter 3). For the Founders, the imperative was not to promote 'good ends'. I argue that they shared, with Kant, the understanding that the imperative to treat morally equivalent persons impartially requires that man 'should promote his happiness not from inclination but from duty, and by his conduct first acquire true moral worth'. The Founders were concerned, therefore, not with preference satisfaction, but with the specification of *permissible* ends, and with the promotion of just, in the sense of impartial, *institutions*. From this perspective, the distinctive features of the American Constitution, its Madisonian 'auxiliary precautions', are intended to set ambition against ambition and so to minimize the effects of narrowly self-interested, intendedly discriminatory 'factious' behavior.

The Founders' procedurally based, consequence-detached moral and political philosophy was, in turn, conjoined to a political economy whose focus was not the *intendedly* value-free maximization of 'social welfare'. Rather, the Founders engaged in an explicitly normative evaluative process based, not upon economic efficiency or first-best Pareto optimality, but upon what constitutional political economists today call political efficiency. In effect, the Founders sought, in the manner of modern-day constitutional political economists, to assess 'the efficacy of differing institutions in reducing or eliminating the incentives for participants to invest resources in rent seeking aimed to secure discriminatory advantage through majoritarian exploitation' (Buchanan and Congleton, 1998, p. 40).

A recurring theme of the book is that none of this finds expression in modern liberalism, a public philosophy that imagines that the citizen-agent is a transcendental autonomous self, 'outside nature and outside the "empirical conditions"' that characterize path-dependent contingent circumstance (Chapters 3 and 4). If this is irreconcilable with the Founders' view of man as a 'social creature', it *is* consistent with an institutional skepticism that finds expression in the question 'Why should I do that?' In this account, 'equal treatment' requires that the transcendental autonomous self be given 'moral and political space', and that 'government be neutral on what might be called the question of the good life'. While the logical, empirical, ontological and other problems attendant to this construal are developed in the text (Chapters 4 and 6), it is sufficient for the moment to emphasize that, if it is inconsistent with what James Buchanan has called 'moral community', it would certainly be alien to the Founders' imagination. Equally important, whereas utilitarianism found no place in the Founders' moral and political philosophy, it is instrumentally im-

portant to modern liberalism's constitutive political position. On the one hand, its contingent defense of democracy is predicated upon respect for rights – asserted to be antecedent to civil society – against persons' political, altruistic and moralistic 'external' preferences. On the other hand, its equal treatment construal requires that the 'anti-egalitarian consequences of free enterprise in action' be remediated. Granting this, and on the presumption that only 'sanitized', strictly personal preferences 'count', social welfare theory's first and second fundamental welfare theorems are regarded as instrumentally important to the 'perfectibility' of the 'economic market'.

If, as I suggest, modern liberalism's peculiar, truncated understanding of the Smithian/Kantian two-person self is inconsistent with 'moral community' it is, *pari passu*, inimical to republican self-government. And if, as I argue, institutionless, intendedly value-free and relentlessly utilitarian social welfare theory can be used to rationalize all manner of government 'market interventions', its 'romanticized view' of politics militates against the specification, let alone the solution, of the *procedural* questions that animated the Founders' enterprise.

While much of my attention centers on the indeterminacy of social welfare theory's fundamental theoretical constructs, and on its inability to accommodate either the moral force of rights or any plausible theory of justice (Chapters 5 and 7), I emphasize that the Founders would be confounded by a public philosophy that embraces both values 'neutrality' and a teleological conception of the state, and by a 'political' economy for which 'want' and 'need' satisfaction and distributive justice are the ultimate desiderata.

The general theme of the book is, then, that both in its public philosophy and in its economics, our republic has strayed far from the Founders' vision. Preoccupation with preference satisfaction, and with the prerogatives of the transcendental autonomous self, has caused us to ignore, to deny or to forget what the Founders understood.

In a letter to James Madison written six months *before* the Constitution was ratified, Thomas Jefferson averred that 'The instability of our laws is really an immense evil'. Now, more than two hundred years *after* the Constitution institutionalized the Founders' 'auxiliary precautions', the metastasization of asserted rights has found expression in an expansion of statutory, common and constitutional law. For its part, the urge to 'perfect' the 'economic market' has been the catalyst both to a rapidly growing body of tax, regulatory, environmental, labor and other law, and to its concomitant, increased congressional reliance on agency rulemaking. If, as I argue, this has facilitated the discriminatory 'factional behavior' that the Founders sought to constrain, it has also undermined both the separation of powers and our federal structure. As Madison feared, the relentless advance of the 'responsive state' has been underwritten by 'the high sanction given to a latitude in expanding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress'. We

have, in short, failed to take account of one of the Founders' fundamental insights; namely, that *constitutional restraints on majoritarian democracy* are instrumentally important to the survival of republican self-government. At our peril, we take little or no cognizance of the fact that, if the moral equivalence of persons demands that the greatest possible equal political participation be promoted, the *worth* or fair value of equal political participation requires that the constitution 'underwrite a fair opportunity to take part in and to influence the political process' (Rawls, 1971, p. 224). The imperative, in short, is to prevent the pleadings of the 'more advantaged social and economic interests' from receiving 'excessive attention' (p. 226). And if this means, as the Founders clearly intended, that the Constitution's *procedural* restraints or 'auxiliary precautions' must be respected, it is also, I argue, justificatory of what James Buchanan has called a generality or impartiality constraint. These and related issues are the subject matter of Chapter 8.