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# CLAREMONT

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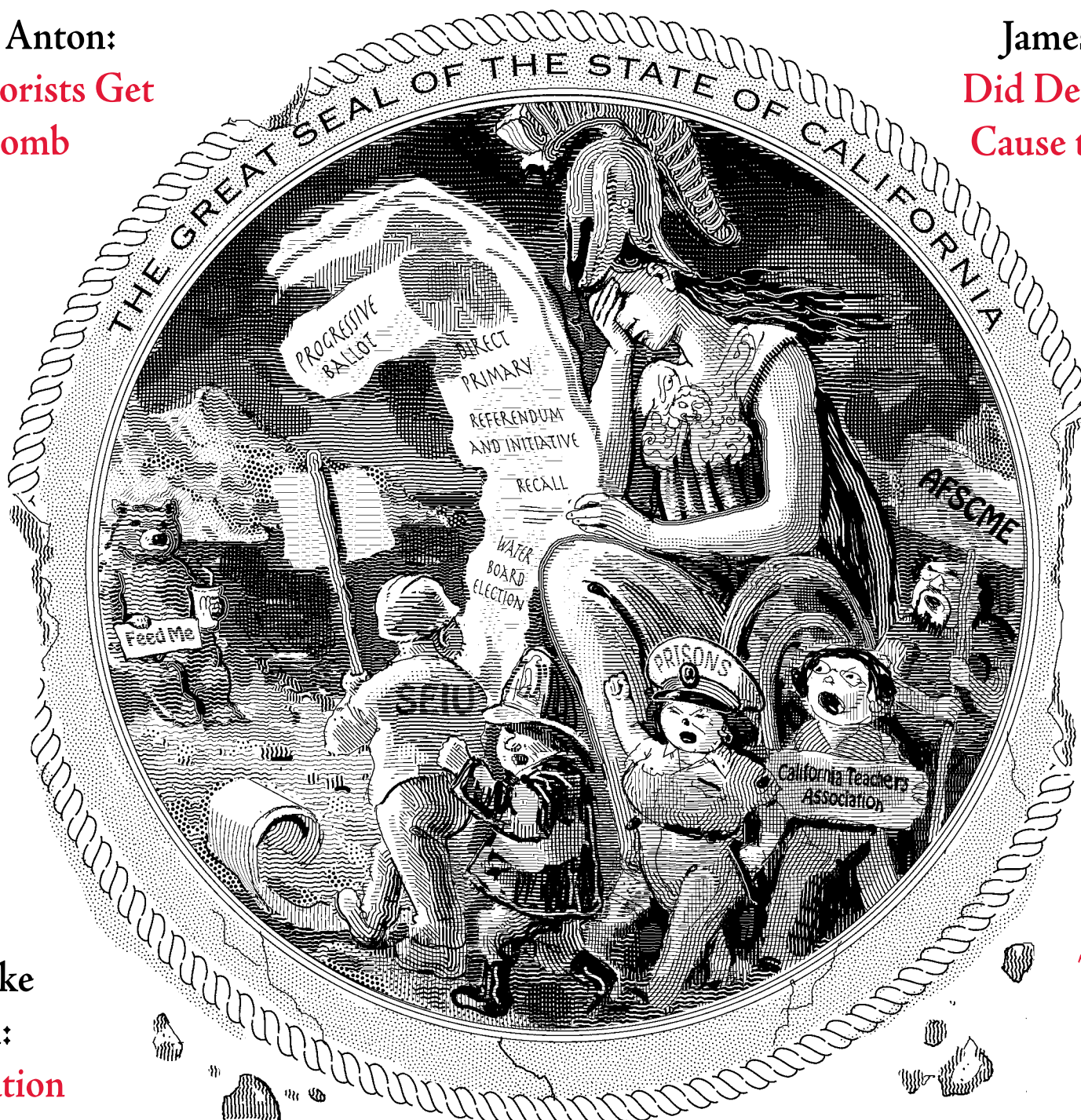
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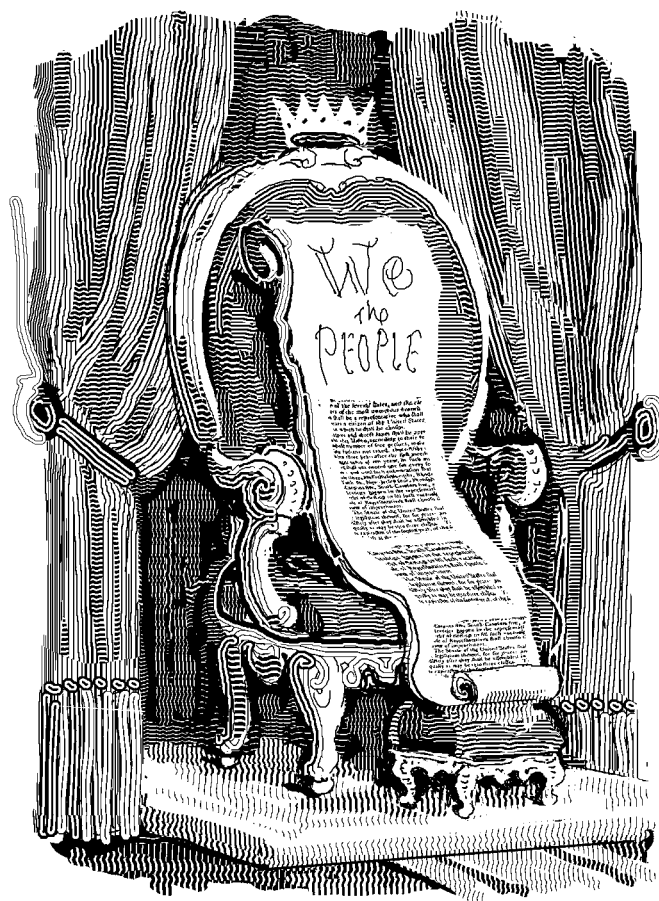


Book Review by Michael P. Zuckert

## MADISON'S AVENUES

*The Madisonian Constitution*, by George Thomas.  
Johns Hopkins University Press, 264 pages, \$50

*James Madison and the Spirit of Republican Self-Government*, by Colleen A. Sheehan.  
Cambridge University Press, 224 pages, \$80 (cloth), \$22.99 (paper)



**A** PART FROM THEIR HIGH QUALITY AND their invocation of James Madison, George Thomas's *The Madisonian Constitution* and Colleen Sheehan's *James Madison and the Spirit of Republican Government* would seem to have little in common. Thomas's book belongs to the genre of constitutional theory. He is attempting to persuade us to think about the Constitution differently from the way most of our constitutional mavens (courts and commentators) do, a way he calls "Madisonian." Madison himself, however, receives little attention, for after a quick sketch of the "Madisonian Constitution" Thomas sets out on a survey of constitutional history and theory that traces the Madisonian Constitution's fate—showing us when it was alive, when departed from, and calling us back to it as a model superior to the versions of constitutionalism currently on offer. He spends more time speaking, say, of the New Deal Supreme Court than he does of Madison.

The clear focus of Sheehan's book, by contrast, is on Madison. She tries to present a new

interpretation of Madison's political philosophy, emphasizing his post-*Federalist* political thinking. Whereas Thomas writes into and against the literature of constitutional theory, Sheehan writes into and against the literature on American political thought and the founding. Both books have a distinctly polemical tone in that they aim to overcome standard views widely accepted in the literature. Both have a distinctly practical aim as well. Both present themselves as efforts at retrieval—to recoup a lost tradition of Madisonian constitutionalism in the one case, of Madisonian republicanism in the other.

**T**HOMAS SETS HIMSELF AGAINST TWO CAMPS of constitutional scholars in particular—the judicial supremacists and the popular constitutionalists. The judicial supremacists take the Supreme Court to be the highest, final, and definitive interpreter of the Constitution. They insist all branches and levels of government are bound to accept and act on the Court's interpretation—the constitutional view that found clas-

sic expression in *Cooper v. Aaron* (1958). Thomas rejects this position on both originalist and theoretical grounds: it is not the theory embedded in the original Constitution, and it is also not morally or politically defensible.

His other target is the new breed of popular constitutionalists, often the same individuals who, not many years ago when the Court was securely in the hands of liberal justices, were judicial supremacists. After the Reagan Revolution began to have some impact on the composition and direction of the Supreme Court, the popular constitutionalists emerged, interested, as one of them put it, in "taking the Constitution away from the courts." They sought to entrench the liberal constitutional changes wrought by the New Deal, and by the Warren and Burger Courts—including the effective repeal of the Tenth Amendment, the permanent expansion of the commerce power, the growth of old individual rights' protections, and the discovery of new rights. This much judicial activism and no more, they decreed; a conservative Court would



not be permitted to undo the constitutional reformations of the earlier liberal courts. These reformations were legitimate, they argue now, not because of judges' final say over the Constitution, but because their changes had garnered "popular ratification," albeit informally and outside the amendment process.

The two positions Thomas rejects have a certain claim to legitimacy within the Madisonian constitutional order, which rests on the dual foundation of natural rights and popular sovereignty. The judicial supremacists take their bearings by rights. They set themselves up as the definers and guardians of rights, and hence claim the power definitively to set the terms of constitutional discourse. The popular constitutionalists, on the other hand, take popular sovereignty, i.e., democracy, as the fundamental purpose of the Constitution. Although each has a kind of legitimacy, each goes astray in neglecting that the constitutional commitment is to *both* rights and democracy.

**T**HE MADISONIAN CONSTITUTION, HOWEVER, embodies the two core commitments through its system of separated powers. The checking and balancing aspect of separation of powers—what one would learn most about from textbooks—is not, however, its main point. When we overemphasize checking and balancing, argues Thomas, we mistakenly elevate the Court as a branch whose purpose is to provide the authoritative reading of the Constitution for the other branches. From this assumption, we arrive at judicial supremacy, the idea that the judiciary's reading of the Constitution is final. The result is "legal constitutionalism," i.e., the notion that the Constitution above all is a legal document, binding the government as law, and in the custody of the courts as the interpreters of law.

Instead, Thomas's Madisonian Constitution is a political entity. It establishes and structures institutions "that look back to the text as part of bringing the Constitution to life." All parts of the constitutional order then have a right and indeed a duty to "expound the constitution, yielding multiple and conflicting views of the Constitution as an inherent...part of the constitutional order." So, as opposed to what the judicial supremacists say, the Constitution is not the unique property of the courts. As opposed to what the popular constitutionalists say, the Constitution does have some fixed and true meaning, even if that meaning is contestable. Indeed, having a "real meaning" is a precondition for meaningful contestation. Like the conventional view, Thomas insists that the separation of powers is "rooted in divided powers," but this is not merely "a machine that would go of itself" (says Thomas, quoting poet James Russell

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Lowell): it “calls on us to continually engage in the process of constitutional self-government,” a process involving constitutional interpretation.

Thomas concedes that his view leads to the constitutional position known as “departmentalism,” a position defended at different times in our history by Thomas Jefferson, Andrew Jackson, and Abraham Lincoln, among others. Yet he also insists that Madisonian constitutionalism “runs deeper” than mere departmentalism. To understand and act in the Madisonian Constitution “entails a responsibility on the part of the president and Congress to justify their actions in constitutional terms (and not merely take refuge in the Court).” Madisonian constitutionalism is the prerequisite to remaining committed constitutionalists at all.

The bulk of Thomas’s book is devoted to exploring a number of constitutional “moments,” which, he argues, illustrate Madisonian constitutionalism in action—more so than the scholars have recognized. But he also traces out the more radical efforts to jettison the Madisonian Constitution, efforts that leave us with a Constitution bereft of all substantive values except democracy, and denuded of all inherent shape and meaning.

**T**HE GREAT DISTANCE BETWEEN THOMAS’S and Sheehan’s books comes to light most easily when we note the centrality of separation of powers to Thomas’s Madison and the lengths to which Sheehan goes to deny that separation of powers, checks and balances, or institutional mechanics are central to Madison’s thought. Thomas claims, for example, that “Madison draws heavily on Montesquieu in crafting an institutional structure,” whereas Sheehan emphasizes not Madison’s dependence on but rather his break with Montesquieu. She believes Montesquieu’s true American heir was John Adams, whom she identifies as the chief target of many of Madison’s polemics in the 1790s.

Instead of institutions, checks and balances, or separation of powers, Sheehan emphasizes “the spirit of republican self-government.” That is to say, Madison may look to institutions as “auxiliary precautions,” but his main concern is the character of the people as proper republican citizens. If the modern political thinkers are understood as being devoted to institutions and the ancients to civic education and virtue, then she clearly aims to locate Madison among the ancients. Indeed her book’s basic thought is

best captured in the title of her projected sequel: *Madison’s Voyage to the World of the Classics*. Her book is an entrant in a scholarly contest over the character of the American Founding—was it essentially ancient or modern in inspiration and character? One of the main battles in this controversy is whether the founding was really liberal (modern) or republican (classical). She notes that the debate has moved beyond that simple either/or and now focuses on one or another of the “multiple traditions” or “amalgam” approaches to the founding, which stress the role of several different influences. Although she criticizes other wayward interpretations—Madison as an anti-democrat, or as a mechanical, amoral institutionalist—her chief target now appears to be the multiple traditionalists, who, she believes, put too much emphasis on the modern, liberal part of the amalgam.

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Unlike most scholars, who treat Madison as if he stopped thinking after 1789, Sheehan attends to his political thought in the early years of the republic. She pays particular attention to the “party press essays” he published in the early 1790s as part of his growing opposition to the Federalists. Unlike many historians she does not believe that these essays mark a major shift in his thinking or a resignation of his reasoning power to his friend Jefferson. Instead she sees them as largely consistent with his earlier writings, and indeed she reads backwards from them to help us see what Madison was really getting at in the 1780s.

Moreover, she delves deeply into the sources of Madison’s reflections and argues persuasively that French Enlightenment thinkers made up a much larger part of his intellectual diet than we have been led to think by scholars who emphasized Hume and Montesquieu. In turn, she uses some of the French writers to build a bridge

back to the classics, to whom at the end of the day she believes Madison was closest.

**D**ESPITE ITS MANY VIRTUES, HER BOOK IS odd in that it leads up to but does not arrive at an analysis of a text that most editors and readers of Madison have treated merely as his notes for the party press essays. She maintains, however, that these notes made up the outline and beginning sketch of a treatise on politics Madison was preparing to write. That treatise would have made the full case for her chief claims about the role of “republican spirit,” public opinion, and the ancient vision of politics that she attributes to Madison. But the analysis of these notes is to follow in her sequel. Without that analysis, her account in this book is not yet substantiated. For example, she fails even to mention the definition of republicanism that Madison presents in *Federalist* 39, a definition that is, to say the least, in tension with her construction of Madison as an active civic republican. Although *James Madison and the Spirit of Republican Self-Government* fails to make the case she wants to make, it does give us a handsome and worthwhile down payment on the more sustained analysis she promises.

Different as the two books are, it must also be said that deep down they share something important. As I have said, they are both efforts to recover the founding, and even though what they wish to recover is not identical, both look to Madison for renewal. Thomas’s Madison points the way to salvation from forms of constitutionalism that either place inordinate power in a small body of elite judges and lawyers, or give up on constitutional government altogether. Either way, we lose sight of the true *politics* of the Constitution. Sheehan’s Madison promises salvation from a republican theory and practice that drain away the meaning of citizenship and civic virtue—i.e., that miss republican life’s *political* character. We have then two books that look back to our greatest founder for guidance in restoring the political to our politics.

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