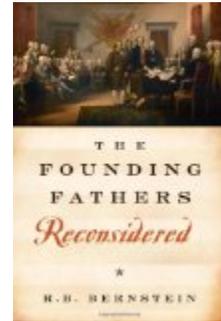


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Reviewed by Paul K. Longmore (San Francisco State University)

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## Synthesizing the Scholarship, Reassessing the Founding

R. B. Bernstein synthesizes for general readers the historiography of the American Revolution produced over the past several decades. Both admiring of “the founding fathers’” historical accomplishments and critically analytical of their efforts, his overview is far from old-fashioned hagiography. That mythologizing and more than a little traditional historiography fell into the trap of depicting the founders as though they operated outside of history. Bernstein presents them not in Olympian isolation but in their historical context. They were not disinterested demigods but a thoughtful, actively engaged group of leaders. By “founding fathers” Bernstein means not only George Washington, Benjamin Franklin, Thomas Jefferson, John Adams, Alexander Hamilton, and James Madison, to whom he gives the greatest attention, but also a great many others of the Revolutionary generation. Together they constituted a political elite that was more porous and more open than any of those governing in contemporaneous Europe. In addition, during the eras of the Revolution, the Confederation, and the early Republic, they found it increasingly necessary to interact with and respond to a more and more politically active and assertive population. The democratic upsurge among ordinary people, including many social groups excluded from historical study in past generations, required this political elite to practice governance more flexibly.

A constitutional, legal, and political historian, Bernstein examines the founders’ intentions and efforts to order their world not mainly by force but with words.

They did so by drafting and adopting a series of foundational political documents: constitutions, declarations or bills of rights, treaties, and laws. John Adams accurately described his era as an “age of revolutions and constitutions.” Examining their writings, which include both those documents and the founders’ arguments for and reflections on them, Bernstein identifies as a major theme their sense of the possibilities and the limitations of ordering the world through words. The point is that the founders were not abstract political theorists but, in a sense, hands-on practitioners of the science of politics.

Furthermore, they, like their contemporaries, operated in and had their perceptions and experiences shaped by several interlocking historical contexts. First of all, they lived on the outer rim of Atlantic European civilization. Within that larger world, they were subjects of the British Empire and subsequently citizens of the independent United States. But it must be kept in mind that whether they were members of that grand and dominating empire or the fledgling and fragile United States, a minor power on the periphery of the Atlantic system, they and the population they led were vulnerable. At every stage of their experience during the latter half of the eighteenth century and into the early nineteenth century, as both colonials and leaders of an independent country, they had to contend with the questions and tensions inherent in their situation as a periphery interacting with a transatlantic center. Even though the founders succeeded in attaining national independence and even while they envisioned national greatness, they remained

perpetually aware of their precarious geopolitical position. And they ceaselessly worried that the great powers of Europe would exploit their young nation or at least deny it the respect it deserved. Given their situation, they simultaneously sought independence from Britain and Europe and the legitimation of European recognition. Calling attention to this ironically contradictory fact of American experience in the early years, Bernstein says that their conflicted relationship with the Old World helped to shape their efforts to establish an independent and prosperous nation grounded in a sound form of government.

The second and third historical contexts that influenced their thoughts and actions were both intellectual. As they tried to order their world through words, the founders' perceptions and political thinking before and after independence were shaped by two major sources: the English tradition of constitutional liberty and the British and European Enlightenments. Until the mid-1760s, British colonials in North America gloried in their English heritage of constitutional liberty. The idea and image of "the free-born Englishman" was not only a legal status but also a core element of British national identity, one that colonials fully shared or at least thought they should share in fully. After centuries of bloody struggle, they and Britons in the home islands believed that the nation had achieved a stable constitution and just political order grounded in distinctively English notions of liberty. That historical accomplishment reached its zenith with the triumph that concluded the Seven Years' War. North American colonials celebrated their membership in an empire they viewed as the summit of human political endeavors.

But then beginning in the mid-1760s, that constitutional heritage unexpectedly and frighteningly came under attack from the mother country itself. New-modeled British colonial policies raised wrenching questions about understandings of the British constitution. How did that system of governance apply to imperial authority in the colonies? To the shock of everyone, the imperial and colonial contenders in this controversy operated from conflicting views of the constitution. Colonials drew on seventeenth-century formulations fashioned in the midst of disputes between Parliament and the Stuart monarchs. That perspective saw the constitution as placing restraints on arbitrary power from any quarter, whether Crown or Parliament. In contrast, metropolitan contestants in the pre-Revolutionary debate adhered to an eighteenth-century view of the constitution. That version upheld the supremacy of Parlia-

ment as the cornerstone institution of the constitutional system. These competing understandings of the British constitution proved irreconcilable. Within a little over a decade, the empire descended into a dismembering civil war.

But the influence of that constitutional and ideological history and heritage did not end on July 4, 1776. The political leaders of the new nation continued to value the English/British constitutional legacy. And so as they designed new constitutional systems at both the state and national levels, they labored to preserve key principles from that political and legal inheritance. But their attempt to perpetuate the best elements of the British constitutional tradition struggled agonizingly with Americans' conflicted feelings about the former mother country. As colonials, they had expected the homeland and home government to protect and guarantee ancient English liberty, but instead, in their view, both were so far gone in corruption that they subverted that tradition of liberty and constitutionalism. Both their adherence to that British tradition and their alienation from the British nation, explains Bernstein, helped to shape Americans' various responses to the political and constitutional problems that arose among them following independence. Whether they sought to promote the practice of public virtue or design structural mechanisms of government to compensate for insufficient public virtue, they continued to grapple with concepts and concerns that carried over from their colonial experience.

As they devised and launched a new constitutional system and fashioned an American nation, the founders, Bernstein explains, felt the historical momentousness of their endeavors. They contended with one another about every decision they took, at times fighting bitterly, because they believed that the fate of future generations of Americans, the fate of all mankind, and their own historical reputations were at stake. They were acutely and ceaselessly aware that every step was a first. Every choice they made marked a precedent that would resonate far into the future. What kind of government would independent Americans fashion? What sort of politics would they practice? What kind of laws would govern them? Corollary to that sense of firstness was their sense of connectedness to both the past and the future, to previous generations and the generations that would follow. Acutely aware of history, the founders acted out of the sense that they operated within historical time and that the historical moment in which they acted was a pivotal one in human history.

As Bernstein tells it, the central issue in framing new governments was the question of independence. Independence aimed at not only national self-determination but individual freedom as well. How would the founders fashion frames of government and laws that would ensure both forms of independence? He identifies these as the founders' tasks in the period from the 1760s down to the 1820s. Within that longer timeframe, he marks three sub-eras. From the mid-1760s to the early 1780s, national independence was an aspiration that became a political goal. Having achieved that status, the task from the late 1780s down through the War of 1812 was how to defend and preserve national independence. Following the war, American independence could be assumed as an established fact. At each stage of this process, according to Bernstein, the key means to ensure American political independence and Americans' personal independence was in the drafting and adoption of the state and national constitutions. For their experiment to succeed, they must give it institutional form. Americans of every social class and every political perspective saw a direct correlation between a society's form of government and that society's values, purposes, and functioning. Institutionalization of those ideas and ends in the framing of governments, says Bernstein, became the founders' most enduring accomplishment.

In bringing about that achievement, Bernstein distinguishes two interconnected elements. On the one hand, there was the substance of the constitutions they drafted and adopted; on the other, there were the mechanisms of framing and ratification. The process began with the precarious situation that followed the overthrow of royal government and its temporary replacement with ad hoc provincial congresses and conventions. It quickly became necessary to establish governments recognized as legitimate and competent to govern. These new governments would necessarily experiment with new forms in an attempt to resolve the political and constitutional problems that had led to revolt and revolution in the first place. Two great waves of state constitution-making followed, one in the mid-1770s, the other in the early and mid-1780s.

During the first wave, state constitution makers did not think much about the question of appropriate procedures for framing new governments. A provincial congress or convention simply authorized itself to draft a constitution for its state. Many of those constitutions were merely modified versions of the old colonial charters. Then this legislative body either promulgated the constitution or held an election of a permanent legis-

lature along with executive officers and mandated that these elected officials operate according to the new constitution. One of the most significant innovative features of these first-wave state constitutions was the inclusion of written declarations or bills of rights. In addition, many of them perpetuated English constitutional principles with American alterations that corrected what Revolutionary leaders saw as dysfunctional features of colonial governance. Because royal governors and royally appointed judges had upheld parliamentary authority and the Crown prerogative, many of the early constitutions significantly reduced the powers of executive officials. The most far-reaching decisions in that direction were taken in Pennsylvania and Georgia, which eliminated the office of governor, replacing it with a rather weak president and executive council. As a corollary, the first state constitutions strengthened the hands of the enlarged, popularly elected legislatures, making them dominant over both executive and judicial officers.

The second wave of state constitution making reacted against what had come to be seen by many, especially those who were antipathetic to the democratic upsurge unleashed by the Revolution, as revolutionary excesses. These new state constitutions restored many of the powers of governors, other executive officials, and judges. But the great innovation of second-wave constitution making in the theory and practice of constitutional government was Massachusetts's invention of the constitutional convention, a separate legislative body authorized for this one task on this singular occasion to draft the basic frame of government.

The two waves of framing of state governments constituted a collective experience that equipped the founding generation of political leaders. The process went on for just over a decade and served as the background of the Federal Convention of 1787. It provided the delegates with precedents and prototypes that could guide their work.

Modern scholars of the convention and Constitution have identified federalism as the great creative innovation of the Constitution makers. But Bernstein importantly points out that federalism was not a carefully designed plan of how the national and state governments would relate to one another. The drafters did not already have in mind some grand plan of federalism when they arrived in Philadelphia. Instead, what would become known as a system of dual federalism was a byproduct of piecemeal decisions made in the convention. And in fact, it was only in the midst of the ratification debates

that the features of this federalist system became generally apparent. Only then did the proponents begin to formulate an explanation and defense of federalism as an ingenious system for counterpoising the powers and duties of the two levels of government. Indeed, only then did they hail it as a major advance in constitutional government.

Echoing the constitutional dispute that had ruptured the British Empire, the advocates of the new U.S. Constitution did not all agree on the shape and limits of federalism. Hamilton and Jefferson represented the polar positions of centralizing and decentralizing nationalism. Other founders occupied positions along a spectrum of understandings of American federalism, with Madison emerging as the leading authority on American constitutional federalism. In Bernstein's view as in Madison's own opinion and contrary to his contemporary critics and many later scholars, Madison was not inconsistent in his understanding of the Constitution. Instead, he recognized that changing historical situations required subtle and shifting adjustments in the line between federal and state authority. He rejected as destructive of the national Union black-and-white rigid readings of the Constitution that favored either state sovereignty or national authority.

Historical memory has focused on the drafting of the new federal Constitution in the convention. Bernstein calls our attention to the ratification process that followed as an equally important achievement in the history of government. First of all, as already noted, the ratification debates became the occasion for the formulation of the concept of dual federalism. Also, Bernstein points out, the discourse over ratification occurred not only within the state ratifying conventions but also among a politicized public that conversed simultaneously at the state and national levels. Through the printed word, not only newspaper essays and pamphlets but wall posters as well, the people of the several states participated in a collective national debate. As a result, inhabitants of each state realized that the decisions in their own state's ratifying convention would have an impact on inhabitants of other states. The struggle over ratification promoted a feeling of commonality across state lines, a sense of American national identity. That in turn facilitated a view of themselves as citizens of the new nation.

The ratification debates not only strengthened the sense of national union and national identity but also helped to democratize American politics. The formal political processes of ratification and the printed arguments

together increased the size of the politically active populace. In addition, state governments temporarily set aside property qualifications for voting so that every white male of adult years (and in some states those who met religious qualifications) could vote in special elections for delegates to the state ratifying conventions. The rationale was that the framing of a new government should be based on wider participation among the citizenry than occurred in ordinary elections. Further democratizing the process, the ratifying conventions were open to the public and their proceedings were published and disseminated. That set a precedent for American legislatures. Whereas colonial legislative bodies had typically met behind closed doors and did not publish full accounts of their deliberations and votes, post-Revolutionary legislatures more and more made themselves open to scrutiny by the press and public.

Politics could no longer remain the possession of an elite. The lessons of the ratification experience continued in the Early National period as growing numbers of white male citizens took a direct active role in political affairs. Indeed, throughout the Revolutionary and Early National periods leaders and ordinary people together invented a new kind of politics. Jointly they fashioned constitutional structures, governmental institutions, and extra-governmental institutions that served as the means to conduct ordinary daily politics and mechanisms to deal with the tensions between political elites and average citizens. Arguably the most important innovation in this new politics was the system of political parties. That development represented a remarkable reversal from traditional Anglo-American political thought and practice that regarded "parties" as conspiracies against the common good.

One of the most important areas of experimentation in governance, reports Bernstein, was in the relationship between church and state. European societies had struggled for centuries with questions about church and state, religion and politics. What sort of connections between religious and governmental institutions were necessary to facilitate social order and political stability? How could those arrangements be designed to forestall conflicts over religion that might end in political disaster? What sorts of policies and structures might uphold religious truth? And now in the era of the American Revolution, Americans asked how they could avoid the bloody social and political disruptions over religion that had plagued Britain and Europe in earlier times. In most of the colonies, various institutional arrangements linked the state with some sort of established church, Congrega-

tionalism in New England, Anglicanism elsewhere. This provoked anxiety among the many Protestant sects and denominations spread throughout the colonies. Adding to their fear was the perception late in the colonial era that the Crown intended to ensure the status of the Church of England as the only legitimate church in the North American provinces.

During the course of the Revolutionary and Early National eras, Americans gradually fashioned distinctive solutions to questions and problems regarding church-state relations. As the quest for national independence weakened the authority and eliminated the legal privileges of the Anglican Church, other denominations enhanced their legitimacy and standing by aligning themselves with the new revolutionary state governments. Taking a more radical stance, some denominations, most prominently the Baptists, allied with liberal political thinkers to argue that separating the institutions of church and state served the well-being of both. Bernstein provides a useful corrective to modern controversialists who mistakenly claim that the founders intended either absolute separation or that the state promoted the cause of religion. In fact, two different perspectives on church-state relations emerged in the founding era, each holding sway in different states of the Union. One of these models, which is usually labeled “separationist” and is most commonly associated with Virginia, aimed to keep religion out of the secular realm of politics while prohibiting the state from mandating particular religious beliefs or compelling taxpayers to support religious institutions to which they did not adhere. But in the Revolutionary Era, most states adopted a different model which might be termed nonpreferentialist or accommodationist. That framing of church-state relations asserted that religion and government must ally to promote civic virtue and personal morality as essential to the preservation of liberty and republican government. One version of this model, which for a very brief time was operative in Virginia, North Carolina, and South Carolina, as well as some of the mid-Atlantic states, the Episcopal Church (the Americanized Anglican Church) was made the “established” church of that state. Members of other Protestant denominations and other churches could exercise freedom of worship but would not receive state funding. A second version of the nonpreferentialist or accommodationist model functioned in New England (except for Rhode Island). It authorized what were in effect multiple establishments: a number of Protestant sects or denominations were legally entitled to support by public funding. These two models persisted in some states from the

1780s into the early decades of the nineteenth century. Over time though, the various states abolished these single and multiple establishments. Massachusetts was the last, eliminating its multiple establishments in 1833. But, Bernstein explains, this did not mean that the United States had adopted the Jeffersonian-Madisonian model of strict separation. Some states continued to require religious qualifications for voting and holding public office, in some cases offering such privileges to members of favored denominations and religions, in other instances denying those privileges to adherents of disfavored denominations and religions. As a result, church-state relations moved from the two divergent models of the Early National period to a nineteenth-century model that was generally separationist but nonetheless assumed a broad religious consensus grounded in Protestant Christianity.

Finally, Bernstein is interested in how Americans have lived and grappled with the “legacies” of the founders. A reconsideration of their endeavors can help us, he says, to rediscover for ourselves “the possibilities and purposes of political thought and action” (p. 8). Those legacies include both their fabled historical reputations and the foundational concepts they formulated, such notions as liberty, equality, separation of church and state, the proper purposes and operation of constitutional government, and the defining features of national identity. Those fundamental concepts, believes Bernstein, mark the founding of the United States as historically distinctive, for this was a nation based not on common ethnicity, language, or religion, but on shared national principles. In this instance, he adopts a rather traditional distinction between “civic” and “ethnic” nationalism. Both recent early American historiography—the scholarship he draws on—and current historical research on nationalism would question that differentiation and explain American nationalism as from the beginning a melding of both the civic and the ethnic. Bernstein’s final chapter offers a particularly useful discussion of the concept of and controversy over “original intent,” while his epilogue provides a brief helpful consideration of a distinctively African American tradition of constitutional interpretation that stretches from Frederick Douglass through Martin Luther King Jr. on to Barbara Jordan and down to Barack Obama.

This broad-ranging synthesis of a large historical literature provides concise thoughtful observations that offers general readers and students useful access to historians’ recent interpretations and historiographical debates about the founding of the nation.

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