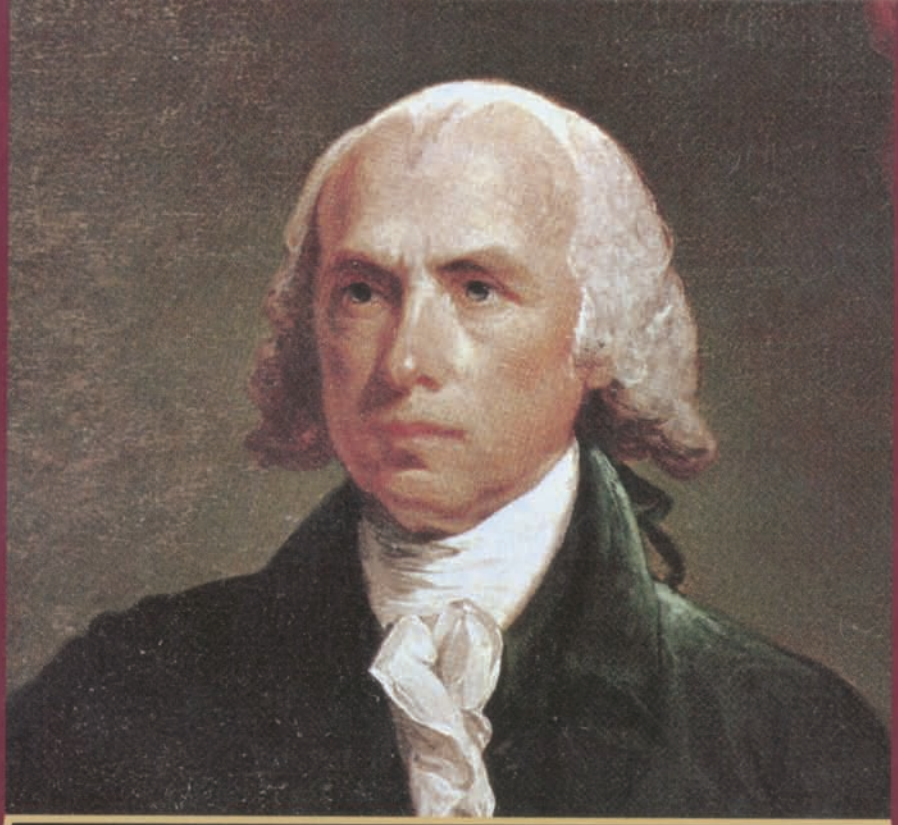

James Madison
AND THE FUTURE OF
Limited Government

EDITED BY JOHN SAMPLES

James Madison
AND THE FUTURE OF
Limited Government

Copyright © 2002 by Cato Institute.
All rights reserved.
Second Printing: August 2003

Library of Congress Cataloging-in-Publication Data

James Madison and the future of limited government / edited by John Samples.
p. cm.
Includes bibliographical references and index.
ISBN 1-930865-22-8 (paper : alk. paper) -- ISBN 1-930865-23-6 (cloth : alk. paper)
1. Madison, James, 1751–1836--Contributions in political science. I. Samples, John Curtis, 1956–

JC211.M35 J36 2002
321.8'092--dc21

2002071636

Cover design by Amanda Elliott.
Cover Illustration by © Bettmann/CORBIS.

Printed in the United States of America.

CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
www.cato.org

Contents

3. Madison's Constitutional Vision: The Legacy of Enumerated Powers

Roger Pilon

In reflecting on James Madison and the future of limited government, the first challenge is to understand Madison's constitutional vision. That would be easier to do had modern political sensibilities not strayed so far from it—had we not become so accustomed to effectively unlimited government and indifferent, largely, to constitutional restraints on the size and scope of government. The second challenge is to understand how and why the limited government Madison sought to secure became the vast Leviathan we know today. Indeed, given the current reach of federal power, Madison's promise in *Federalist* No. 45 that the powers of the new government would be "few and defined" strikes the modern ear as not a little quaint. At the outset, therefore, we have to grant that Madison's legacy is less than certain, even as we draw from it to speculate about the future of limited government.

To say that Madison's legacy is uncertain is not to say, of course, that he left us nothing. Quite the contrary, although the federal government today is far larger than he imagined it would be, Madison's constitutional vision has doubtless spared us the kind of oppressive and even tyrannical government we've seen so often around the world since his plan was first unveiled. In fact, more than 200 years after it was first erected, most of Madison's structure is still standing. Looking over the events of that period, that is no small accomplishment. On balance, therefore, one would have to say that the legacy of Madison's vision has been relatively stable government, even if more government than Madison would have wanted.

To learn from that mixed legacy, it will be useful to begin with a brief overview of Madison's vision, focusing in particular on his constitutional doctrine of enumerated powers. Our main concern in that will be with Madison's conception of political legitimacy,

especially as it contrasts with our own. Having sketched that vision, we will then trace its history to the present. That story has two main parts, with the Progressive Era marking the divide; the New Deal, which is usually taken to have ended Madison's limited government, simply institutionalized the ideas of the progressives. Finally, to speculate about the future, we will look briefly at the recent turn the Supreme Court has taken in its federalism jurisprudence, which it has couched in the language of "first principles." Madison would have been pleased with that turn, but he would have noticed, too, how much more is needed if limited constitutional government is to be restored.

Madison's Vision

Students of Madison often begin by noting the central role he played in bringing the Constitution about—so central that he is ordinarily thought to be the father of the document. They proceed then to describe the structure of government he helped to craft, focusing on federalism, the separation of powers, and other such devices. Prior to such structural devices, however, are Madison's principles of government, grounded in morality and prudence. And prior to those is his basic moral vision, from which the political principles and the constitutional structure ultimately flow.

At the outset, therefore, we need to examine Madison's moral vision and recognize, in particular, that he was very much a product of the nation's founding in 1776, even if he was not present at the founding. Thus, like others at the constitutional convention of 1787, he took his inspiration, and his moral vision, from the principles set forth first in the Declaration of Independence. We need to begin, therefore, with those principles, not least because they illuminate the document that followed some 11 years later.[1]

The Declaration's Moral Vision

In the Declaration the Founders outlined their philosophy of government in the course of explaining, and justifying, their decision to dissolve the political bands that had tied them to England. The importance of their concern with justification—with laying down the principles of legitimate government—cannot be overstated, for it set our course ever after. America truly is different from other nations: from the start, we have taken justification, and political legitimacy, seriously.

And what are those principles? Drawing on the Lockean natural rights tradition[2] and the better parts of the common law, both grounded in reason,[3] the Founders spoke first of the moral order. Only then, after they had outlined the moral order, did they turn to the political and legal order their moral vision entailed. Thus, unlike in the ancient world, or even in the *ancien régime*, they began with morality, not with government.[4] And they began, in particular, with a premise of moral equality: we're all created equal, as defined by our natural rights to life, liberty, and the pursuit of happiness. Note that those rights—rights, essentially, to be free—preexist government. We don't get our rights from government; on the contrary, whatever rights or powers government has come from us. That crucial point is made clear when government is introduced at last. Government's purpose, the Declaration says, is to secure our rights, its *just* powers *derived from the consent of the governed*. Thus, legitimate government is twice limited—by its ends, to secure our rights, and by its means, which must be consented to.[5]

Clearly, that is a libertarian vision. We're born with the right to plan and live our lives as we see fit, and with every other right that basic right entails. Government exists not to plan our lives for us but simply to secure the rights we already have and those we create over time. Thus, Madison envisioned a limited government: most human affairs were to take place not through government but in what we call today the private sector. We enter that sector with our property rights—broadly understood as lives, liberties, and estates, as Locke put it.[6] Once there we create new rights and obligations and alienate current ones through the mechanisms of promise or contract, on one hand, or tort or crime, on the other.[7] The purpose of government in that scenario is not to create those rights and obligations but simply to recognize and enforce them, through powers we have given it. That was the concept of legitimacy that Madison brought with him when he went to Philadelphia in 1787. It is a far cry from the modern conception of government as providing goods and services through all manner of statutorily created redistributive and regulatory schemes, their "legitimacy" grounded in majoritarian politics.[8]

Among countless statements by Madison illustrating that vision, one of his clearest, pertaining to the commercial world that is the subject of so much regulation today, was made in the very first Congress:

> I own myself the friend to a very free system of commerce, and hold it as a truth, that commercial shackles are generally unjust, oppressive and impolitic—it is also a truth, that if industry and labour are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened legislature could point out.[9]

Long before 20th century economists like Ludwig von Mises and Friedrich Hayek were explaining systematically the folly of social planning, there with the essential insight was Madison. Yet modern progressives still cling to the idea that enlightened legislatures, better than the parties themselves, can regulate commerce in everything from agriculture to education, manufacturing, medicine, and more. That uncritical faith in government is endemic today, so much so that it leaves little room for any concern about legitimacy. For Madison, however, legitimacy is the first concern: he begins his remarks by speaking of "shackles," saying that commercial shackles are generally "unjust and oppressive" because they interfere with a "free system of commerce"—the natural order. If that simple point about illegitimate interference with individual liberty is now foreign to the modern mind—unthinkingly accustomed as it is to paternal government—how far more distant must Madison's theory of *constitutional* legitimacy be?

The Constitution's Theory of Legitimacy

We come, then, to that theory. Madison was driven not simply by the idea that excessive governmental interference with liberty is illegitimate because inconsistent with the moral principle that each individual has a right to live his own life, free from such interference. To be sure, that principle grounded the rest. But it was secured, practically, through a quite different theory of *political* or *constitutional* legitimacy, aimed at showing how government and governmental powers might arise legitimately, and how other powers might be shown to be illegitimate. Known as the doctrine of enumerated powers, that theory truly is the centerpiece of the Constitution and the foundation of Madison's conception of constitutional legitimacy.

To appreciate it, however, it is useful to notice first that the practical problem the Framers faced when they got to Philadelphia was how to create a government at once strong enough to do what

government is mainly created to do—secure our rights—yet not so powerful or extensive as to violate rights in the process. In tackling that problem, Madison was well aware, as he showed in his famous "if men were angels" discussion in *Federalist* No. 51, that we have to start with people as they are, then try to both empower and restrain them by creating institutional arrangements that pit power against power and ambition against ambition. That explains the Constitution's many checks and balances, from the division of powers (federalism) to the separation of powers, to the provision for judicial review, to periodic elections, and much more.

The most basic limit on power, however, could not have been simpler in its conception. In fact, it can be reduced to a short admonition: if you want to limit power, don't give it in the first place. Notice, however, that that is not simply an instruction for limiting government. More important, it is a principle of legitimacy. In fact, it draws from the Declaration's claim that government's *just* powers are derived from the consent of the governed. In a word, powers are legitimate if and only if they have been delegated by the people and enumerated in the document through which the people constitute themselves as a political entity, their constitution. Thus, the doctrine of enumerated powers.

We find that doctrine implicit in the Constitution's very first words, the Preamble: "We the people . . . do ordain and establish this Constitution." At the outset, all power rests with the people; no power rests with government, there being none yet in existence. And in the very next sentence, the first sentence of Article I, we find the doctrine again, a bit more explicitly: "All legislative Powers *herein granted* shall be vested in a Congress. . . ." (Emphasis added.) Thus, the people grant some of their power to the government that comes into being after ratification. But by implication, again, not all powers were "herein granted." We discover which powers were granted by reading the rest of the document—primarily Article I, section 8, in the case of Congress. Finally, in the Tenth Amendment, the final documentary evidence of the Framers' plan, we discover the doctrine of enumerated powers in its most explicit formulation: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That final statement makes it clear beyond doubt that power is divided: some has been delegated to the federal

government, as enumerated in the Constitution; the rest is reserved to the states—or to the people, never having been delegated to either level of government. In sum, the federal Constitution creates a government of delegated, enumerated, and thus limited powers.

To the modern mind, accustomed to thinking that government exists to solve such personal problems as how to pay for education, daycare, or prescription drugs, the ideas just articulated are utterly foreign. Yet on numerous occasions and subjects, Madison was quite clear about the limits imposed by the doctrine of enumerated powers. In his *Report of 1800*, for example, he wrote that

> in all the co-temporary discussions and comments, which the Constitution underwent, it was constantly justified and recommended on the ground, that the powers not given to the government, were withheld from it; and that if any doubt could have existed on this subject, under the original text of the Constitution, it is removed as far as words could remove it, by the 12th amendment, now a part of the Constitution, which expressly declares. . . .[10]

(Madison was referring to the present Tenth Amendment, which was originally the final of 12 amendments Congress submitted to the states for ratification in 1789. Two failed ratification.)

And in his actions, too, Madison took the doctrine of enumerated powers to be the bedrock limit on federal power. Thus, in 1794, when faced with a bill appropriating some $15,000 for relief of French refugees who had fled to Baltimore and Philadelphia from an insurrection in San Domingo, Madison rose on the floor of the House to object that he could not "undertake to lay [his] finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents."[11]

Years later, as president, Madison would continue to insist on constitutional fidelity. Thus, in 1817 he vetoed a comprehensive plan for internal improvements that Congress had passed, saying that "the legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers. . . ."[12] Noteworthy in that veto message, moreover, were his comments on the role of the judiciary:

> Such a view of the Constitution [as the bill contemplated] would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.[13]

Madison's concern was not, as in the modern view, to have the judiciary defer to the political branches as those branches decide wide-ranging questions of policy. Rather, quite the opposite, it was to uphold the power of the judiciary to say that Congress had no power to decide questions of policy if doing so would take it beyond the boundaries of its enumerated powers. He was saying, in short, that it fell ultimately to the judiciary to police the doctrine of enumerated powers, not as a matter of policy but as a matter of principle. It fell to the judiciary to tell Congress, simply, "You haven't the power you purport to have. You are acting without constitutional authority."

Thus, the doctrine of enumerated powers speaks explicitly to powers, only implicitly to rights, which helps to explain why it is so foreign to the modern ear. Madison understood that if you want to protect rights from government abuse, you would be wise not to give government the power in the first place that can then be used to abuse rights. That is a lesson we have forgotten. As we have asked government to do more and more for us, we have forgotten that a government big enough to give us everything we want will be powerful enough to take everything we have.

The Demise of Enumerated Powers

The history of the demise of Madison's plan is long and tortured, but it falls into two main periods, with the Progressive Era marking the intellectual divide, as noted earlier, and the New Deal marking the institutional divide.[14] Expansive government had its friends from the outset, of course. Perhaps the earliest example was Alexander Hamilton's 1790 *Report on Manufactures*, calling for a kind of national "industrial policy."[15] Congress voted the report down, but that hardly brought an end to efforts to expand the federal government's role in our lives. For the most part, however, those efforts died in

Congress. And when they survived there, they were often vetoed by the executive or, eventually, found unconstitutional by the courts.[16]

A fine example of presidential respect for constitutional limits occurred in 1887, 100 years after the Constitution was written, when President Grover Cleveland vetoed a bill appropriating some $10,000 to buy seeds for Texas farmers suffering from a drought. Cleveland's veto message is instructive on the old way of thinking:

> I can find no warrant for such an appropriation in the Constitution; and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that, though the people support the Government, the Government should not support the people.[17]

Stern words, but the climate of ideas was changing even then. The "prevalent tendency" to disregard limits that Cleveland noted would gather intellectual steam over the next 50 years, reaching a crescendo in 1937 when President Franklin Roosevelt's notorious Court-packing scheme would lead to a fundamental rewriting of the Constitution—without benefit of constitutional amendment.

The Progressive Era

The Progressive Era that spurred on that change drew from many sources. In philosophy the classical theory of natural rights had long been under attack. British utilitarianism, looking not to rights but to future goods—in particular, to the greatest good for the greatest number—was now the norm,[18] together with its cousin, American pragmatism.[19] Both enjoyed an easy affinity with democratic theory, which had been gaining ground for some time in politics. Among the new social sciences, German ideas about good government and the virtues of social planning were all the rage. Practitioners of those sciences, imbued often with moral zeal and a hubris all but unbounded, sought to better the human condition much as the hard sciences were doing. Thus, at century's end we could find the *Encyclopedia of Social Sciences* stating confidently that "almost all social thinkers are now agreed that the social evils of the day arise in large

part from social wrongs."[20] And by 1920 the president of the National Conference of Social Work could call upon social engineers to impose "a divine order on earth as it is in heaven."[21] This activism, just to be clear, was to be carried out not by private institutions but by government. Indeed, in 1922, Frank Dekker Watson, director of the Pennsylvania School for Social Service, commended the ongoing "crowding out" of private by public charity, for only thus would "public funds ever be wholly adequate for the legitimate demands made upon them."[22]

What such activism among the intellectual vanguard most reflected, of course, was a fundamental shift in our conception of government. Whereas the founding generation had seen government as a necessary evil, to be guarded against at every turn, modern thinkers saw government as an engine of good, an instrument through which to solve all manner of "social" problems, the kinds of problems that had arisen with industrialization and urbanization following the Civil War. Looming before the moderns, however, was the Constitution, standing starkly athwart their agenda. And the courts, for the most part, were upholding the Constitution, nowhere more clearly than in the famous *Lochner* decision of 1905,[23] in which the Supreme Court held New York State's maximum hours statute for bakers to be unconstitutional because it violated the freedom of contract.

Things came to a head during the New Deal when the activism shifted from the state to the federal level. Watching one program after another go down in constitutional flames, Roosevelt in 1937 threatened to pack the Supreme Court with six new members.[24] Not even Congress would go along with that. Nevertheless, a cowed Court got the message. There followed the famous "switch in time that saved nine," with the Court essentially rewriting the Constitution.

Rewriting the Constitution

The Court did its rewrite in two main steps. In 1937 it effectively eviscerated the doctrine of enumerated powers. Then in 1938 it bifurcated the Bill of Rights, creating a two-tiered theory of judicial review in the process. The 1937 rewrite involved the General Welfare and Commerce Clauses, both of which were meant to be shields against overweening government. When the Court was through they had become swords for promoting government. The 1938 changes effectively removed the Court from reviewing most of the programs that followed from the 1937 changes.

Madison spoke and wrote often about the General Welfare Clause because it was a source of congressional mischief from the start. Indeed, Hamilton was of the view that the clause granted Congress an independent power to spend for the general welfare, provided only that the spending was general and not particular or local.[25] That was not the dominant view, however. In fact, Madison, Jefferson, and many others were at pains to point out that if that reading were correct, then enumerating Congress's other powers would have been pointless, since anytime Congress wanted to do something it was not authorized to do it could say simply that it was spending for the general welfare. Given the prominence of the doctrine of enumerated powers in the minds of the Framers—indeed, many thought it obviated the need for a bill of rights[26]—it is difficult to believe that many Framers thought they were giving Congress so unbounded a power—much less that ratification would have succeeded under such an understanding.

Here, for example, is Madison on the point, writing to Edmund Pendleton in 1792: "If Congress can do whatever in their *discretion* can be *done by money*, and will promote the *general welfare*, the Government is no longer a limited one possessing enumerated powers, but an indefinite one subject to particular exceptions."[27] And in his *Report of 1800* Madison wrote:

> Money cannot be applied to the General Welfare, otherwise than by an application of it to some *particular* measure conducive to the General Welfare. Whenever, therefore, money has been raised by the general Authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made.[28]

Far from being an independent grant of power, therefore, the General Welfare Clause, if anything, limited Congress's spending *on enumerated ends or powers* to those that served the *general* welfare as opposed to any particular or sectional welfare.[29]

In the *Butler* decision of 1936,[30] however, the Court came down, albeit in dicta, on Hamilton's side. Then a year later, in the *Helvering* decision,[31] the Court elevated its dicta to the holding of the case. With Congress now free to spend for "the general welfare," it was only a matter of time before the modern redistributive state emerged,

with Congress spending on all manner of programs not remotely authorized by the Constitution.

A similar fate awaited the Commerce Clause. As the history surrounding the adoption of that clause makes clear, Congress was given power to regulate commerce among the states as a defense against the kinds of protectionist measures that had arisen in the states under the Articles of Confederation, measures that were leading to a breakdown in interstate commerce. In fact, it was to address that problem, in significant part, that a new constitution was called for. Under it, Congress would be given the power to "regulate" interstate commerce—to make it "regular." The idea was to ensure an open, national market, to ensure that goods and services would flow freely among the states. It was not to enable Congress to regulate anything it wanted for any purpose it wanted.

In his 1817 message to Congress vetoing the Bonus bill, among other places, we find Madison's view of the scope of the commerce power.

> "The power to regulate commerce among the several States" can not include a power to construct roads and canals, and to improve the navigation of water courses in order to facilitate, promote, and secure such a commerce without a latitude of construction departing from the ordinary import of the terms strengthened by the known inconveniences which doubtless led to the grant of this remedial power to Congress.[32]

It was that "remedial power" that the Court invoked in 1824 in its first great Commerce Clause case, *Gibbons v. Ogden*.[33] In that decision the Court found that a New York statute granting a monopoly to ferry the waters between New York and New Jersey conflicted with the power of Congress to regulate the trade, which it had already done by statute. In his concurrence, Justice Johnson stated the larger matter plainly: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."[34] Thus, the function of the Commerce Clause.

In its *Jones & Laughlin* decision of 1937,[35] however, the Court found that Congress had power under the Commerce Clause to regulate anything that "affected" interstate commerce, and for any reason. Plainly, there is virtually nothing that does not, at some level, affect interstate commerce, which means that Congress today can regulate

anything and everything. Over the years, it has moved far in that direction, giving us the modern regulatory state in the process.

But the Court was not through rewriting the Constitution, for the Bill of Rights was still standing. After 1937, claims that Congress was acting beyond its authority were rendered, in effect, without merit. One could still invoke one's rights, however. To address that impediment to expansive government, the Court in 1938, in the notorious *Carolene Products* decision,[36] bifurcated the Bill of Rights, distinguishing two kinds of rights and two levels of judicial review. If a law implicated "fundamental" rights like the right to vote or speak, the Court would give it "strict scrutiny" and probably find it unconstitutional. By contrast, if a law implicated "nonfundamental" rights like those of property or contract—rights pertaining to "ordinary commercial transactions"—the Court would give it minimal scrutiny, meaning it would probably pass constitutional muster. That scheme was nowhere to be found in the Constitution, of course. It was written from whole cloth to make the world safe for the programs of the New Deal. In effect, the Constitution was democratized. A constitution for limited government was converted, to a significant degree, into one for parliamentary majoritarianism.

The Future of Limited Government

After some 65 years of this, we should hardly be surprised that many Americans think of the Constitution as having instituted a majoritarian democracy, not a limited republic. Indeed, they will be forgiven, after listening to the Castro-length State of the Union addresses that came from our last administration, for thinking that there is no problem too trivial or too personal for federal attention. But that view afflicts both major parties and both political branches, state and local officials, and many of our judges. In a word, government has become a service industry, striving to satisfy the demands of its customers.

It is instructive, in this connection, to cite remarks Madison gave in 1792 in opposition to a bill aimed at encouraging cod fisheries. In defense of the doctrine of enumerated powers, Madison rose on the floor of the House to say:

> There are consequences, sir, still more extensive. . . . If Congress can apply money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare,

> they may take the care of religion into their own hands; they may establish teachers in every state, county, and parish, and pay them out of the public treasury; they may take into their own hands the education of children, establishing in like manner schools throughout the union; they may assume the provision for the poor; they may undertake the regulation of all roads other than post roads; in short, every thing, from the highest object of state legislation, down to the most minute object of police, would be thrown under the power of Congress; for every object I have mentioned would admit the application of money, and might be called, if Congress pleased, provisions for the general welfare.[37]

How prescient.

In 1995 the Supreme Court heard a case coming out of Texas that challenged the constitutionality of the Gun-Free School Zones Act of 1990 on the by-then novel theory that Congress had no authority to enact such a statute.[38] Conventional wisdom was puzzled that such a claim would be made. More surprising still, the claim had been upheld below. The smart money said, therefore, that the Supreme Court took the case so that it could reverse the mistake of the court below—nine to nothing, it was predicted. Well, as is often the case, conventional wisdom was wrong. By a vote of five to four the Court upheld the court below. The Commerce Clause, the Court said, does not authorize Congress to regulate anything and everything. More important still, Chief Justice William Rehnquist began his opinion with a ringing statement: "We start with first principles. The Constitution establishes a government of enumerated powers."[39] For nearly 60 years, no such statement had come from the Court. Official Washington was awakened from its dogmatic slumbers.[40]

The Court's opinion in the case was a breath of fresh air, but it went only so far, as Justice Clarence Thomas made clear in his concurring opinion. Still, it was a start, and it has been followed by a number of other such opinions, all pointing to something of a revival of Madison's doctrine of enumerated powers. That the Court has circumscribed its opinions should probably not surprise us. After all, were it to give us a true reading of the General Welfare and Commerce Clauses, the whole edifice of the modern welfare state, in all its illegitimacy, would come tumbling down, and the country is not ready for that.

We come, then, to the future of limited government, about which one can only speculate. That our present arrangements are constitutionally illegitimate is increasingly said by critics of those arrangements.[41] But proponents, too, have often said as much.[42] If constitutional legitimacy is important—and it should be in a nation purporting to be governed by the rule of law—then we have essentially two choices. We can either amend the Constitution so that it authorizes all the government we now have. Or we can carefully roll back those programs and policies that Mr. Madison's Constitution, as amended, does not authorize. Those of us who cherish the right to be free, the right to plan and live our own lives, will prefer the latter course, to be sure. If that course is to be pursued, however, it cannot be done through the courts alone. In addition, it will be necessary to rekindle among the people that love of liberty that so animated and inspired the founding generation, especially Mr. Madison. Perhaps this volume will begin that process.

Notes

1. I have discussed the issues that follow more fully in Roger Pilon, "The Purpose and Limits of Government," ch. 2 in *Limiting Leviathan,* Donald P. Racheter and Richard E. Wagner, ed. (Cheltenham, U.K. and Northampton, Mass.: Edward Elgar Publishing, Inc., 1999); reprinted as *Cato's Letter No. 13* (Washington: Cato Institute, 1999).

2. John Locke, "Second Treatise of Government," in *Two Treatises of Government,* Peter Laslett, ed. (New York: Mentor, 1965).

3. "The notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law," Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca and London: Cornell University Press, 1955), p. 26. Not all of the common law could be justified, of course. In fact, Madison took a somewhat jaundiced view of parts of it and was concerned in particular that it not be frozen by being constitutionalized: "If it be understood that the common law is established by the constitution, it follows that no part of the law can be altered by the legislature . . . and the whole code with all its incongruities, barbarisms, and bloody maxims would be inviolably saddled on the good people of the United States." James Madison, *The Report of 1800,* Jan. 7, 1800, cited in *James Madison's "Advice to My Country,"* David B. Mattern, ed. (Charlottesville and London: University Press of Virginia, 1997), pp. 21–22.

4. In the tradition of Enlightenment state-of-nature theory, one starts one's argument with the individual, not with government, asking first what rights individuals have against each other. That helps avoid begging any questions about the rights or powers of government, which must be derived from the rights individuals first have and hence have to yield up to government when they create that institution through a constitution. See, for example, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 6.

5. See Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Vintage, 1958); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Belknap, 1967); Morton White, *The Philosophy of the American Revolution* (Oxford, Oxford University Press, 1978).

6. "Lives, Liberties and Estates, which I call by the general Name, *Property*." Locke, ibid., para. 123 (*original* emphasis).

7. I have developed the theory of rights more fully in Roger Pilon, *A Theory of Rights: Toward Limited Government* (Chicago: unpublished Ph.D. dissertation, University of Chicago, 1979).

8. For some of the justificatory problems of majoritarian democracy, see Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970); Roger Pilon, "On the First Principles of Constitutionalism: Liberty, Then Democracy," *The American University Journal of International Law and Policy*, vol. 8 (1992–93), p. 531.

9. James Madison, Speech in Congress, Apr. 9, 1789, cited in *Advice*, note 3, p. 21.

10. James Madison, *Report of 1800*, in *The Papers of James Madison*, vol. 17, David B. Mattern et al., ed. (Charlottesville and London: University Press of Virginia, 1977), p. 308.

11. 4 *Annals of Congress* 179 (1794).

12. James Madison, *Veto Message*, March 3, 1817, cited in *The Mind of the Founder*, Marvin Meyers, ed. (Hanover and London: University Press of New England, 1981), p. 308.

13. Ibid.

14. I have discussed the issues that follow more fully in Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," *Notre Dame Law Review*, vol. 68 (1993), p. 507.

15. See *Industrial and Commercial Correspondence of Alexander Hamilton*, Arthur Harrison Cole, ed. (Chicago: A. W. Shaw Company, 1968).

16. I do not mean to overstate the restraint that prevailed for our first 150 years, for that period did witness genuine inroads on the doctrine of enumerated powers. In comparison to what followed from the New Deal, however, those inroads were limited and did not amount to anything like the fundamental rewriting of the Constitution that occurred in 1937–38. For an excellent discussion of those inroads, published in 1932, see Charles Warren, *Congress as Santa Claus* (Charlottesville: The Mitchie Company, 1932).

17. 18 *Congressional Record* 1875 (1887).

18. Thus, Jeremy Bentham, the father of British utilitarianism, wrote in 1791 that talk of natural rights was "simple nonsense: natural imprescriptible rights, rhetorical nonsense,—nonsense upon stilts." "Anarchical Fallacies," in *Works of Jeremy Bentham*, vol. 2, Richard Doyne, ed. (Edinburgh: W. Tait, 1843), p. 501.

19. For pragmatism in law, see Robert S. Summers, "Pragmatic Instrumentalism: America's Leading Theory of Law," *Cornell Law Forum*, vol. 5 (1978): 15.

20. *Encyclopedia of Social Reform*, p. 270, William D. P. Bliss, ed. (New York: Funk and Wagnalls Company, 1897), p. 15.

21. Owen R. Lovejoy, "The Faith of the Social Worker," vol. 44 *Survey*, p. 209, May 8, 1920.

22. Frank Dekker Watson, *The Charity Organization Movement in the United States: A Study in American Philanthropy* (New York: Macmillan Company, 1922), p. 332.

23. *Lochner v. New York*, 198 U.S. 45 (1905).

24. See Merlo J. Pusey, *The Supreme Court Crisis of 1937* (New York: DaCapo Press, 1973).

25. See Hamilton's *Report*, ibid., note 15, p. 293: "It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under the description, an appropriation of money is requisite and proper. And there seems to be no room for doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money. The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object, to which an appropriation of money is to be made, be general, and not local; its operation extending, in fact, or by possibility throughout the Union, and not being confined to a particular spot."

26. In fact, Hamilton himself made that point in *Federalist* No. 84: "Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"

27. James Madison, "Letter to Edmund Pendleton," Jan. 21, 1792, in *The Papers of James Madison*, vol. 14, Robert A. Rutland et al., ed. (Charlottesville: University Press of Virginia, 1984) (original emphasis).

28. James Madison, *Report of 1800*, in *The Papers of James Madison*, vol. 17 (Charlottesville and London), p. 315 (original emphasis).

29. See Hamilton's comments, Note 25 above.

30. *United States v. Butler*, 297 U.S. 1, 65–66 (1936).

31. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

32. James Madison, *Veto Message*, Note 12 above, p. 308.

33. 22 U.S. 1 (1824).

34. 22 U.S. 1, 231 (1824).

35. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

36. *United States v. Carolene Products*, 304 U.S. 144 (1938). For a devastating critique of the case, and the facts behind it, see Geoffrey P. Miller, "The True Story of Carolene Products," 1987 *Supreme Court Review*, p. 397.

37. James Madison, "Bounty Payments on Cod Fisheries," February 6, 1792, in *The Papers of James Madison*, 14.

38. *United States v. Lopez*, 514 U.S. 549 (1995).

39. Ibid., at 552.

40. See Roger Pilon, "It's Not about Guns," *Washington Post*, May 21, 1995, p. C5.

41. See, for example, Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (1994): 1231. "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution"; Richard A. Epstein, "The Proper Scope of the Commerce Power," *Virginia Law Review* 73 (1987): 1388. "I think that the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so. . . ."

42. See, for example, Laurence H. Tribe, *American Constitutional Law* (New York: Foundation Press, 2000), p. 816: "The Court's application of its substantial effect and aggregation principles in the period between 1937 and 1995, combined with its deference to congressional findings, placed it in the increasingly untenable position of claiming the power to strike down invocations of the Commerce Clause, while at the same time applying a set of doctrines that made it virtually impossible actually

to exercise this power." The tortured "principles" and "doctrines" the Court has invented over the past 60 some years to try to square the circle were all but predicted by one of the principal architects of the New Deal, Rexford G. Tugwell, offering his reflections some 30 years after the tortured reasoning first took place: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document intended to prevent them." Clearly, they knew what they were doing. "Rewriting the Constitution: A Center Report," *Center Magazine*, March 1968, p. 18.

$10.95

"To know America, you must know Madison. This delightful collection of essays applies Madisonian philosophy to a wide range of situations and controversies, past and present, from federalism to religion and politics to foreign policy. All of us—pure citizens and officeholders alike—will gain from a deeper understanding of Mr. Madison's views and hopes for our Republic."

—Larry J. Sabato
University of Virginia

"An interesting and important contribution to our understanding of this major Founder of American constitutionalism."

—Garrett Ward Sheldon
Author, *The Political Philosophy of James Madison*

"A wonderful tribute to Madison! The scholars gathered in this volume offer invaluable explorations of what Madison's political and constitutional practice and thought mean for us today, and they provide an important reminder of Madison's continuing relevance to all those who hope to secure liberty."

—Keith Whittington
Princeton University

"That Madison was in a real sense the founder of our constitutional order, or at least the most important influence on it, is well known. This collection of essays, however, brings the matter up-to-date. We still have much to learn from Madison in applying his ideas. The contributors to this book make a sizable step forward in this endeavor."

—Gordon Tullock
University Professor of Law and Economics
George Mason University

ISBN 1-930865-22-8
51095
9 781930 865228

Distributed to the trade by
National Book Network

Cato Institute
1000 Massachusetts Avenue, N.W.
Washington, D.C. 20001
www.cato.org