

James Madison and Constitutional Imperfection



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University of Houston



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32 Avenue of the Americas, New York, NY 10013-2473, USA

Cambridge University Press is part of the University of Cambridge.

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www.cambridge.org

Information on this title: www.cambridge.org/9781107547421

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First published 2015

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Bailey, Jeremy D., 1974–

James Madison and constitutional imperfection / Jeremy D. Bailey.

pages cm

Includes bibliographical references and index.

ISBN 978-1-107-12160-7 (hardback) – ISBN 978-1-107-54742-1 (paperback)

1. Madison, James, 1751–1836 – Political and social views. 2. United States – Politics and government – Philosophy. 3. Republicanism – United States – History – 18th century. 4. Constitutional history – United States. I. Title.

E342.B235 2015

973.5'1092–dc23 2015012683

ISBN 978-1-107-12160-7 Hardback

ISBN 978-1-107-54742-1 Paperback

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James Madison and Constitutional Imperfection

This book presents a provocative account of James Madison's political thought by focusing on Madison's lifelong encounter with the enduring problem of constitutional imperfection. In particular, it emphasizes Madison's alliance with Thomas Jefferson, liberating it from those long-standing accounts of Madisonian constitutionalism that emphasize deliberation by elites and constitutional veneration. Contrary to much of the scholarship, this book shows that Madison was aware of the limits of the inventions of political science and held a far more subtle understanding of the possibility of constitutional government than has been recognized. By repositioning Madison as closer to Jefferson and the Revolution of 1800, this book offers a reinterpretation of one of the central figures of the early republic.

Jeremy D. Bailey is the Ross M. Lence Distinguished Teaching Chair at the University of Houston, where he holds a dual appointment in the Department of Political Science and the Honors College. He is the author of *Thomas Jefferson and Executive Power* and coauthor of *The Contested Removal Power, 1789–2010*.

For Wilson Alexander Bailey

Preface

This book's cover includes a photograph of James Madison's letter to John G. Jackson, written in 1821. In that letter, clearly revised with care, Madison made an extraordinary confession to Jackson. He confessed that some of the delegates to the Federal Convention of 1787 had been overly influenced by Shays' Rebellion in Massachusetts. By overestimating the importance of that rebellion, these delegates imparted a "higher toned system than was perhaps warranted."

This confession should surprise readers who are familiar with Madison's political thought and with the history of the early republic. It is not surprising because an important American Founder said it. After all, Madison's friend and lifelong accomplice made that point over and over again as soon as the text of the new Constitution reached him in France. To Madison, Thomas Jefferson wrote, "The late rebellion in Massachusetts has given more alarm than I think it should have done."¹ Jefferson was more descriptive to William S. Smith: "Our Convention has been too much impressed by the insurrection of Massachusetts; and in the spur of the moment they are setting up a kite to keep the hen-yard in order."² It is surprising because, according to our accepted understandings of Madison, Shays' Rebellion represents the critical difference between him and Jefferson.

In what follows, I argue for a new reading of Madison, and this new reading emphasizes the alliance between Madison and Jefferson. In this, I have followed the path blazed by Lance Banning. I do not, however, agree with all of Banning's conclusions. Most importantly, I do not share Banning's central assumption that, for Madison, republicanism presupposed a particular variety

¹ Thomas Jefferson to Madison, 20 December 1787, in Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York: Library of America, 1984), 917.

² Thomas Jefferson to William S. Smith, 13 November 1787, in *Thomas Jefferson: Writings*, 911.

of federalism. I think Banning's otherwise definitive account is distorted on that point, and readers will see that I am not all that interested in determining the extent to which Madison was a nationalist.

This requires another clarification. At an earlier stage of this project, I aspired to write what I believed would be the first comprehensive account of Madison's political thought and practice over the course of his entire career. After some time, it occurred to me that this was not what I actually have done, for I leave many features of Madison's political thought unexamined (I do not discuss religious liberty, for example). While I do cover most of Madison's career (from ratification to retirement), I focus on one important feature of Madison's political thought: the problem of constitutional imperfection. Moreover, rather than offering new interpretations of familiar events in Madison's career, I instead spend more time on those that have received little and sometimes no attention. With both of these choices, my intention is to create space in the scholarship on the early republic by reconceiving how we understand Madison's constitutionalism by detaching it from what I call Madisonian constitutionalism. My intention is not to settle or end debate, but rather to push that debate forward and open it to more participants. It remains for another day, and hopefully for another scholar, to write that comprehensive and definitive treatment of Madison's political thought.

Acknowledgments

I must begin by saying that I am humbled by the fact that the United States has carved a place for university professors to do this kind of work. The State of Texas and the University of Houston afforded me two sabbaticals, one in Spring 2010 and the other in Fall 2014, without which this book would have been delayed for several more years. I should also thank the State of Texas and the University of Houston for preserving the institution of tenure. Tenure has given me the freedom and the will to undertake the necessary research, work that takes a long time and is often not recognized in annual merit reviews. I must acknowledge, however, that academic freedom at my university and in my state has declined since I arrived in 2007, and the changing incentive structure makes work of this kind less rewarding and more vulnerable to the meddling of the powerful and the rich. I fear that my son's generation will find university life less appealing and scholarly research less possible.

On a happier note, my graduate students at the University of Houston have been a source of energy and several deserve special mention. Between 2008 and 2014, Robert Ross and Shellee O'Brien came to UH and wrote doctoral dissertations related to Madison; they provided the intellectual community that is possible only in a doctoral program and cannot be taken for granted. Likewise, Sarah Mallams followed one rabbit trail after another, and was especially helpful in helping me understand the background of the famous Jefferson letter to Henry Lee. One undergraduate, Madison West, helped with the project in Spring 2013 and assisted with sorting out what was missing from Madison's correspondence and what was not.

This book is a continuation of a project that I began in the Fall of 1999. It thus has benefited from fifteen years of conversations ranging from academic chitchat to formal conference presentations, from anonymous reader reports of articles to intense debates into the night. There are more participants in these conversations, and more friends, than I can call to memory and as a result

more people deserving of thanks than are listed here. Early drafts of individual chapters of this book have benefited from the reading of friends and colleagues who share my interest in American political thought. Among those are David Alvis, Wyndham Bailey, James Ceaser, Daniel Cullen, Todd Estes, Dustin Gish, Ben Kleinerman, Daniel Klinghard, Marc Landy, Bill McClay, Jim Stoner, Flagg Taylor, George Thomas, Jeffrey Tulis, Steve Wirls, Scott Yenor, and Michael Zuckert. Deserving special mention are Rafe Major and Alan Gibson. Rafe read conference paper after conference paper and helped me find my argument; Alan shared his vast knowledge of Madison and the Madison literature and took the time to help me catch up and to correct many of my errors. I must also thank the reviewers for Cambridge University Press. Simply put, their hard work made this better. I remain indebted to Lew Bateman, whose support has been important for me, and who has been an aegis for many of us working in the field of the early republic. Thanks also to Mike Andrews and Pamela Edwards and the Jack Miller Center for providing an opportunity for me to discuss the early republic with many historians and political theorists. Of particular value to this project was their 2009 conference at Georgetown, where I was given the chance to introduce my Madison to many of the aforementioned friends.

It is customary to say that the persons thanked should not be held responsible for any errors of the author. That custom is especially warranted in this case, because the argument in what follows runs counter to much of what is normally taught and written about Madison. The argument is my own, and it will stand or fall as it is tested against the evidence. A version of Chapter 2 was published in 2012 as “Should We Venerate That Which We Cannot Love?: James Madison on Constitutional Imperfection” in *Political Research Quarterly*, 732–44. Portions of Chapter 4 were previously published in 2008 as “The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton” in *American Political Science Review*, 453–65, and in 2012 as “Was James Madison Ever for the Bill of Rights?” in *Perspectives on Political Science*, 59–66. This material is used with permission of the publishers.

Finally, my deepest debts are to my wife Wyndham and my son Wilson, who have to put up with my excursions to the past. Wyndham is a far better teacher than I am, and her sense of the present continues to light my way. Namaste. This book is dedicated to Wilson, whose birth coincided with Game 4 of the 2004 American League Championship Series and whose mental toughness continues to be a source of fatherly pride and wonder. The earth indeed belongs to the living, but its peaks and mysteries belong to the courageous and to the true.

Abbreviations

- Hunt *The Writings of James Madison*, ed. Gaillard Hunt, vol. 9 (New York: G. P. Putnam's, 1910).
- Koch James Madison, *Notes of Debates in the Federal Convention of 1787 as Reported by James Madison*, ed. Adrienne Koch (Athens: Ohio University Press, 1966).
- Madison Papers Presidency* *The Papers of James Madison, Presidential Series*, 8 vols., ed. J. C. A. Stagg, Jeanne Kerr Cross, and Susan Holbrook Perdue (Charlottesville: University of Virginia Press, 1984–2015).
- Madison Papers Retirement* *The Papers of James Madison, Retirement Series*, 2 vols., ed. David B. Mattern, J. C. A. Stagg, Mary Parke Johnson, and Anne Mandeville Colony (Charlottesville: University of Virginia Press, 2009–2013).
- Madison Writings* *James Madison: Writings*, ed. Jack N. Rakove (New York: Library of America, 1999).
- PJM *The Papers of James Madison, Congressional Series*, 17 vols., ed. William T. Hutchinson, William M. E. Rachal, Robert E. Rutland, and John C. A. Stagg (Chicago: University of Chicago Press; Charlottesville: University of Virginia Press, 1962–1991).

Republic of Letters

The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison, 1776–1826. 3 vols., ed. James Morton Smith (New York: Norton, 1995).

Scigliano

The Federalist, ed. Robert Scigliano (New York: Modern Library, 2000).

Contents

<i>Preface</i>	<i>page</i> ix
<i>Acknowledgments</i>	xi
<i>Abbreviations</i>	xiii
1 The Madison Problem	I
2 Appeals to Tradition: The Case for and against Veneration	15
3 Appeals to Elites: The Problem with Deliberation	38
4 Public Opinion before Parties	59
5 The Turn to Public Opinion	89
6 Appeals to the People: Madison and the Revolution of 1800	114
7 Appeals to Text and History	141
8 “Take care of me when dead”	171
<i>Index</i>	175

The Madison Problem

“We must refer to the monitory reflection that no government of human device and human administration can be perfect; that that which is least imperfect is the best government.”

James Madison, 1833¹

This book attempts to answer a question that arose during my examination of Thomas Jefferson’s transformation of executive power. That question is this: Given James Madison’s critique of Jefferson’s proposals for frequent appeals to the people, why did Madison collaborate with Jefferson to bring about and institutionalize a version of those frequent appeals? Put another way, if we assume that Jefferson’s Revolution of 1800 was actually a revolution, why did Madison go along with it?²

In answering this question, this book introduces and attempts to answer a second question. Specifically, what was Madison’s solution to the problem of constitutional imperfection? By constitutional imperfection I mean the gaps that necessarily arise because no constitution can anticipate every contingency and opportunity, and I mean the flaws that derive from the errors of the founders. Constitutions are doomed to have both, so, as a result, those who live under one must determine whether their own constitution has a doctrine with respect to the problem of constitutional imperfection. That doctrine will have to first determine the extent of the imperfection as well as provide a remedy. The remedy might be formal amendment, judicial interpretation, legislative deliberation, executive discretion, appeals to the people, or some combination of any of these. I believe studying Madison with an eye to the problem of

¹ Madison to unknown, 1833, Hunt 9: 528.

² Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (New York: Cambridge University Press, 2007).

constitutional imperfection will liberate his thought from what can be called Madisonian constitutionalism. By examining Madison's political thought and practice unburdened by the assumptions of Madisonian constitutionalism, this book seeks to offer a fresher and more accurate account of Madison himself.

Madisonian Constitutionalism

Studies of American constitutionalism often rely on one of two well-known dichotomies. The first is the famous contest between Jefferson and Alexander Hamilton, between a strict construction of the Constitution with an emphasis on consent and a broad construction of the Constitution with an emphasis on sovereignty. The second dichotomy pits Jefferson against Madison. Under Jeffersonian constitutionalism, institutions should represent and embody the will of the people, and constitutional change should be frequent because each generation has the right to give its consent to its fundamental laws. Under Madisonian constitutionalism, institutions should mediate the will of the people, and constitutional change should be relatively infrequent because people need a constitution they can "venerate" and tinkering with it every generation would undermine this requirement of government.³

There is much to be said for these dichotomies. The first one helps us classify and understand the way ideas and partisan politics have interacted throughout American politics.⁴ The second one is perhaps less well worn, but equally important. In particular, it is useful in distinguishing a republic from a democracy, and perhaps in separating presidential from parliamentary regimes, as well as those in which there is a tradition of strong judicial review from those where there is not.⁵ Unsurprisingly, this literature overlaps with the increasing calls for a new Constitution. For example, in a recent book recommending a new constitutional convention, Sanford Levinson urges readers to reject Madison and embrace Jefferson.⁶ In his view, the problem is that where there had once been a healthy debate between Jeffersonians and Madisonians, victories over totalitarianism abroad and Jim Crow at home have allowed twentieth-century Jeffersonians to join the Madisonians "in support of the Constitution in all respects." This is a mistake, in Levinson's view, because Madison's victory over Jefferson stands in the way of fixing important structural defects in the

³ See also Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (South Bend, IN: University of Notre Dame Press, 1996), 232–43.

⁴ A good example is Franklin D. Roosevelt's recommendation to employ Hamiltonian means to achieve Jeffersonian ends.

⁵ Robert A. Dahl, *How Democratic Is the American Constitution?* Second Edition (New Haven, CT: Yale University Press, 2003).

⁶ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford: Oxford University Press, 2006). See also Barber's discussion of the corrosive effects of Madisonian constitutionalism in Sotirios A. Barber, *Constitutional Failure* (Lawrence: University Press of Kansas, 2014).

Constitution. Levinson goes on to compare the newly converted Madisonian to the “battered wife who continues to profess the ‘essential goodness’ of her abusive husband.”⁷

In addition to providing a convenient historical framework for would-be constitutional reformers, the distinction between Jefferson and Madison has served as a useful measure of constitutional change across governments. In his study of what he calls the state constitutional tradition, John Dinan concludes that even though Madison might have won the contest with respect to the U.S. Constitution, Jefferson clearly scored many victories at the level of the state constitutions.⁸ Likewise, in their *The Endurance of National Constitutions*, Elkins, Ginsburg, and Melton collected data on every national constitution since 1787 to determine what it is that makes a constitution last over time. Their argument is framed in terms of Jefferson versus Madison, and they find that both visions of constitutional life win: the average length of endurance for a constitution just happens to be Jefferson’s nineteen years, yet constitutions seem to “improve” with age.⁹

In addition to offering a handy formula for social scientists who aim to classify democratic regimes, the difference between Jefferson and Madison is especially important for ongoing scholarship in political theory, as political theorists and intellectual historians have returned to considering what it is that constitutes any particular people. This literature is rapidly expanding, but what animates it is the difficulty in determining the moment at which, to borrow the formulation of the Declaration, “one people” becomes dissolvable from “another.” Or as Brian Steele put it in his groundbreaking study of Jefferson and American nationhood, the problem is that “two peoples cannot become two overnight.”¹⁰

The importance of the idea of Madisonian constitutionalism can also be seen in the renewed scholarly attention to “constitutional identity” and “constitutional maintenance.” For example, Walter F. Murphy quotes from Madison’s *Federalist* No. 49 to reveal a distinction between “constitutionalists” and “democrats”: constitutionalists are “more pessimistic about human nature than are democrats” and, unlike democrats, “they are concerned, sometimes obsessed with humanity’s propensity to act selfishly and abuse power.”¹¹ Further, Murphy appeals to Madison several times to distinguish constitutional

⁷ *Ibid.*, 20.

⁸ John J. Dinan, *The American State Constitutional Tradition* (Lawrence: University Press of Kansas, 2009).

⁹ Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

¹⁰ Brian Steele, *Thomas Jefferson and American Nationhood* (New York: Cambridge University Press, 2012), 12. See also Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham, NC: Duke University Press, 2010).

¹¹ Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: Johns Hopkins University Press, 2009), 8.

maintenance from mere constitutional change, especially constitutional change “run amok.”¹² Similarly, Gary Jeffrey Jacobsohn points to Madison, who, “like Burke, calculated the benefits of consistency in terms of winning over the ‘prejudices of the community.’”

Implicit in Madison’s calculation is the idea that a constitution, however clear and reasonable in its articulation of rules and principles, can only succeed in translating word into deed (and thereby establish a discernible identity) if fundamental continuity in basic law and actual constitutional practice are seen as two sides of the same coin.¹³

Jacobsohn’s invocation of Madison, however, is not a complete endorsement. Madisonian and Burkean consistency is important as it serves as a kind of capital to help constitutional theorists navigate the inevitable challenges of what Jacobsohn calls constitutional disharmony, but for Jacobsohn, this consistency is insufficient as a solution because sometimes “it is innovation that is in fact required.” Like Murphy, Jacobsohn sees this innovation as required by the universal claims made by natural law, which inevitably force serious constitutional theorists to look abroad to solve constitutional difficulties at home. “Constitutional imperfection is, then, the setting within which constitutional interpretation, especially as it looks outward, takes places.”¹⁴

From these accounts, we can see that the dichotomy between Madison and Jefferson still plays a role in the way political scientists and constitutional theorists think about constitutional design. This book, however, argues that this dichotomy is flawed or at least under-examined. Specifically, it argues that our notion of Madisonian constitutionalism has stood in the way of examining Madison’s political thought and practice on its own terms.¹⁵ In particular, it ignores the inconvenient fact that Madison spent the vast majority of his life helping Jefferson bring about changes that inevitably made the United States and its Constitution more Jeffersonian. If Madisonian constitutionalism is what scholars say it is, did Madison believe it?

Recent Work on Madison

Given the stakes, it is perhaps no surprise that there has been a resurgence of interest in Madison’s political thought. While the discussion so far suggests that there is basic unity among political scientists and constitutional theorists about Madisonian constitutionalism, there is in fact less unity among Madison

¹² *Ibid.*, 498–99, 512.

¹³ Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge, MA: Harvard University Press, 2010), 97.

¹⁴ *Ibid.*, 203.

¹⁵ I should acknowledge that there has been very good work revising Madisonian constitutionalism with respect to Madison and judicial review. See, for example, George Thomas, *The Madisonian Constitution* (Baltimore: The Johns Hopkins University Press, 2008), 1–38.

scholars about the important contours of Madison's thought. In short, Madison scholars are still divided concerning Madison's commitment to democracy and concerning the consistency of his political thought.

Years ago, Charles Beard and Robert Dahl found in Madison's *Federalist* essays an antidemocratic effort to divide and check the landless majority, but these accounts were challenged by Martin Diamond, who emphasized the freedom assumed by *The Federalist's* vision of a "commercial republic" and concluded that Madison was a "friend" to democratic government.¹⁶ Later, in the seminal study of Madison in the 1780s, Lance Banning argued that Madison's efforts to strengthen the national government were consistent with Madison's previous commitment to popular government.¹⁷ For the past two decades, the question of Madison's democratic commitments has remained unsettled. Eminent scholars such as Gary Wills, Isaac Kramnick, and Drew McCoy still find Madison to be suspicious of democracy, and a few, such as Sheldon Wolin and Richard Matthews, even go as far as to conclude that Madison was hostile to it.¹⁸ On the other side, Alan Gibson, Larry Kramer, Robert Martin, and Colleen Sheehan have built on Banning's argument by emphasizing Madison's democratic credentials.¹⁹

The question regarding Madison's commitment to democratic principles has also become entangled with another, namely whether there is "a Madison problem" with respect to Madison's consistency over time.²⁰ Broadly, the problem is that Madison's efforts in the 1790s to form and organize the Republican party seem inconsistent with Madison's efforts in the 1780s to form and ratify the Constitution of 1787.²¹ This problem can be formulated in numerous

¹⁶ Charles A. Beard, *An Economic Interpretation of the Constitution* (New York: The Free Press, 1913); Robert Dahl, *Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956); Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framers' Intent," *American Political Science Review* 53 (1959): 52–68.

¹⁷ Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca, NY: Cornell University Press, 1995), 250–52.

¹⁸ Garry Wills, *Explaining America: The Federalist* (Garden City, NY: Doubleday, 1991); Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1991); Richard K. Matthews, "James Madison's Political Theory: Hostage to Democratic Fortune," *Review of Politics* 67 (2005): 49–67; Sheldon Wolin, "Fugitive Democracy," *Constellations* 1 (1994): 11–25.

¹⁹ As discussed later, scholars within these groupings disagree among themselves about the contours of Madison's democratic theory as well as about the degree to which its form in the 1790s was a departure from that in the 1780s. See Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York: Cambridge University Press, 2009); Alan Gibson, "Veneration and Vigilance: James Madison and Public Opinion, 1785–1800," *Review of Politics* 67 (2005): 5–35; Robert W. Martin, "James Madison and Popular Government: The Neglected Case of the Memorial," *Polity* 42 (2010): 185–209.

²⁰ The phrase comes from Wood's chapter, "Is There a 'James Madison Problem'," in Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* (New York: Penguin, 2006), 141–72.

²¹ Alan Gibson, "The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research," *Review of Politics* 64 (2002): 331–38.