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978-1-107-12160-7 - James Madison and Constitutional Imperfection

Jeremy D. Bailey

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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*.

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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.

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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.

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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

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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, Flag 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	<i>The Writings of James Madison</i> , ed. Gaillard Hunt, vol. 9 (New York: G. P. Putnam's, 1910).
Koch	James Madison, <i>Notes of Debates in the Federal Convention of 1787 as Reported by James Madison</i> , ed. Adrienne Koch (Athens: Ohio University Press, 1966).
<i>Madison Papers Presidency</i>	<i>The Papers of James Madison, Presidential Series</i> , 8 vols., ed. J. C. A. Stagg, Jeanne Kerr Cross, and Susan Holbrook Perdue (Charlottesville: University of Virginia Press, 1984–2015).
<i>Madison Papers Retirement</i>	<i>The Papers of James Madison, Retirement Series</i> , 2 vols., ed. David B. Mattern, J. C. A. Stagg, Mary Parke Johnson, and Anne Mandeville Colony (Charlottesville: University of Virginia Press, 2009–2013).
<i>Madison Writings</i>	<i>James Madison: Writings</i> , ed. Jack N. Rakove (New York: Library of America, 1999).
PJM	<i>The Papers of James Madison, Congressional Series</i> , 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).

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Scigliano

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