

BOOK REVIEWS

James Madison

Richard Brookhiser

New York: Basic Books, 2011, 287 pp.

Richard Brookhiser, a longtime senior editor of *National Review*, has contributed more than most to satisfying the revived demand for books about the lives and works of the American Founders. He has published books about Washington, Hamilton, the Adamses, Gouverneur Morris, and now James Madison. His biography is both serious and readable.

Madison scholars, however, will not be wholly happy with Brookhiser. He does not engage their concerns directly. For example, he does not mention the “James Madison problem,” which might be summarized as the difference between Madison’s early nationalism and later doubts about centralized power. Brookhiser does offer sotto voce his view of the matter: Madison was an engaged politician who changed his mind about some things as circumstances changed, and he stayed true to other commitments—for example, religious liberty and Francophilia. Scholars might also note that several leading works on Madison are not found in Brookhiser’s bibliography, notably the works of Lance Banning and Gary Rosen. Nevertheless, Brookhiser does cite significant parts of the scholarship on his subject and has 250 footnotes that provide adequate support without excessive detail.

Brookhiser is an excellent writer; his book is engaging and a pleasure to read. What we find is a Madison who was intensely intellectual, skilled at the small arts of domestic politics, but not a great commander-in-chief or president. Brookhiser does well to remove

himself largely from his story. He rarely offers lessons from Madison's life for his readers. He does indicate that both Jefferson and Madison should have worried more about defending the nation prior to 1812. Yet he draws no conclusions about what we should do, if anything, about Iran or China. The book is better for his reticence.

Brookhiser is a conservative, and conservatives often treat the Founding Fathers as demigods whose words should guide us without question. Brookhiser's Madison and the other Founders in this book are decidedly human. He reports on their scheming, faults, pettiness, achievements, and failures. He largely allows the record to speak for itself, thereby encouraging the reader to judge Madison and his fellow Founders. One might say that Brookhiser has taken a Madisonian approach to his subject by offering a reasoned, realistic, and temperate account of the founding era.

The Founders should be remembered and celebrated not as infinitely wise immortals but as humans struggling with their circumstances, their interests, and their ideals. Their profound failing regarding slavery still burdens the nation to this day.

Brookhiser is both temperate and just in his evaluation of Madison's sorry record on slavery. He offers no sympathy for the left's view that slavery undercuts the authority of the Founders and with it, the legitimacy of the Constitution. But Brookhiser does not overlook Madison's flaw regarding the ownership of others. He concludes Madison simply avoided the issue in any serious way, hoping for hopeless (and costless) answers to questions that needed attention from statesmen. Here again Brookhiser finds a Madison who is all too human. Madison's family estate, never opulent or especially prosperous, might have become untenable absent slavery.

Doubting that the Founders were divine does not mean affirming that the past has nothing to say to the present. The philosopher Hans-Georg Gadamer came closer to the truth in calling for a dialogue between the past and present, a conversation that might produce a "fusion of horizons." Brookhiser's account of Madison's legacy suggests what the great man is saying to us. How might we reply?

Brookhiser thinks Madison played a great role in giving us constitutionalism, "the laws of doing and not doing, and all the debate and revisions they have generated." Does this part of Madison's patrimony have any value? The United States Supreme Court will soon decide whether the Commerce Clause permits Congress to mandate purchase of a product. Perhaps the Court will strike down President

Obama's health insurance mandate, but even then Congress will retain vast powers over almost all actions that can be said to affect the American economy. Recently the president waged war in Libya without congressional approval and then stated the war was not actually a war and that the engagement fell within his inherent powers as commander-in-chief. Other evidence of the limits of American constitutionalism might be easily adduced. True, Americans revere their Constitution, but their piety may be based more on ignorance than love. I would like to have seen Brookhiser say more about what we might say to Madison about his constitutionalism.

Brookhiser sees American politics—"the behavior that makes constitutionalism work"—as Madison's other great gift to the present. Here I find Brookhiser on solid ground: Madison knew, he remarks, that "politics can be low, sometimes sordid." But improvement is perhaps possible and, in any case, what is the alternative? Madison was famously committed to representative rather than direct democracy; he was a republican for liberal reasons. Today we are rather more direct democrats, judging public matters through polling data. Perhaps our government extends beyond Madison's plans precisely because we have come to distrust our representatives beyond all reason. Of course, our representatives may deserve that distrust.

James Madison adds to Brookhiser's considerable reputation as a biographer of the founding generation. He has given us a fine biography. His writing skills and shrewd judgments, not to mention his refusal to enlist Madison in current political struggles, commends the book to any reader interested in the "chief architect of the Constitution" or in the question of what the founding era means for Americans today. The reader will largely have to answer that question on his own, perhaps as Madison himself might have desired.

John Samples
Cato Institute

The Ethics of Voting

Jason Brennan

Princeton, N.J.: Princeton University Press, 2011, 222 pp.

Grab anyone at a coffee shop, political rally, or cocktail party. Ask him, "Do you think we have a duty to vote?" Chances are he'll say

“Yes.” Follow it up with, “Is it because there’s something special about voting that places it above other duties we might have, like say avoiding speeding or paying our taxes?” It’s a safe bet you’ll get a “yes” to this one as well.

Jason Brennan calls the thinking behind these twin affirmatives the “folk theory of voting ethics.” It’s the common view of civics classes, straw polls, and town hall meetings. The folk theory is what we all learn in school, along with the three branches of government and the Founding Fathers. Teasing specifics out of these near-universal—but often rather vague—attitudes, Brennan arrives at the following three-part formal view of the folk theory:

1. “Each citizen has a civic duty to vote. In extenuating circumstances, one can be excused from voting, but otherwise, one should vote.”
2. “While it is true that there can be better or worse candidates, in general any good faith vote is morally acceptable. At the very least, it is better to vote than to abstain.”
3. “It is inherently wrong to buy or sell one’s vote.”

The Ethics of Voting attacks the folk triumvirate and mostly succeeds. Brennan presents his opponents’ cases clearly and fairly and then exposes them as irreparably weak. He often does such a good job, in fact, that his conclusions frequently seem obvious. Sadly, the persistence of the folk theory indicates otherwise.

The book’s first chapter covers arguments in favor of the duty to vote. The trouble for those who would demand such a duty is that voting simply doesn’t accomplish much—and not voting produces no harm. Any duty-to-vote argument that depends on the instrumental value of the act thus runs into very real problems with numbers, because the benefits of each individual’s vote are so tiny as to be effectively zero. Moreover, voting isn’t free. By voting, I’m not doing something else, which may have *more* value (by however we choose to measure it) than hopping in the car and driving to the local elementary school to spend an hour standing in line.

Other theories fail as well, including those from causal responsibility (even if your vote isn’t the *deciding* vote, it may be among the *group* of votes that decided the election) and from public goods (*your* vote may not matter, but what if everyone thought like that and so everyone stayed home?). So the instrumental theories fail. But what about voting as an expression of civic virtue?

The book's best chapter is its second, "Civic Virtue without Politics." It cuts to the heart of a lamentably common shibboleth of much political theorizing—namely, the fetish for politics. Because individuals who are politically interested assume the rest of us are or ought to be as well, they derive the idea that the highest aim of man is to participate in the deliberative democracy. To this Brennan responds with perhaps the most important message in the whole of *The Ethics of Voting*:

For some people, heavy political participation is necessary for them to lead what they consider a full life. For many others, active political participation would inhibit them from leading the kind of lives they want to lead. The first kind of person is not inherently more noble or sophisticated than the second.

The citizenship theorists might retort that people who don't get much out of politics aren't as civically virtuous as those enlightened citizens who do.

Yet, Brennan notes that "most ways to exercise civic virtue in contemporary liberal democracies do not involve politics, or even activities on the periphery of politics, such as community-based volunteering or military service." He argues against the often deleterious effects of political participation—and for the often forgotten salubrious, public good generating activity of private action.

Thus, Brennan dispatches the first element of the folk theory, and he does so in rich and exemplary fashion. The idea that we have a duty to vote simply can't stand up to careful scrutiny.

His response to the folk theory's second element (any vote is as good as another, what matters is the act of voting) is that

if citizens do vote, they must vote well, on the basis of sound evidence for what is likely to promote the common good. They must make sure their reasons for voting as they do are morally and epistemically justified. In general, they must vote for the common good rather than for narrow self-interest. Citizens who lack the motive, knowledge, rationality, or ability to vote well should abstain from voting.

He uses this argument to contest the third element of folk theory (buying or selling votes is "inherently wrong"). For Brennan, selling a vote is fine so long as the sold vote is still used to vote well. And no

vote—bought, sold, or retained by its original owner—is acceptable if it is not done well.

It is with the conditions triggering a moral duty not to vote that I have troubles—though they are troubles not with his conclusions but with how he gets there. Brennan’s thesis is that good voters (those who vote well) lack a moral obligation one way or the other when it comes to the act of voting. They’re morally permitted to vote, but needn’t feel obligated to do so. And, should good voters choose to abstain, we aren’t justified in condemning them. Bad voters (those who don’t vote well), on the other hand, face a moral obligation *not* to vote. It is wrong for bad voters to go to the ballot box, *no matter who* they intend to vote for.

Therefore it’s crucial that we establish just what “good” and “bad” mean within the context of voting. Brennan is clear, of course, that a moral duty to abstain from voting does not entail a lack of a right to vote. In other words, even though voting by a bad voter is immoral, the state may not prohibit it.

But that doesn’t make Brennan’s claim a minor one. After all, we really ought not to do immoral things. In fact, others are generally supposed to get mad at us for doing immoral things. So it matters from a practical standpoint what “good” and “bad” mean within the context of voting. And the distinction between them needs to be clear enough—and acceptable enough—that we can act upon it.

But the distinction *The Ethics of Voting* gives us isn’t. While Brennan does say that “good” voting is public spirited and “bad” voting results from ignorance and animus, he fails to flesh this out enough to get around a very real concern. Namely, that “good” and “bad” are simply code words for “classical liberal” and “not classical liberal.”

Brennan divides bad voting into two sorts. The first is unexcused harmful voting, which “occurs when a person votes, without epistemic justification, for harmful policies or for candidates likely to enact harmful policies.” The second is fortuitous voting, which “occurs when citizens vote for what are in fact beneficial policies or candidates likely to enact beneficial policies, but they lack sufficient justification to believe that these policies or candidates are good.”

The concept of fortuitous voting isn’t particularly troubling, but unexcused harmful voting is. And it is troubling in part because

Brennan dodges the issue of just what it actually means. According to Brennan,

Rather [than] trying to settle the exact standards for justified belief here, I leave that to be determined by the best epistemological theories. My argument then rests upon there being such a thing as unjustified political beliefs, but it need not be committed to any particular epistemology. On any reasonable epistemological view, the kinds of beliefs I use as examples of unjustified beliefs are counted as unjustified beliefs.

In other words, it really doesn't matter what theory we use because we can *all* agree that certain political views and their corresponding policies are wholly without merit and that only an ignorant, nefarious, or crazy person would believe them. Moreover, all the examples Brennan uses to illustrate his case will be of this sort.

One example Brennan employs is that of a woman who sincerely wants to help her fellow citizens but is completely uninformed about how to do so. She finds "a candidate espousing a regressive neomercantilist (i.e., imperialist, protectionist) platform emotionally appealing and votes for that candidate despite the evidence showing that the candidate's platform is inimical to the goal of creating prosperity."

Now, I'm quite certain that neomercantilist policies are not good. And I'm quite certain most of the readers of this review agree. But is it true that, according to "any reasonable epistemological view," neomercantilist policies are obviously, without-a-doubt wrong? It seems a stretch.

Brennan offers another example: "A person who votes to ban gay marriage because she finds it disgusting would, except in extraordinary circumstances, be guilty of harmful voting." I agree that voting to ban gay marriage is wrong. But is it so obviously wrong to think gay marriage is disgusting and so should be banned that it again doesn't even amount to a "reasonable epistemological view"?

Generally speaking, whenever Brennan offers examples of what a good vote or a bad vote looks like, his principle of demarcation seems to be "those policies Jason Brennan agrees (or disagrees) with." Given that Brennan's preferred policies are broadly libertarian, this may not seem a bad thing. What freedom-loving

person could object to a philosophical defense of the claim that people who would vote against libertarian policies have a moral duty not to vote?

In reality, however, very few voters would ever profess to have no reasons for why they decide one way or another. Fewer still would admit that their vote is wholly the product of bigotry. And even fewer would characterize their very epistemological view as unreasonable.

Brennan's rules appear designed to create something like an oligarchy of libertarian elite. Now, from the perspective of this libertarian reviewer, that's terrific. But it does stick a finger in the eye of the values of democracy and rule by the common man.

This need not be a bad thing, of course. Many thinkers have proposed alternatives to the system we have—and Brennan's sounds quite good. Yet, throughout *The Ethics of Voting* he asserts that this is precisely not what he's set out to do. His argument is value neutral, he says. Define "justice" however you like and Brennan's conclusions still apply.

But if enough voters embraced those conclusions and so respected the lines between permissible and impermissible voting Brennan advocates, we'd hardly even have democracy in name anymore. The barriers to "good voting" seem so demanding (any degree of ignorance seems to do the trick) that it is clear Brennan thinks almost no one should vote. Is a democracy where only one out of a hundred (or a thousand?) votes—and the rest are told it would be a serious moral *wrong* for them to do so—a democracy anymore? Probably not. At least not in any sense of democracy Americans would find at all recognizable.

The Ethics of Voting is terrific when it is attacking the folk theory and particularly the duty to vote, where its arguments ring wholly persuasive. But the bulk of what Brennan would replace the folk theory with often feels like a tease. He admits as much and seems happy to accept it, but his reader is left hungry for clarity. After all, even if the book is intended as "proof, not persuasion or behavior modification," as Brennan writes in his last paragraph, it needs to be proof of *something*. As it stands, *The Ethics of Voting* leaves us with the rather unhelpful conclusion that, should we vote, we need to make it "good." Whatever that means.

Aaron Ross Powell
Cato Institute

The Concept of Justice: Is Social Justice Just?

Thomas Patrick Burke

New York: Continuum, 2011, 256 pp.

Justice is the primary object of political philosophy. Yet, like so many of our highest aspirations, we are prone to use capacious words that can create consensus in their most abstract formulations but engender discord, if not worse, in more specific forms. “Justice” has always been like this. During a civil war or an intense political conflict, both sides will preach the justness of their cause, and neither will claim to be fighting on the side of “injustice.”

As much as political philosophers have penned defenses of particular conceptions of justice, they have also attacked rival conceptions either as being unjust or as being category mistakes. In *The Concept of Justice*, Thomas Patrick Burke engages in the latter type of criticism, arguing that what is usually described as “social justice” is in fact wholly different from, and antagonistic to, “genuine justice.”

For Burke, genuine justice has four characteristics: First, it is an ethical judgment. As such, it can only describe actions of individuals and not mere states of affairs—“only persons and their actions can be unethical. To speak of a state of affairs as unethical, independently of any unethical action that produced it, is to commit a fallacy.” While Bob can perform an unjust action, it cannot be unjust if Bob was born with cerebral palsy, a state of affairs that no one culpably acted to bring into existence. Because it would be strange to describe Bob’s condition as “unethical,” it is equally odd to describe it as “unjust” (but we are certainly free to describe it as good or bad).

Second, justice is a “relationship between wills” which requires not merely action, but an internal state of mind, a *mens rea*, for the action to be either just or unjust. An assault committed while sleepwalking or an involuntary muscle twitch that harms another do not fall under the category of “justice.”

The third criterion, which flows from the first two, is that “justice and injustice entail individual accountability and responsibility.” “Responsibility” can be assigned only to purposeful actions that are the product of the will. Injustice can be corrected by making accountable those who are responsible.

The last characteristic is also entailed by the previous three: “If action, will, and responsibility are key elements of justice, this can only be so on condition that the will is free.” In other words, freedom

of the will is necessary for determinations of justice or injustice because “moral value belongs only to a free will.”

Not only does the concept of social justice, as Burke understands it, not incorporate these characteristics of “genuine” justice, but it actively denies all four. Those who seek social justice, for example, will often describe a certain state of affairs, such as relative poverty, as unjust. Although poverty can result from human action, it is usually not directly intended, and thus it is not a product of human will. A businessman may find himself impoverished due to the arrival of a new competitor, but those who take their business elsewhere do not intend to impoverish the businessman.

Burke also examines the growth of the concept of social justice, which originated in religious circles and was developed in official statements from religious authorities. His discussion of this history is illuminating. He rightly focuses on the meaning of the term rather than the simple words “social justice,” and he finds that the meaning has changed over time to one that denies individual responsibility and focuses on states of affairs rather than purposeful human action.

This modern conception of social justice would receive its most clear statement in Pope Pius XI’s encyclical letter *Quadragesimo anno* (1931). Pius’s letter promoted a starkly condemnatory view of economic inequality, calling it a “violation of justice.” President Franklin Roosevelt even quoted the letter while campaigning in 1932.

Although Burke’s focus on the ecclesiastical tradition is worthwhile, he surprisingly almost totally omits John Rawls, author of *A Theory of Justice* and the most important thinker in the social justice tradition in the past 50 years. Burke calls Rawls’s view of social justice “idiosyncratic” and credits him with starting the philosophical, rather than the religious, interest in social justice. This claim only makes Rawls’s absence from the book even odder. Even in a small section devoted to the concept of “fairness” (the subtitle of *A Theory of Justice* is “Justice as Fairness”), Rawls does not get mentioned.

In Rawls’s system, the Difference Principle works to ensure that those who are the least well-off in a society are, so to speak, the center of attention. Inequalities are allowed in a Rawlsian system, but only when they work to the advantage of the least well-off people. This system is justified by asking the question, “If people didn’t know which advantages and disadvantages they would have in life, and they were designing the rules for that society, what sort of rules would

they create?" Thus, through this pseudo-Kantian mechanism, elements of basic fairness are turned into principles of justice.

Burke endorses fairness, calling it a "virtue." In a sense, Rawls seeks a fair system in which traits that are irrelevant to justice are eliminated from considerations of justice. The idea that certain traits are irrelevant to justice—that is, that there are traits that should not determine one's place in society—deeply informs our moral reasoning. Our aversion to racism, for example, seems at least partially based on this idea. As Rawls puts it,

men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favor certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect men's initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit and desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice apply [Rawls, *A Theory of Justice*, p. 8].

In other words, people should not be answerable for things for which they are not responsible.

Because the idea of responsibility looms large in *The Concept of Justice*, it is somewhat striking that he does not address the Rawlsian view. True, there are states of affairs that no one willed to come about, and thus no one can be called responsible for those misfortunes. Equally true, however, is that those who live in these unfortunate states of affairs are often not responsible for their plight. So, far from being excised from the Rawlsian system of social justice, responsibility is an integral element.

Burke observes that social justice champions claim that "an individual can justly be considered responsible for harm, not on the ground that he caused it, but solely because he has the means to remedy it. The rich or powerful are made responsible for the fate of the poor or less powerful even though they played no causal role in it." Perhaps some would say this, but more nuanced social justice thinkers might say that the rich and powerful are being made accountable, not responsible, for those who are downtrodden through no fault of their own. We do this merely because there is no other reasonable remedy for the situation available; the deprivations,

after all, are already disproportionately placed on the heads of those least able to endure them.

While I do not agree with this argument, I respect its cogency. I also partially endorse Burke's presumptive response to this claim: "Acts of injustice, all of them in their immense variety, are coercive, and only coercion can balance out and overcome coercion." By focusing on coercion, Burke centers his analysis on state force rather than voluntary action. Yet I fear that Burke's book, with its focus on bold assertions of ethical truths and a neo-Aristotelian view of virtue, suffers from not addressing many of these points directly. It's not the radically egalitarian and anti-capitalism vision of Pius XI that needs analysis, but rather that of modern social democrats who claim to value the free market as long as it comes with modifications that care for those who find themselves destitute through no fault of their own.

At times, Burke's discussion of social justice threatens to be more semantic than substantive. Crusaders for social justice can accept his definitions while still pushing for a more egalitarian world. They can acknowledge that what they seek is not justice, at least in the traditional sense; they can concede that they wish to do away with robust theories of personal responsibility and replace them with more communitarian theories; they can accept that their vision for a just society will radically diverge from the subject up to this point. In fact, many social engineers, from Marx to Mussolini to Mao, have argued just this point: the old ways of looking at the world and at human nature need to be radically reworked in order for a better world to be realized. Objections to social justice based on classical philosophy and claims of natural rights will likely be seen by many as yet another attempt to enforce Western philosophical hegemony upon the world.

Yet, in the end, Burke's book is still valuable for those who respect that "philosophical hegemony" and believe the wisdom of the ages should not be thrown out. While others, such as F.A. Hayek in *Law, Legislation, and Liberty Vol. II: The Mirage of Social Justice*, have pushed very similar theses, Burke's natural-rights take on the question gives valuable food for thought.

Trevor Burrus
Cato Institute