

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

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

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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

father of the Constitution in the sense that Thomas Jefferson is the father of the Declaration of Independence.

We honor Madison as the Father of the Constitution because of his contribution on the plane of ideas. Madison was the political philosopher of the Constitution, the one who articulated the grand theory on which the text was based.<sup>4</sup> As the national government descended into crisis in the 1780s, Madison researched in painstaking detail the fate of confederacies and republics in the past. He concluded that republics that grew too large inevitably collapsed into tyranny. On the other hand, confederacies inevitably were undone by rivalries among their constituent republics. As Madison pored through the books that his friend Thomas Jefferson sent him from France, he sketched out a new political system, which he believed might rescue the Union from its weakened state and from the mistakes of the past.<sup>5</sup>

The name of this political theory was federalism. Its secret was a form of dual sovereignty that had never been tried before. Madison posited that state and federal governments might coexist as sovereigns over the same space, representing and acting on behalf of the people of the United States, the ultimate source of authority. The national government would enjoy a limited set of powers, which Madison described as “few and defined,” enabling it to deal with those matters that concerned the states collectively, such as national defense and interstate commerce. At the same time, the states would retain everything else—powers that were “numerous and indefinite, extend[ing] to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”<sup>6</sup>

The states would retain all the attributes of sovereign nations, “form[ing] distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them within its own sphere.”<sup>7</sup> But the Constitution would limit the states in two ways. They could neither regulate in ways that frustrated national policies on matters of national concern nor violate any of the explicit limitations in the Constitution, which in Madison’s day were few in number but have grown considerably since the adoption of the Fourteenth Amendment.

Madison understood that this federal system had the potential to be superior to any historical alternative. By creating a system of

dual sovereignty, the Constitution established a central government with the authority to secure national goals while, at the same time, maintaining the local autonomy necessary for good republican government. The smaller republics would provide their citizens with a greater chance to participate in the democratic process and their representatives would more closely reflect their interests. Rather than imposing a uniform solution to local problems, the state governments would enact laws suited to the character and interests of their citizens.

While a consolidated government might obtain some of those benefits by delegating power to local governments, divided sovereignty fundamentally changed the business of government by introducing competition into that oldest of monopolies. Federalism aimed at producing many of the benefits one would expect from open competition. The most important benefit, Madison recognized, was that each government would stand watch over the other, to prevent its rival from abusing the liberty of the citizens and to provide instruments of judicial redress.<sup>8</sup>

The multiplication of governments would also improve the quality of institutions. As each state government chooses its own way, there will be a greater diversity of choices. Some may be bad choices, but others will not. The good ones may be followed, replicated, and improved upon. Competition among governments also gives the states an incentive to innovate as they compete for taxpayers and encourages them to improve their infrastructure and laws in order to attract a mobile citizenry. Many bad ideas are also avoided, because states know that businesses and citizens may vote with their feet.

Madison well understood the virtues of this “compound republic.” But while we may praise this system on a theoretical level, we should consider whether it really reflects our present system of government. Madison described a limited federal government, whose powers were few and defined, limited to regulating only national objects. Contrast that vision to the federal government of today. By the mid-1980s, the federal government had effectively set a national speed limit, minimum wage, and drinking age. It is a federal crime to grow marijuana on your land or to shoot a wolf menacing your cattle. Many Americans turn to the federal government to provide them with health care, disability and unemployment

insurance, and a social security pension. And in return, Americans give more than a third of their income to the federal government. We may talk about a federal government of limited powers, but for much of the past century it would be difficult to discern any limits on that power.

At some point in the recent past, the Supreme Court began to remember that the Constitution contemplated a federal government of limited authority. In several decisions, the Court took small steps to recapture the Madisonian Constitution, often citing Madison himself. The Court barred Congress from requiring state officers and state legislatures to carry out federal policies;<sup>9</sup> it imposed upon Congress clear statement rules to ensure that decisions altering the federal balance are not made lightly;<sup>10</sup> and it revived the Eleventh Amendment as a protection of the states' sovereignty.<sup>11</sup>

These decisions reflect a desire to recapture the system of dual sovereignty that Madison envisioned. When the federal government regulates every aspect of our society, we lose the benefits of energetic state governments. State politicians have proven unwilling to resist, because it always seems better to have someone else pay the bills, and many state politicians run for election with the ambition of someday ascending to federal office. Thus, if the Supreme Court neglected to enforce the constitutional limitations on federal power, few state or local politicians would mourn the demise of federalism.

Through recent decisions, the Court has attempted principally to protect state sovereignty by constraining the *means* through which the federal government might regulate state actions. But protecting federalism by limiting the choice of means at the national government's disposal is an incomplete solution. Congress must have broad discretion in choosing how to exercise its powers, and in any event, if Congress is determined to regulate an area, it may always choose alternative means to achieve the same goal. So long as the end result is constitutional, the legislature will find a way to reach it.

In two recent instances, though, the Court has taken the more significant step of striking down laws it regarded as beyond the *ends* permitted by the Constitution. Although there was nothing particularly objectionable about the means used in either case, the Court concluded that the *object* of the legislation was a matter of local, not federal, concern. In the first of those decisions, *United States v. Lopez*, the Court held that Congress could not make a federal

crime out of possessing a gun near a high school.<sup>12</sup> The Court began by quoting what it called “first principles,” which, not surprisingly, turned out to be James Madison’s words: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”<sup>13</sup>

The Court reached the unremarkable conclusion that prohibiting gun possession in schools, though no doubt a good idea, fell outside Congress’s power to regulate interstate commerce. When Alfonso Lopez, a Texas high school senior, packed his .38-caliber handgun and went to school, few ordinary people would assume he was engaging in commercial activity, much less commercial activity with implications in Oklahoma, Arkansas, or Louisiana. But, in deference to Congress, the Court had concluded 50 years earlier that pretty much anything could affect interstate commerce if enough people were doing it.<sup>14</sup> *Lopez* reflected the judgment that, at least in the most obvious instances, the Court was once again willing to place some things outside Congress’s reach.

The Court reiterated this conclusion in 2000 in *United States v. Morrison*, when it struck down a civil remedy provided by the Violence Against Women Act.<sup>15</sup> The Court concluded that Congress lacked the power to create a remedy for violence against women, not because the end was unimportant, but because under our constitutional scheme, what is federal is not coextensive with what is important. We entrust the states with the authority to protect citizens against crime. If the states refuse to protect certain citizens, the federal government might intervene, as it did during the civil rights era. But absent evidence that the states were hostile to women, the area lay beyond the concern of the national government.

For those convinced of Madison’s wisdom, the *Lopez* and *Morrison* decisions represent necessary steps in restoring the balance of powers between state and federal governments. If we are to enjoy the benefits of dual sovereignty, we must allow the states to solve the local problems within their competence. They should not be reduced to clients of the federal government, allowed to regulate only those matters that the national government chooses to leave in their hands.

Although these recent decisions may help restore the federal balance, they will never be more than pennyweights so long as the Supreme Court neglects one critical part of Madison’s Constitution.

While the Court has recognized that Congress may not regulate fields beyond its enumerated powers, it has granted Congress the power to spend without limit. The days where Congress debated the constitutionality of purchasing Madison's copyright are long gone. Instead, we see debates over whether Congress should bribe the states into passing stricter drunk-driving laws. Madison recognized in his own time that an unlimited federal spending power could not coexist with a truly federal government. So long as the Supreme Court ignores Madison's warning, true federalism will remain a thing of the past.

The Constitution lacks a spending clause, but the first enumerated power grants Congress the authority to levy taxes and otherwise raise money "to pay the Debts and provide for the common Defence and general Welfare of the United States."<sup>16</sup> The first thing to note about this clause is that it does not speak of spending at all. Instead, it qualifies Congress's power to raise money by noting that it must be for the purpose of paying the nation's debts and of providing for national defense and the general welfare. The meaning of that last phrase, the acknowledgment that Congress may provide for the "general welfare," has been a source of controversy since the nation's founding.

The Constitution's critics feared that clause granted Congress the power not simply to spend money but to "adopt any measure that would in effect provide for the general welfare. Not so, Madison wrote in *The Federalist*. That clause refers only to the purposes for which Congress may raise money. It does not authorize Congress to spend money for any purpose whatsoever. The General Welfare Clause precedes Congress's other enumerated powers and, as Madison wrote, "Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars."<sup>17</sup> In short, it would make no sense to list a series of particular purposes, which would all be rendered unnecessary by an all-encompassing general phrase. Thus, the General Welfare Clause does not permit spending for all purposes. The clause permits spending only in the exercise of those powers enumerated in Article 1, section 8, of the Constitution.

Madison offered a second justification for such a reading of the General Welfare Clause. The phrase "common defense or general welfare" was lifted right out of the restrictive Articles of Confederation. The Articles provided that "[a]ll charges of war, and all other

expenses that shall be incurred for the *common defense or general welfare*'' should be paid by requisitions from the states.<sup>18</sup> The drafters of the Constitution copied this clause, but added the power to levy taxes directly, rather than forcing the government to rely exclusively on state contributions. Nothing indicated an intention to broaden Congress's power to spend, and Madison argued that the General Welfare Clause could not in any way be construed as expanding Congress's powers beyond the enumerated objects of the Constitution.

But that's precisely how Alexander Hamilton chose to read the clause broadly during his tenure as Secretary of the Treasury. The great nationalist of the Federalist era, Hamilton advocated a reading that would enable Congress to spend for any purpose that served the "general welfare," whether that purpose lay within its enumerated powers or not. Ignoring the clause's origin in the Articles of Confederation, Hamilton argued that the General Welfare Clause was a catchall, allowing Congress to deal with the numerous incidents that would otherwise be left without provision. The only limit, said Hamilton, was that "the object to which an appropriation of money is to be made [must] be General and not local; its operation extending in fact, or by possibility, throughout the Union and not being confined to a particular spot."<sup>19</sup> This constraint would allow Congress to devote money to national causes, but it would prevent the federal government from spending for local matters, such as the projects that are the pork of modern politics.

Madison sharply criticized the Hamiltonian view, because he recognized that there was no "power of any magnitude which, in its exercise does not involve, or admit, an application of money."<sup>20</sup> The tendency of Hamilton's construction, Madison argued, would be to destroy the meaning and effect of the principle of enumerated powers. If Congress were found to be able to spend money on any national purpose, then the federal government would soon find itself involved in regulating spheres of activity reserved to the states.

History left the question to the future, since for a while Congress lacked both the will and the resources to intervene too heavily in local affairs. But the enactment of the Sixteenth Amendment in 1913, giving Congress the power to tax income, created a revenue machine that would fuel a growing appetite for national power. When the New Deal Congress asserted hitherto unknown federal authority, the Supreme Court confronted head-on whether Hamilton or Madison's

view of the Spending Clause would prevail. In 1936, in *United States v. Butler*, the Court considered whether Congress could authorize the Secretary of Agriculture to pay farmers not to grow crops in order to artificially raise the market price.<sup>21</sup> This was a classic case of Congress spending money to regulate a field not otherwise within the domain of congressional power, at least as Congress's authority under the Commerce Clause was then understood.

The Supreme Court concluded that Hamilton's was the better reading of the spending power. Without elaborating on its reasons, the Court held that the General Welfare Clause gave Congress the power to spend for any general purpose. Although *Butler* invoked another reason to strike down the statute, the damage was done, and the next year, the Court relied on it to hold that Congress might set up a national system of unemployment insurance.<sup>22</sup> These days, the Court would justify such spending under Congress's power to regulate interstate commerce, but back then, the Court concluded that simply because unemployment was a problem of national concern, Congress could address it through its power of the purse.

Given the green light by the Supreme Court, Congress put federal money into all areas of the national life over the ensuing decades. Congress not only spent money but conditioned spending in order to regulate states and citizens. The state legislatures readily accepted the federal money, concluding there was more to gain from accepting the funding than from asserting their independence. In 1984 Congress enacted a law that directed the Secretary of Transportation to penalize states where the legal drinking age was under 21, by reducing the federal highway funds granted to the state each year. South Dakota filed suit claiming that the condition on highway funds was unlawful because it regulated an area reserved to the states. Although in the 1980s Congress could regulate just about anything under the Commerce Clause, the amendment repealing Prohibition had expressly given the power to regulate alcohol consumption to the states. Thus, South Dakota would seem to have had a pretty good argument that Congress was trying to regulate a matter beyond the scope of federal power.

In those early days of the Rehnquist Court, many hoped it might back South Dakota and constrain the spending power. But the Court did not see things that way; it affirmed once more that Congress's power to spend for the "general welfare" could go beyond its enumerated powers.<sup>23</sup> The Court suggested there might be a limit on

how far Congress could condition the receipt of spending: The spending must be reasonably related to the purpose of the federal grant. But the Court applied this test in a way that was not much of a limit at all. It concluded that a state's drinking age was related to highway funds, because a higher drinking age would reduce teenage drinking, which would reduce the number of drunk teenagers on the highways, which would lead to safer highways.

That's an awfully attenuated way of ensuring that the states do not misuse highway funds. In fact, it does not have much more to do with the highways than guns at school have to do with interstate commerce. What really happened is that Congress decided a 21-year-old drinking age was a good idea, and it pressured the states to follow suit. But the drinking age is exactly the kind of local issue that the Constitution leaves to the states to regulate. Maybe some states want no drinking age; others prefer an 18-year-old drinking age; and some want to ban alcohol altogether. But whatever policy a state chooses, our federalism understands it as a decision for the people of the state who must live under it. By placing a rider in a funding bill, Congress constrains state prerogatives by imposing a national standard on a quintessential local issue.

If Congress may regulate alcohol consumption through federal highway funds, then there really are no areas that Congress cannot touch. Federal education grants may be used to develop a national curriculum, and federal welfare funds may be used to rewrite state family law. Employee Retirement Income Security Act benefits can be used to replace the state law of trusts and estates, and federal crime aid might require states to establish life tenure for judges. And, of course, federal funds may be used to require states to pass those laws struck down in *Lopez* and *Morrison*, making a mockery of the notion that the states remain supreme in their own spheres of activity.

For those of us who believe in Madison's Constitution, this is not a trivial problem, and it cannot be resolved by saying that the states are free to refuse to accept federal money. Over the course of the 20th century, federal funds have become the lifeblood of the state government budgets. In 2001, for example, the federal government gave states \$273 billion in grants for federal programs and another \$40 billion for specific projects. Virginia, for instance, received 20 percent of its annual revenues directly from the federal government;

Maryland received 22 percent; and my home state, California, received 29 percent of its annual revenue in federal funds.<sup>24</sup>

Most of this government spending falls within the broad powers that the federal government enjoys over interstate commerce. But so long as the federal government is free to use its spending powers to regulate areas beyond its enumerated powers, there will never really be areas free from federal control. If we are serious about recovering Madison's Constitution, then the Supreme Court must turn its attention to this lever of federal power. We must recognize, as Madison did, that the competition, democracy, and heterogeneity at the heart of our federalism require state sovereignty in fact as well as in theory.

## Notes

1. Drew McCoy, *The Last of the Fathers* (New York: Cambridge University Press, 1989), p. 150.
2. This sum was calculated by The Inflation Calculator at [www.westegg.com](http://www.westegg.com).
3. See Robert Allen Rutland, *James Madison: The Founding Father* (New York: McMillan, 1987), p. 34.
4. See Stanley Elkins and Eric McKittrick, *The Age of Federalism* (New York: Oxford University Press, 1993), p. 83.
5. See Rutland, pp. 12–13.
6. *The Federalist* No. 45 (James Madison).
7. *The Federalist* No. 39 (James Madison).
8. See *The Federalist* No. 51 (James Madison).
9. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).
10. See *Solid Waste Agency v. United States Army Corps of Eng'rs*, 121 S. Ct. 675, 684 (2001); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).
11. *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).
12. 514 U.S. 549 (1995).
13. *Lopez*, 514 U.S. at 552 (quoting *The Federalist* No. 45).
14. See *Wickard v. Fillburn*, 317 U.S. 111 (1942).
15. 120 S. Ct. 1740 (2000).
16. U.S. Constitution, art. I, § 8, cl. 1.
17. *The Federalist* No. 41 (James Madison).
18. Articles of Confederation, art. VII (1781) (emphasis added).
19. Alexander Hamilton, "Report on Manufactures" (Dec. 5, 1791), in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett, vol. 10 (New York: Columbia University Press, 1961–79), p. 302.
20. James Madison, "Report on the Virginia Resolution (1800)," in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, ed. Jonathan Elliot, vol. 4 (Charlottesville, Va.: Michie, 1941).
21. 297 U.S. 1 (1936).

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22. See *Helvering v. Davis*, 301 U.S. 619 (1937).
23. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).
24. For the 2000–2002 biennium, Virginia took in \$43.7 billion in revenue, of which \$8.7 billion was in federal funds. See “Frequently Asked Questions about Virginia’s Budget,” [www.dpb.state.va.us/budget/faq/faq.htm](http://www.dpb.state.va.us/budget/faq/faq.htm); “Maryland Budget Priorities FY 2001,” [www.dbm.state.md.us/html/budgetpri.html](http://www.dbm.state.md.us/html/budgetpri.html); “California Department of Finance, State Budget Highlights, 2000–2001,” [www.dof.ca.gov](http://www.dof.ca.gov).