

*James Madison*  
AND THE FUTURE OF  
*Limited Government*



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EDITED BY JOHN SAMPLES

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# Introduction

*John Samples*

James Madison advanced the cause of liberty before, during, and after the Constitutional Convention of 1789. His constitutional vision of limited government has enabled Americans to enjoy liberty and its material and spiritual rewards. As we begin what may be the next American century, the 250th anniversary of Madison's birth offers a chance to reflect on the future of his legacy. The essays in this volume, first presented at a conference at the Cato Institute in March 2001, explore the relevance of Madison's ideas for the future of the United States and the world. Madison, it turns out, may offer as much to coming generations as he has to the living.

## **Reviving Limited Government**

In the *Federalist Papers*, Madison noted that the Framers tried to create a government strong enough to control the governed and yet somehow able to control itself. The Framers saw the Constitution as a social contract that delegated power from the people to advance the goals cited in the Preamble. That delegation was both limited to the powers enumerated in the Constitution and constrained by the Bill of Rights.

Judge Alex Kozinski and co-author Stephen Engel as well as Roger Pilon point out in their contributions to this volume that the original Constitution did not grant Congress a general power to spend. It did grant the authority to raise money to pay national debts as well as to provide for the common defense and the general welfare. Madison denied that the "general welfare" clause gave Congress unlimited authority to tax and spend. The clause granted authority to spend only in pursuit of the powers enumerated in Article 1, Section 8, of the Constitution.

Contemporary American government has slipped free from these constitutional constraints. Kozinski and Engel document how the general welfare clause of the Constitution became an excuse for

unlimited congressional spending and a spur to a burgeoning federal Leviathan. Roger Pilon expertly traces the downfall of Madison's idea of enumerated powers, first in the ideas of the Progressives and later in the political acts of the New Deal. Madison would be shocked by a federal government that consumes one-fifth of national wealth and regulates most economic activity. He would be less shocked that the federal government is largely in the business of redistributing wealth. *Federalist* No. 10 argued that redistribution arose from a flawed human nature and tended to destroy republican liberty.

Congress has not fulfilled Madison's high expectations for representative democracy. He conjectured that delegating power from the voters to their representatives would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."<sup>1</sup> Today most members of Congress spend most of their time either pushing for pork for their districts or acting as ombudsmen for constituents who have problems with federal programs. Members of Congress have little time or incentive to look beyond local concerns toward the national interest.<sup>2</sup> Far from "refining and enlarging" public opinion, members of Congress seem to have become parochial servants of special interests. As James Buchanan notes, this struggle to redistribute income and wealth feeds on itself, leading both to a strong federal government that endangers liberty and to citizens seeking wealth through political activity, rather than individual effort.

Madison's friend Thomas Jefferson offered a clear solution for constitutional failure. In the Declaration of Independence, Jefferson argued that government existed to secure the rights of life, liberty, and the pursuit of happiness. When a government failed to secure those rights, "it is the Right of the People to alter or to abolish it, and to institute new Government. . . ." Roger Pilon shows in his contribution that American government currently lacks legitimacy as defined by consent to a constitutional order. He recommends amending the Constitution to accommodate the welfare state or else rolling back the expansive government built up over seven decades. Jefferson reminds us that a third alternative always exists: the right of a people to institute a new government.

Madison was not as keen as Jefferson was on abolishing and instituting governments. As Robert McDonald shows, Madison hoped prejudice and settled habits would support the new constitution. Yet he was not just a defender of tradition. Joyce Malcolm's essay indicates that Madison thought government could be reformed through reasoned action. In that spirit, some contributors to this volume suggest paths for restoring limited government for the United States.

Professor Malcolm shows that Madison did not support judicial review in theory or practice. Yet the Supreme Court offers hope in the endless battle to restrain the state. A majority of the Court has partially revived federalism in recent years. Kozinski and Engel, and Pilon, analyze this trend in Supreme Court jurisprudence and insist that reviving federalism requires judicial limits on what Congress can regulate. Matters that should be left to the states (i.e., producing most public goods) should be legally off limits to Congress.

My own essay examines the citizen initiative as a way to protect liberty and constrain government. Madison had his doubts about direct democracy, a skepticism that perhaps led him to exaggerate the promise of representative democracy. His skepticism was not mere prejudice; the history he read in the months before the constitutional convention told terrible stories of majority tyranny in direct democracies. Looking at more recent evidence, I conclude that the initiative as practiced in 23 states has by and large advanced the cause of liberty. That conclusion does not refute Madison's skepticism about direct democracy for the nation as a whole. Lacking experience with a national initiative, I believe we can only speculate about its effects on liberty or any other political value. If the United States in the future takes up the question of a national initiative, Madison's doubts about pure democracy should be the starting point for our deliberations. But it need not be our final judgment.

### **Factions and the Future**

Madison believed both that all political power came originally from the people and that voters would be the best guardians of the Constitution. He also saw the need for "auxiliary precautions" to uphold the Constitution. As Joyce Malcolm notes, these precautions often resulted in divided sovereignty. The division of power between

national and state governments created a healthy competition that might restrain the overly ambitious. As Madison saw it, the three branches of the national government would be jealous defenders of their turf and thus effective checks against unrestricted power in the capital.

Madison feared that abuses of power might grow out of a majority faction's possessing unrestrained political power. He believed differences over the distribution of property or over religious doctrine divided citizens, and that when passions ran high, such divisions fostered factions that might strive to oppress the wealthy or unorthodox minorities. Indeed, political passions, coupled with the human tendency toward factionalism, might even lead to civil war. How might factions be tamed and controlled? Palmer, Levy, and Hayes are among the contributors to this volume who address the question of factions in contemporary American politics.

### *Multiculturalism*

The political philosopher Chandran Kukathas explicates how contemporary multiculturalism challenges liberal societies:

In modern societies, particularly the societies of the liberal democratic West, cultural diversity poses a challenge not only to the makers of government policy, but also to the philosopher looking to understand how it might be possible—in principle—for people of different ways to live together. The challenge is posed because society's institutions have been challenged, as the members of different groups have demanded "recognition." They have demanded not simply recognition of their claims to a (just) share of the social pie but, more important, recognition of their distinct identities as members of particular cultural communities within society.<sup>3</sup>

Tom G. Palmer and Jacob Levy take up this challenge within a Madisonian framework. They address in different ways the question of whether factions founded on cultural differences endanger the American republic.

Palmer denies the received wisdom that classical liberals believe politics can never rise above particular interests to attain a common good. According to Palmer, Madison believed Americans share a limited though real common good defined by liberty and a regime of rights. Madison's liberal republic has no place for group-specific

rights or the subordination of citizenship to group identity. Madison would not, Palmer avers, endorse notions like “racially authentic” representatives and group reparations.

Levy takes a different tack. He recounts Madison’s overlooked political activity and reflection related to American Indians. Madison comes off well in Levy’s account; he recognized that the Cherokees in particular had justice on their side in their claims against the United States. Levy concludes that Madison believed some groups threatened by a majority—like the American Indians—might require special group protections.

### *Religion*

Madison thought religious commitments could sometimes lead to the oppression of a minority by a majority. His famous *Memorial and Remonstrance against Religious Assessments* excludes religious faith from the ambit of political power. Walter Berns provides a provocative explication and critique of Madison’s thinking on religion and politics. Berns argues that Madison rejected the view common to his time and to much of American history that government should support religion as a way of improving public morality and instilling the virtues needed in a self-governing republic. Berns challenges Madison’s view that republics should be completely secular, while Michael Hayes suggests that Madison’s separation of religion and politics comports well with both Christianity and conservatism. The true vocation of the Christian, Hayes concludes, lies in the private sphere of persuasion and ministry.

### *Majorities*

Madison worried that majority factions would endanger the new American republic. My contribution to this volume argues that the historical record of direct democracy in states with the initiative provides little evidence of majority tyranny. Moreover, contemporary Americans should be at least as concerned about minority factions. The economist Mancur Olson has demonstrated that the costs and benefits of political activity give intense minorities ample opportunity to exploit rationally apathetic majorities, especially through congressional policymaking. As a result, government grows larger than a majority wishes. Minority factions bent on plunder are the most harmful ill of the contemporary American body politic.

## Madison and the World

Some see Madison as more Virginian than American, and certainly as more American than a citizen of the world. Yet that impression is a mistake. To prepare for the constitutional convention, Madison importuned Thomas Jefferson, then living in Paris, to buy for him all the leading European books on constitutions and the history of republics. Madison was a citizen of the world and a student of all of human history. Both James Dorn and John Tomasi believe that Madison's legacy should inform the future of humanity.

James Dorn argues that Madison would counsel emerging democracies to avoid simple majoritarianism in favor of a constitutional republic that protects liberty and property rights. Dorn marshals data showing that limited, constitutional government offers developing countries both freedom and prosperity. After decades of statism, poverty, and restrictions on freedom, the leaders of developing nations may be ready to consider Madison's realistic reflections on the limits of politics and government.

John Tomasi draws upon Madison to imagine what an international government might look like in the era now upon us. To quote Jefferson again, the United States began with the belief that all men are created equal and endowed with certain rights. That universality has been subject to much doubt, not least from postmodern theorists. Tomasi renews Jeffersonian universality through Madisonian means. His essay should provoke (and delight) the friends of liberty.

A liberal might say that a "United States of the World" may be the destiny of coming generations; if so, we should hope that Madison's skepticism about political power informs the making of any global constitution. Madisonian worries about a world government are germane. In *Federalist* No. 10, Madison notes that property is the most important source of factions that pose the danger of civil war. Creating an international polity might well threaten property if the "South" had working majorities in the new government and decided to expropriate the wealth of the "North." Seeking peace through world government might instead bring war and even greater restrictions on human freedom.

## Conclusion

Joyce Malcolm recalls that Madison once asked:

Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks—no form of government can render us secure. To suppose that any form of

government will secure liberty or happiness without any virtue in the people is a chimerical idea.<sup>4</sup>

Many of the contributions to this volume explicitly or implicitly address Madison's tough question anew. Do Americans possess enough virtue to maintain a limited government? The historian H. W. Brands suggests that Americans have long possessed the prime virtue needed for a classical liberal society, skepticism about government:

From before they had become a nation, and continuing until almost the middle of the 20th century, Americans registered chronic skepticism regarding a more active role for the federal government in their lives. Every generation harbored its advocates of skepticism, but every generation comprised a larger collection of skeptics.<sup>5</sup>

James Buchanan is less optimistic. He sees the conduct of individuals as part of a society where everyone seeks to take wealth from someone else. Roger Pilon indicates how far the American people have moved away from the personal attitudes necessary for limited government. As government grows, individuals focus on gaining favors from the state. In an older language of politics, unlimited government corrupts its citizens and undermines the virtues needed to support a republican form of government. Buchanan recommends "investments" in ethics, especially in restoring the old puritan constraints on individual conduct, constraints that pushed people toward self-reliance rather than political rent-seeking.

Difficult questions about human nature complicate all speculation about the future. Should we be pessimistic about freedom and limited government? In the end Madison believed humans were neither angels nor devils:

As there is a degree of depravity in mankind that requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.<sup>6</sup>

Like Madison we may hope that the republican qualities of human nature as nurtured and constrained by constitutions triumph over

the traditional enemies of freedom. The essays in this collection offer due honor to the architect of the American Constitution and a hopeful start toward that victory. James Madison matters now more than ever.

### Notes

1. *The Federalist* No. 10 (James Madison).
2. Dennis C. Mueller, *Constitutional Democracy* (New York: Oxford University Press, 1996), chap. 1.
3. Chandran Kukathas, "Liberalism and Multiculturalism: The Politics of Indifference," *Political Theory* 26 (October 1998): 686.
4. James Madison, "Speech in the Virginia Ratifying Convention" June 20, 1788, *Papers of James Madison*, vol. 11, p. 163.
5. H. W. Brands, *The Strange Death of American Liberalism* (New Haven: Yale University Press, 2001), p. 1.
6. *The Federalist* No. 55 (James Madison).

# 1. Madison's Angels

*James M. Buchanan*

But what is government itself, but the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In forming a government which is to be administered by men over men, the great difficulty lies in this: you must first enable government to control the governed; and in the next place oblige it to control itself.

James Madison, *The Federalist* No. 51

I could scarcely go wrong by starting with this most familiar passage from James Madison's justly acclaimed *The Federalist*, No. 51. Here Madison succinctly provides a justification for government itself and, at the same time, offers the reason for constitutional constraints on political authority. I shall not challenge Madison's statement here. Indeed, Madison retains an honored place in my personal pantheon.

What I propose to do, instead, is to examine Madison's statement more carefully. But, at the outset, let me say that my initial project was to examine what must have been Madison's counterfactual image of a society without governance, a society of angels. Just what sort of behavior would such angels exhibit, and what would the social interaction among the separate angels look like? I soon found myself in difficulty. As my old professor Frank Knight always said, it remains nearly impossible to describe what heaven would be like. Nonetheless, it does seem to me that Madison must have had some such image in mind when he wrote that statement.

We may begin to unravel some of his thinking.

Consider Madison's use of the word "angels" twice in the passage cited. I suggest that Madison did not intend to refer to the beings called angels in modern dictionaries. There, angels are defined as

beings that possess suprahuman attributes or qualities. Such a definition, in Madison's construction, would rob the passage of much of its meaning. By "angel" I think that Madison referred to a being recognizable as human but who does indeed treat others in a fashion that, if generalized to all persons, would eliminate the need for governance. All of us can, I think, imagine such persons to exist, as ideals toward which we might strive but not as divinities of unattainable perfection. The most imaginative element in Christianity is surely the attribution of humanity to Jesus.

This interpretation of Madison allows us to place ethics alongside politics as alternative and complementary means to move beyond the ever-threatening Hobbesian jungle.

We may note, in particular, that Madison remained unclear about the particulars of the behavioral requirement. He did not say that government would be unnecessary if only all persons behaved like angels all of the time. He did not assume that all persons could be identical. But some persons, some of the time, surely behave toward each other in such fashion as to make explicit governance of those persons unnecessary. And, Madison did not imply that no persons were ever angels. Recognizing that individuals are different in relevant behavioral dimensions allows us to construct an ethical spectrum that may be used to describe societies potentially, ranging from one extreme defined by "all persons behave as angels all of the time" to the other extreme defined by "no person behaves as an angel any of the time."

Madison does not directly address the subsidiary question that such a spectrum prompts: Does the need for, and the range and scope of, government vary as societies find themselves differently located along an ethical scalar? Can and does ethics serve as a substitute for politics, and in what degree and in what manner? Can we make government less necessary by making more persons more like angels more of the time?

It seems clear that there are externalities between ethics and politics considered as instruments to keep our behavioral proclivities within acceptable limits. The libertarian ideal of ordered anarchy comes closer to realization if and when more persons more of the time behave like Madison's angels. On the other hand, and conversely, an increase in the politicization of our society almost necessarily reduces the proclivities of persons to behave like angels. In a

paper written a quarter century ago entitled "Markets, States, and the Extent of Morals," I suggested that, if we politicize activities that extend beyond our moral capacities, we necessarily generate increased exploitation. To put this argument in Madisonian terms, if we put too much reliance on politics, we may stifle even those behavioral motivations that might qualify as near-angelic. This conclusion becomes especially relevant as and if we allow our political units to become too large, in both membership and territorial extension. A returned James Madison would surely stand aghast at the behemoth that is the United States federal government.

How can we act like angels, even in limited aspects of our behavior, when we are thrown, willy-nilly, into the gladiatorial pit of present-day political reality? Madison was not suggesting that we are necessarily gladiatorial, always out to destroy one another, facing a fate from which only politics can save us. Such interpretation would distort the meaning of the message. Madison would say that now, as in 1788, we need laws to control our behavior. But he would surely also say that now the political realm has gone far beyond his imagined constitutionally ordered limited governance.

We create and maintain institutions of governance to preserve social order in light of the proclivities that we, as members of the community, exhibit in our behavior, one toward another. The attainability as well as the desirability of this order remain critically intertwined with those proclivities, as measured along our imaginary ethical scalar. We must move well beyond Madison and realize that justification of marginal extensions of government must be grounded on something other than the universal human attribute of ethical fallibility. At the margin, the positive benefit-cost ratio from investment in ethics may be much larger than those from investment in politicization, which may indeed be negative. We may be logically libertarian in our opposition to all efforts to enlarge the range and scope of governance while, at the same time, we may be persuasively puritan in our discourse on behavioral attributes.

Finally, we should never forget what was surely James Madison's starting point, namely, his presumption that the ideal society is one in which all persons are indeed angels and in which governance has no place.



## 2. Recapturing Madison's Constitution: Federalism without the Blank Check

*Alex Kozinski and Steven A. Engel*

James Madison spent the last six years of his life troubled by a national debate over federalism. On the one side stood the “nullifiers,” who claimed that the Tariff of 1828 was unconstitutional and that the states, as sovereign entities, retained the right to ignore it, or even secede from the Union. On the other side were the nationalists, who argued that sovereignty resided only in the federal government and that the states had no authority to question its dictates. Madison feared the nullifiers much more than the nationalists, but the old man was convinced that both camps misunderstood the government that his generation had established. The nation must not forget, he warned, that the Constitution had set in motion a regime “so unexampled in its origin, and so complex in its structure” that the traditional “political vocabulary” of sovereignty could not apply.<sup>1</sup> The Founders had divided sovereignty between two governments, leaving the federal and state governments each supreme in their respective spheres.

The one thing Madison refused to do during his last days was to release his notes on the Constitutional Convention, which he had tirelessly recorded more than forty years before. The Convention had deliberated in secret; so to many Americans of his time, Madison's notes were a buried treasure of constitutional wisdom. Madison refused requests that he release them during the nullification crisis, fearing that the public might then read them with partisan eyes. Instead, he repeated his desire to postpone their publication until after his death, when no one could malign his motives for publishing them. Madison hoped that the notes would be regarded as a gift to the people of the United States.

Well, not exactly a gift. Madison was also convinced, like some contemporary public figures, that private publishers would pay big money for his memoirs. Madison expected that his wife, Dolly, and

his family might live for some time off the proceeds. He instructed Dolly on the fine points of extracting a good deal from the publishers in New York.

It turns out that Madison had mistaken the commercial value of this national treasure. Dolly Madison wrote to Congress that the reputable publishers were not sure the debates would be a best seller, and so they would not publish them unless the widow paid some of the production costs. She might therefore lose money if the notes failed to sell as well as Madison expected. Mrs. Madison asked whether the government might be willing to buy the manuscript. After some haggling, she agreed to accept \$30,000 (the equivalent of \$467,470 in the year 2000)<sup>2</sup>, so long as she retained the foreign copyright.

But there was a problem. A number of members believed that Congress had no authority to purchase the copyright. John Calhoun, the arch-proponent of state's rights, expressed his admiration for the manuscript, but he asked Madison's supporters what part of the Constitution gave Congress the power to purchase a copyright and publish a book. Madison himself, Calhoun recalled, had argued that Congress's power to raise money for the "general welfare" did not permit spending beyond the constitutionally enumerated powers of the federal government. Fortunately for Madison's family, Madison's vision of a limited spending power did not carry that day.

With the publication of Madison's account of the Constitutional Convention, his position as the "Father of the Constitution" seemed assured. But as the debate over purchasing his manuscript reveals, not all of Madison's constitutional views survived him. In considering Madison's legacy today, we might ask whether this Founding Father would even recognize the federal government we have today.

So why do we honor Madison as our constitutional father? As his description of the debates reveals, the Constitution was the work of many men. Madison was one of the most vocal advocates of the system that emerged from the Convention, but he was hardly the only one. Nor was he the sole architect of the great compromises that made the adoption possible. Madison shared the writing of the *Federalist Papers* with Alexander Hamilton and John Jay, and by the time Madison appeared at the Virginia Ratifying Convention, six other states had already ratified.<sup>3</sup> Although no one did more than Madison to ensure the ratification of the Constitution, he is not the