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ENUMERATED MEANS AND UNLIMITED ENDS

*H. Jefferson Powell**

*United States v. Lopez*¹ can be read as a fairly mundane disagreement over the application of a long-settled test. The Government defended the statute under review in the case, the Gun-Free School Zones Act of 1990,² along familiar lines as a permissible regulation of activity affecting interstate and foreign commerce. The Solicitor General reasoned that the Act's prohibition on the possession of firearms in local school zones was a rational means of limiting the incidence and effects of violent crime, and the prevention of violent crime was a rational means of protecting "the functioning of the national economy" from various negative effects.³ Agreeing with the Government, Justice Breyer argued in his dissent that "[n]umerous reports and studies . . . make clear that Congress could reasonably have found the empirical connection [between 'gun-related school violence and interstate commerce'] that its law, implicitly or expressly, asserts."⁴ The *Lopez* majority, however, found that there was no basis on which to conclude that the activity prohibited by the Act "substantially affects" interstate commerce⁵ and accordingly held that the Act "exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States.'"⁶

On this reading of *Lopez*, its main point of interest lies in the fact that, for the first time since the New Deal, the Supreme Court has found that a congressional statute flunks its Commerce Clause test. In and of itself, though, that fact is little more than a curiosity, and, as a practical matter, the main effect of *Lopez* is very likely to be nothing more than a renewed congressional interest in loading federal criminal statutes with findings and "jurisdictional ele-

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1. 115 S. Ct. 1624 (1995).

2. 18 U.S.C. § 922(q) (1994).

3. See 115 S. Ct. at 1632 (summarizing the Government's argument).

4. 115 S. Ct. at 1659 (Breyer, J., dissenting).

5. See 115 S. Ct. at 1630, 1634.

6. 115 S. Ct. at 1626 (quoting U.S. CONST. art. I, § 8, cl. 3).

ment[s]"⁷ in order to demonstrate the close link between what Congress wishes to regulate and "Commerce . . . among the several States."⁸ *Lopez*, in short, may have little effect on the post-1937 norm of congressional omnicompetence.⁹

In this essay, I do not address the question whether *Lopez* was an important decision. My concern instead is with the problem that underlies *Lopez*'s particular issue of the scope of the commerce power: Given our commitment to limited national government, in what way is the national legislature actually limited? Or, more exactly, how are we to approach the task of constitutional interpretation so as to give appropriate meaning and effect to our commitment to limited national government? Many Supreme Court decisions, of course, pose this question in one fashion or another, but *Lopez* particularly invites reflection. The specific issue before the Court — the interpretation of Congress's enumerated powers — is our oldest vehicle for debating the problem of giving meaning to national limitation, and all the opinions in *Lopez* reflect a serious attempt to wrestle with its implications and resolution.¹⁰ At the same time, the sharp divisions among the Justices in *Lopez*¹¹

7. See 115 S. Ct. at 1631 (discussing the significance of the fact that the Act contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

8. U.S. CONST. art. I, § 8, cl. 3.

9. In his dissent, which shrewdly analogizes the majority's reasoning to pre-1937 substantive due process, Justice Souter suggests that this may in fact be all there is to the decision. See 115 S. Ct. at 1657 ("[T]oday's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard . . ."). For reasons somewhat similar to those I present in this article, Souter raises doubts about his own suggestion: "Not every epochal case," he reminds the reader, "has come in epochal trappings." 115 S. Ct. at 1657 (Souter, J., dissenting). Justice Thomas, at least, clearly sees *Lopez* as the beginning of something much bigger, but his opinion was not joined by any of his colleagues. See 115 S. Ct. at 1642-43, 1650-51 (Thomas, J., concurring).

10. In doing so, the opinions canvas the original meaning of "Commerce," see 115 S. Ct. at 1643-46 (Thomas, J., concurring), the history of the Court's interpretation of the Commerce Clause, see 115 S. Ct. at 1627-29; 115 S. Ct. at 1634-37 (Kennedy, J., concurring); 115 S. Ct. at 1648-49 (Thomas, J., concurring); 115 S. Ct. at 1652-53 (Souter, J., dissenting), the nature and application of modern Commerce Clause case law, see 115 S. Ct. at 1629-34; 115 S. Ct. at 1649-50 (Thomas, J., concurring); 115 S. Ct. at 1653-57 (Souter, J., dissenting); 115 S. Ct. at 1657-65 (Breyer, J., dissenting), and the correct reading of *Gibbons v. Ogden*, see 115 S. Ct. at 1626-27; 115 S. Ct. at 1634 (Kennedy, J., concurring); 115 S. Ct. at 1646-48 (Thomas, J., concurring); 115 S. Ct. at 1657, 1665 (Breyer, J., dissenting).

11. The *Lopez* Justices often sharply disagree about the conclusions to draw from the sources of constitutional interpretation they invoke. Justice Breyer, for example, believes that the dissenters' position rests on a view of the Commerce Clause stemming from *Gibbons v. Ogden*, 115 S. Ct. at 1665 (Breyer, J., dissenting), while Justice Thomas insists that "*Gibbons* simply cannot be construed as the principal dissent would have it," 115 S. Ct. at 1648 (Thomas, J., concurring). The fact that Justices Kennedy and O'Connor plainly disagree with Justice Thomas about the implications of *Gibbons* complicates the picture still further. Compare 115 S. Ct. at 1634 (Kennedy, J., joined by O'Connor, J., concurring) (*Gibbons* recognized that "the Commerce Clause grants Congress extensive power and ample discretion to

demonstrate that despite its fundamental character, the problem of how to construe the Constitution so as to limit the national government remains uncertain more than two centuries after its ratification.

My purpose is to compare one of the approaches to the problem of limited national government offered in *Lopez*, that of the majority opinion written by Chief Justice William Rehnquist, with early attempts to address the same issue. Chief Justice Rehnquist's reasoning, I argue, closely resembles the constitutional logic developed by early Republican theorists such as Madison for the express purpose of preserving the Constitution's commitment to limited national power.¹² At the same time, however, Chief Justice Rehnquist, like — virtually¹³ — everyone who has sat on the Supreme Court since the 1930s, believes that the range of Congress's legitimate concerns is as broad as "the common Defence and general Welfare,"¹⁴ a position that is expressly contrary to, and fundamentally subversive of, the early Republican logic. After this comparison, I then examine the approaches to constitutional interpretation articulated by early constitutionalists who shared Chief Justice Rehnquist's profound nationalism as to the ends Congress may pursue. In the conclusion, I reflect on the relative merits of the Republican and nationalist positions as models for contemporary constitutional interpretation. Many of us, including Chief Justice Rehnquist, believe that Congress may employ its limited powers to address the essentially unlimited goals of the national welfare. If we agree with the early nationalists to that extent, I suggest, a decision such as *Lopez* may be a questionable judicial intervention into

determine its appropriate exercise") with 115 S. Ct. at 1648 (Thomas, J., concurring) (referring to "Gibbons's emphatic statements that Congress could not regulate many matters that affect commerce").

12. I want to note at the outset that Chief Justice Rehnquist undoubtedly views a much wider range of legislation as within the scope of the commerce power than would have occurred naturally to early constitutionalists. As the Chief Justice notes, the New Deal expansion of the authority accorded Congress under the Commerce Clause is "[i]n part . . . a recognition of the great changes that had occurred in the way business was carried on in this country." 115 S. Ct. at 1628; see also 115 S. Ct. at 1637 (Kennedy, J., concurring). While this is troublesome to some, see 115 S. Ct. at 1643 (Thomas, J., concurring) (discussing the problems with "interjecting a modern sense of commerce into the Constitution"), for the purposes of this essay I want to put the issue to one side.

13. It would be unnecessary to add this qualification if it were not for Justice Thomas's concurring opinion in *Lopez*, which suggests that his view of congressional power may be narrower than that espoused by any Supreme Court Justice since the Court unanimously adopted Hamilton's view of the spending power in *United States v. Butler*, 297 U.S. 1 (1936). See, e.g., 115 S. Ct. at 1650 n.8 (Thomas, J., concurring) (expressing a possible willingness "to return to [his own view of] the original understanding"). The many interesting questions Justice Thomas's concurrence raises are beyond the scope of this essay.

14. U.S. CONST. art I, § 8, cl. 1.

legislative discretion rather than an appropriate defense of the concept of limited federal government.

I. CHIEF JUSTICE REHNQUIST'S APPROACH TO THE INTERPRETATION OF CONGRESSIONAL POWER

Chief Justice Rehnquist's reasoning is elegant and in its own terms irrefutable.¹⁵ He "start[s] with first principles,"¹⁶ principles that he clearly deems first both as a matter of logic and as a matter of history.

The Constitution creates a Federal Government of enumerated powers. See U.S. Const., Art. I, § 8. As James Madison wrote, "[t]he 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."¹⁷

The act of specifying the powers to be delegated to Congress necessarily assumes the existence of unspecified and thus undelegated powers. As Chief Justice John Marshall wrote of the commerce power in *Gibbons v. Ogden*,¹⁸ "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."¹⁹ Congressional powers are enumerated powers; the enumeration of some powers implies the existence of powers not enumerated: from these two premises, the *Lopez* majority draws two inferences. First, the commerce power — and one would assume all congressional powers, but we must return to that issue later — "is subject to outer limits."²⁰ Second, the outer limits on the commerce power are judicially enforceable.²¹

15. I would reach the same conclusion about the principal dissent, written by Justice Breyer, which convincingly demonstrates that, on an ordinary application of the Court's decades-old Commerce Clause jurisprudence, the statute at issue in *Lopez* is plainly constitutional. See 115 S. Ct. at 1657-71 (Breyer, J., dissenting). The disagreement between the majority and the dissenters in *Lopez* is the product of a fundamental disagreement over how the Court should approach the task of reviewing the constitutionality of congressional statutes. The separate opinions of Justices Kennedy and Souter directly address this disagreement over the judicial role. See 115 S. Ct. at 1634-42 (Kennedy, J., concurring); 115 S. Ct. at 1651-57 (Souter, J., dissenting). The purpose of this essay is to explore the same fundamental disagreement from a different perspective, that of early constitutional history.

16. 115 S. Ct. at 1626.

17. 115 S. Ct. at 1626 (citing THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

18. 22 U.S. (9 Wheat.) 1 (1824).

19. 22 U.S. (9 Wheat.) at 195, quoted in *Lopez*, 115 S. Ct. at 1627.

20. 115 S. Ct. at 1628; see also 115 S. Ct. at 1642 (Thomas, J., concurring) ("[T]here are real limits to federal power.").

21. See 115 S. Ct. at 1633 (referring to "judicially enforceable outer limits"); see also 115 S. Ct. at 1640 (Kennedy, J., concurring) (referring to "our duty to recognize meaningful limits on the commerce power of Congress"). The *Lopez* majority does not explain its rejection of

Neither of these steps in the Chief Justice's argument is surprising nor do the dissenters challenge them. The crucial step in the Chief Justice's logic, and the point at which he and the dissenters part company, lies in a further inference that Chief Justice Rehnquist clearly draws but nowhere directly states. For the Court to uphold a supposed exertion of the commerce power, the Chief Justice believes that the Court must be able to assure itself that in doing so it has not foreclosed the possibility of invalidating any other federal acts with the same analysis. That is to say, if the argument that must be made to justify a particular statute leaves one unable to hypothesize any piece of legislation that Congress could not lawfully enact under the same reasoning, the argument and the statute stand self-condemned as invalid attempts to ignore the principle of enumerated and limited federal power.²²

This last step in the Chief Justice's logic made virtually inescapable his conclusion that the Gun-Free School Zones Act is unconstitutional. Neither the Government nor the dissent identified any specific federal legislation that would fall outside the commerce power as they interpret it, and rightly so in Chief Justice Rehnquist's view, for their reasoning did not in fact preserve any discernible area of legislation that the commerce power could not reach.²³

the view that it is Congress rather than the courts that is charged with enforcing limitations on federal power that stem from the enumeration of powers. The Court came close to adopting that position in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548 (1985), with respect to federalism issues. The only members of the *Lopez* majority then on the Court, Justices Rehnquist and O'Connor, dissented.

22. The opinion of the Court repeatedly refers to the unwillingness of the Government and the dissenters to identify specific legislation as beyond the scope of the commerce power in order to demonstrate the incompatibility of their position with the principle of enumerated, limited, and judicially policed federal powers. See 115 S. Ct. at 1628-29 ("[T]he . . . commerce power ' . . . may not be extended so as to . . . create a completely centralized government.' ") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)); 115 S. Ct. at 1632 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not."); cf. 115 S. Ct. at 1633 (noting that uncertainty about the validity of commerce power legislation is unavoidable "so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits"); 115 S. Ct. at 1649 (Thomas, J., concurring) (commenting on the failure of the Government and the dissenters to specify "any limits to the Commerce Clause").

23. See 115 S. Ct. at 1632.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limita-

"To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."²⁴

It is important to be clear about what Chief Justice Rehnquist is implying about the proper approach to construing congressional powers. In effect, *Lopez* suggests that it is not enough to make the positive argument that a given statute has a substantial relationship to interstate commerce; it is also necessary to make the essentially negative demonstration that one can with logical consistency prove some other, hypothetical statute unconstitutional.²⁵ This second, negative requirement — what we might call "the test of consequences" — serves to confirm that, in upholding the use of the Commerce Clause under review, the Court is not inadvertently "conclud[ing] that the Constitution's enumeration of powers does not presuppose something not enumerated" contrary to the principle of enumerated and therefore limited federal power.²⁶

In itself, the Chief Justice's adoption of the test of consequences for demonstrating that a statute lies within the commerce power seems to me entirely sensible. In good common law fashion, Chief Justice Rehnquist is proposing that we test an argument for a proposed answer to an uncertain question by its compatibility with propositions of law we know to be true.²⁷ We know from the principles of enumeration and limitation that there must be something Congress cannot do. If the consequence of a constitutional argument is that we cannot imagine anything that would be beyond Congress's power under it, that is a powerful indication that the argument is mistaken. More broadly, the test of consequences evidences the Chief Justice's allegiance to the widely held view that the significance of judicial review lies in the actual or potential invalidation of governmental action.

The opinion of the Court in *Lopez* evidences Chief Justice Rehnquist's concern about preserving the principles of enumera-

tion on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

115 S. Ct. at 1632.

24. 115 S. Ct. at 1634.

25. Presumably neither the Court nor the Government would attempt to make such a showing with respect to an actual statute that had not been invalidated already.

26. 115 S. Ct. at 1634.

27. For purposes of this essay, it seems to me unimportant whether propositions of law can ever be "true" other than in the sense that they are generally accepted.

tion and limitation. But *United States v. Lopez* is not the only opinion Chief Justice Rehnquist has written that implicates those principles. The Chief Justice is also the author of *South Dakota v. Dole*,²⁸ the leading modern case on the scope of Congress's power to spend money. In *Dole*, he briskly rejected the argument that the spending power is limited in its goals to the ends embodied in the enumeration of particular congressional powers in Article I, Section 8.²⁹ Instead, according to *Dole*, Congress may expend funds for any purpose that serves the "general Welfare," subject to certain very general doctrinal standards that do not appear to have any great limiting effect on the scope of the spending power as a practical matter.³⁰ *Dole* included no parallel to the test of consequences in *Lopez*: the Government was not required to point out specific expenditures of money that would transcend the bounds of the spending power in order to show that the use of the power at issue in *Dole* was legitimate. After *Lopez*, we know that the commerce power and thus Congress's legislative competence in fact remain limited: there is at least one piece of legislation — the Gun-Free School Zones Act of 1990 — that is beyond the scope of the power. After *Dole*, in contrast, we do not know if there is any legislation involving the expenditure of federal funds that is outside the scope of the spending power. This power, in fact, may be infinite — to be sure, as long as Congress can accomplish its goal through expenditure.

On a purely doctrinal level, *Dole* and *Lopez* are of course easily reconcilable: the statute *Dole* upheld was a straightforward exercise of the power to spend that the Court could not deem outside the scope of the "general Welfare," while the statute *Lopez* struck down was not, the Court concluded, a regulation of anything that could be seen as "Commerce . . . among the several States." I do not mean to suggest that the Chief Justice has been inconsistent in any straightforward sense. My interest in comparing the two decisions lies in the tension between them that emerges when one reflects on them in light of early constitutional debates over the proper construction of Congress's powers. As I mentioned above,³¹ Chief Justice Rehnquist's reasoning in *Lopez* closely resembles the

28. 483 U.S. 203 (1987).

29. See 483 U.S. at 207.

30. See 483 U.S. at 207-08; see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 322-23 (2d ed. 1988) (discussing "the absence of effective limits [on the spending power] derived from the general welfare clause itself").

31. See *supra* note 12 and accompanying text.

approach to congressional power that James Madison and his political allies developed in the first decade or so after ratification. But *Dole* expressly endorsed a central proposition of the early nationalist opponents of Madison — that Congress is not limited in its *goals* by the Constitution's enumeration of its *powers*. Nor is this a peculiarity of *Dole* or of the spending power: nothing in his opinion in *Lopez* suggests that Chief Justice Rehnquist has any qualms about Congress's use of any of its powers as instruments to achieve ends that are not themselves encompassed within those powers.³² On the question of what goals Congress may pursue, in other words, Chief Justice Rehnquist is the heir of the early nationalists not of Madison.

II. THE MADISONIAN APPROACH TO THE INTERPRETATION OF CONGRESSIONAL POWER

The majority opinion in *United States v. Lopez* begins its analysis with the well-known passage from *The Federalist No. 45* in which Madison contrasts the powers which the Constitution would accord the federal government — “few and defined” — with the “numerous and indefinite” powers that would remain with the states.³³ For Chief Justice Rehnquist's purposes, however, he also might have quoted Madison's famous speech against the national bank bill, delivered in the House of Representatives in February 1791.³⁴ That speech, far more clearly than Madison's general statement in *The Federalist No. 45*, employs an approach to the interpretation of congressional powers that closely parallels Chief Justice Rehnquist's own in *Lopez*. Madison began his attack on the bank bill by noting “the peculiar manner in which the Federal Government is limited. It is not a general grant out of which particular powers are excepted — it is a grant of particular powers only, leaving the general mass in other hands.”³⁵ With this fact in mind, Madison described the first rule of “right interpretation” in terms of the consequences of a proposed argument: “An interpretation that destroys the very charac-

32. Once again, I intend no criticism. It would have been remarkable if *Dole* had come to the opposite conclusion. It has been settled law at least since *Champion v. Ames*, 188 U.S. 321 (1903), that Congress may employ its enumerated powers to accomplish ends that are incidental to the inherent purpose of the enumerated powers themselves. In *United States v. Butler*, 297 U.S. 1 (1936), the Court confirmed that this conclusion applied to the spending power as well, even as the Court struck down an exertion of the spending power on federalism grounds.

33. See 115 S. Ct. at 1626 (quoting *THE FEDERALIST* No. 45, *supra* note 17, at 292-93).

34. See James Madison, Speech on the Bank Bill (1791), reprinted in 13 *THE PAPERS OF JAMES MADISON* 372 (Charles F. Hobson & Robert A. Rutland eds., 1981).

35. 13 *Id.* at 374.

teristic of the Government cannot be just.”³⁶ If a proposed congressional action cannot be defended except through an argument that subverts “[t]he essential characteristic of the government as composed of limited and enumerated powers” by leaving nothing clearly beyond congressional reach, the argument must be erroneous and the action unconstitutional.³⁷ The bank bill, in Madison’s view, failed this test by necessarily resting on arguments that gave “an unlimited discretion to Congress” to legislate.³⁸

Later in the speech, Madison invited his audience to test the argument for the bank bill with reasoning parallel to the *Lopez* test of consequences and to Chief Justice Rehnquist’s objection to “pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority . . . to a general police power of the sort retained by the States.”³⁹

Mark the reasoning on which the validity of the bill depends. To borrow money is made the end and the accumulation of capitals, implied as the means. The accumulation of capitals is then the end, and a bank implied as the means. The bank is then the end, and a charter of incorporation, a monopoly, capital punishments, &c., implied as the means.

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.⁴⁰

If the bank bill were deemed constitutional, Madison could imagine no legislation that would be beyond Congress’s authority. That consequence alone, because it would “destroy[] the very characteristic of the government,” proved the bill invalid.⁴¹

Madison’s insistence that any congressional action be brought to the test of its consequences for the principle of enumerated and limited federal power became at once a standard and central feature of constitutional argument among the opponents of the activist central government advocated by Hamilton and other nationalists. A few examples will suffice. Advising President Washington to

36. 13 *Id.*

37. 13 *Id.* at 376.

38. 13 *Id.* (speaking with specific reference to the Necessary and Proper Clause).

39. *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995).

40. Madison, *supra* note 34, at 377-78 (emphasis omitted). The constitutional reasoning necessary to sustain the bank bill, Madison pointed out, would enable Congress to do anything that would serve “the general wealth of the society [and thus] the general prosperity of agriculture, manufactures, and commerce.” 13 *Id.* at 377; cf. 115 S. Ct. at 1633 (rejecting the Government’s “national productivity” argument for the Gun-Free School Zones Act).

41. Madison, *supra* note 34, at 374. Madison had other arguments against the bank bill too. See 13 *id.* at 372-82 for a summary of his views from which the phrase quoted in the text is taken.

veto the bank bill after Congress passed it over Madison's objections, Secretary of State Thomas Jefferson criticized the arguments in the bill's favor as implicitly leaving no legislative power beyond Congress's reach. If the unenumerated power to incorporate a bank were a legitimate means of executing the power to collect taxes, Jefferson wrote, the same reasoning "will go to every [unenumerated power], for there is not one which ingenuity may not torture into a convenience in some instance or other, to some one of so long a list of enumerated powers."⁴² The consequence of accepting the argument for the bank, in other words, would be "to take possession of a boundless field of power, no longer susceptible of any definition"⁴³ and thus overthrow the constitutional intent to "lace [Congress] up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect."⁴⁴

When the bank's 1791 charter was presented to Congress for renewal in 1811, Representative Peter Porter took the lead in attacking its validity.⁴⁵ Porter restated the fundamental principle that "[t]he Constitution has expressly given to Congress the power to do certain things; and it has, as explicitly, withheld from them the power to do every other thing."⁴⁶ But the justifications of the bank bill directly violated this principle by implying that Congress could legislate across the range of what Madison had called "political economy." Porter pointed to the implications of the argument that "the right to incorporate a bank is implied in the power to regulate trade and intercourse between the several States."⁴⁷

It is said to be so, inasmuch as it creates a paper currency, which furnishes a convenient and common circulating medium of trade between the several States. Money, sir, has nothing more to do with trade, than that it furnishes a medium or representative of the value of the articles employed in trade. The only office of bank bills is to

42. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in JEFFERSON POWELL, *LANGUAGES OF POWER* 41, 43 (1991).

43. *Id.* at 42.

44. *Id.* at 43.

45. Porter was more successful in 1811 than Madison had been in 1791: the 1811 renewal bill died in the Senate when the Vice President exercised his power to break a tie by voting against the bill, on expressly constitutional grounds.

By 1811, Madison himself had concluded that renewal or reenactment of the Bank Act would be constitutional, although on the ground of precedent rather than as a matter of the proper interpretation of the Constitution's text. See, e.g., Letter of James Madison to Charles Jared Ingersoll (June 25, 1831), in *THE MIND OF THE FOUNDER* 390-93 (Marvin Meyers rev. ed. 1981).

46. 22 ANNALS OF CONG. 636 (1811).

47. 22 *Id.* at 636-37.

represent money. Now, if it be a regulation of trade, to create the representative articles or subjects of trade, *a fortiori*, will it be a regulation of trade to create the representative articles or subjects themselves. By this reasoning then you may justify the right of Congress to establish manufacturing and agricultural companies within the several States; because the direct object and effect of these would be, to increase manufactures and agricultural products, which are the known and common subjects of trade.⁴⁸

Madison himself returned to the theme in 1817, when as his last act as President he vetoed an internal improvements bill that he supported as a matter of policy. As he explained in his veto message, "no adequate landmarks would be left by the constructive extension of the powers of Congress as proposed in the bill":⁴⁹ it would be impossible thereafter to identify legal limits on the exercise of congressional powers.

Madison and his allies thus anticipated the *Lopez* test of consequences, and, to that extent, they and Chief Justice Rehnquist share a common approach to the task of preserving the principle of enumerated and limited national powers. For the Madisonians, however, the test of consequences and their rejection of interpretation by "piling inference upon inference"⁵⁰ were linked inextricably with their view of the goals Congress was authorized to pursue. Not only Congress's means but also its ends had to be construed as limited by the enumeration of powers. To do otherwise, they believed, would be to subvert, just as surely, the limiting purpose of enumeration. This point emerges most clearly and most frequently in their discussion of the scope of the spending power — the very power that *Dole* explicitly held not to be limited in purpose by the principle of enumeration. Madison addressed the issue in 1791: "No argument could be drawn from the terms 'common defence and general welfare.' The power as to these general purposes, was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined."⁵¹

48. 22 *Id.* at 637.

49. James Madison, Message to the U.S. House of Representatives (Mar. 3, 1817), in POWELL, *supra* note 42, at 314.

50. See *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995).

51. Madison, *supra* note 34, at 375.

Madison reiterated this view at significant length in his *Report of 1800*, which defended the Virginia legislature's 1798 resolutions denouncing the Alien⁵² and Sedition Acts⁵³ as unconstitutional.

Now whether the phrases in question be construed to authorise every measure relating to the common defence and general welfare, as contended by some; or every measure only in which there might be an application of money, as suggested by the caution of others, the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers, which follow these general phrases in the Constitution. For it is evident that there is not a single power whatever, which may not have some reference to the common defence, or the general welfare; nor a power of any magnitude which in its exercise does not involve or admit an application of money. The government therefore which possesses power in either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers⁵⁴

Later Madisonians repeated this reasoning. Arguing against the constitutionality of an internal improvements bill in 1818, Representative Alexander Smyth insisted that the breadth of congressional goals was no broader under the spending power than under any other power. "The common defence and general welfare are to be provided for, by expending the money raised in the execution of the other powers expressly granted. If Congress have greater latitude in making appropriations than in passing other laws, it is not given to them by the Constitution."⁵⁵

52. Act Concerning Aliens, 1 Stat. 570 (1798) (expired in 1800 by its own terms).

53. Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 596 (1798) (expired in 1801 by its own terms).

54. James Madison, Report of 1800 (1799), reprinted in 17 THE PAPERS OF JAMES MADISON 314-15 (David B. Mettern ed., 1991). See the entire passage, 17 *id.* at 313-15. Madison consistently maintained this view throughout his public career. In vetoing the 1817 internal improvements bill, he wrote that "the terms 'common defence and general welfare,' embrac[e] every object and act within the purview of a legislative trust," Madison, *supra* note 49, at 313, and for that reason their use in Article I, § 8 could not properly be construed as a direct delegation of power without "giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them," *id.* But Madison was equally critical of the argument that, while Congress could not directly legislate for "the general welfare," it could employ its spending power across that indefinite range of legislative ends.

A restriction of the power "to provide for the common defence and general welfare" to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution.
Id. at 314.

55. 31 ANNALS OF CONG. 1146 (1818). About the same time, Jefferson noted that the Republican "tenet" had always been that

Congress had not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated; and that, as it was never meant they should provide for that welfare but by the exercise of the enumerated powers, so it could not

The Madisonians sometimes linked the necessity of limiting Congress's ends with the preservation of the role of judicial review in the constitutional order. Madison wrote in 1817 that if Congress could legislate for any legitimate purpose whatsoever, directly or through the spending power, the effect would be to "exclud[e] 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."⁵⁶ The following year, Alexander Smyth noted a different problem. If Congress treated the spending power as unlimited in its ends, judicial review would no longer play a significant role in maintaining limits on federal power because of the improbability of "the constitutionality of an appropriation law being brought before the judiciary."⁵⁷

Viewed from the perspective of James Madison and his constitutional allies, Chief Justice Rehnquist's allegiance to the principle of enumerated and limited federal power is so imperfect as to be effectively pointless. *Lopez*, it is true, subjects exercises of the commerce power to the test of consequences. But for the Madisonians, *Dole*, and more generally Chief Justice Rehnquist's acceptance of the modern consensus that Congress's ends are not limited by the Constitution, are as a practical matter just as destructive of the principle of enumeration and limitation as is the interpretation by "piling inference upon inference" that the test of consequences is meant to check.⁵⁸ As Madison explained, "there is not a single

have been meant they should raise money for purposes which the enumeration did not place under their action

Letter of Thomas Jefferson to Albert Gallatin (June 16, 1817), in 10 THE WRITINGS OF THOMAS JEFFERSON 90, 91 (Paul Leicester Ford ed., 1899).

56. Madison, *supra* note 49, at 313. In his cautious, private criticism of *McCulloch v. Maryland*, Madison made a related point. His concern, he explained, was that Marshall's opinion rendered it impossible for the Court to carry out its promise to invalidate legislation enacted "for the accomplishment of objects not entrusted to the Government." Letter of James Madison to Spencer Roane (Sept. 2, 1819), in THE MIND OF THE FOUNDER, *supra* note 45, at 360-61.

But suppose Congress should, as would doubtless happen, pass unconstitutional laws not to accomplish objects not specified in the Constitution, but the same laws as means expedient, convenient or conducive to accomplishment of objects entrusted to the Government; by what handle could the Court take hold of the case? . . . Should Congress [pass such an act] as a means judged by them to be necessary, expedient or conducive to the borrowing of money, which is an object entrusted to them by the Constitution, it seems clear that the Court, adhering to its doctrine, could not interfere without stepping on Legislative ground, to do which they justly disclaim all pretension.

Id.

57. 31 ANNALS OF CONG. 1146 (1818).

58. In 1817, Jefferson wrote that the Republican insistence on the limited scope of Congress's legitimate goals was "almost the only landmark which now divides the federalists from

power whatever, which may not have some reference to the common defence, or the general welfare; nor a power of any magnitude which in its exercise does not involve or admit an application of money.”⁵⁹ In his view, therefore, a government with the power to spend for any purpose coming within the notion of the general welfare “is a government without the limitations formed by a particular enumeration of powers.”⁶⁰

Modern Supreme Court Justices are not obliged, of course, to render their constitutional views consistent with those of any early constitutionalist, not even James Madison. But the stark inconsistency, from a Madisonian perspective, in Chief Justice Rehnquist’s approach to interpreting congressional powers suggests the value of looking to the Madisonians’ opponents to examine the way or ways in which they reconciled a rejection of the enumeration of powers as a limit on Congress’s purposes with the common constitutional commitment to the principle of enumerated and limited powers.

III. THE EARLY NATIONALIST APPROACH TO THE INTERPRETATION OF CONGRESSIONAL POWER

Against the background of the long run of post-1937 decisions invariably upholding Commerce Clause legislation, Chief Justice Rehnquist’s opinion in *United States v. Lopez* reads like a reaction to views expressed by the Court in earlier cases.⁶¹ Since the New Deal, an undiluted nationalism in the interpretation of congressional authority has been the almost unbroken norm, and Chief Justice Rehnquist’s arguments on behalf of placing some limits on that nationalism have up to now been the exception.⁶² In the founding era, however, as a rhetorical matter the situation was the reverse, and early nationalist views were crafted in response to Madisonian attacks on proposed congressional legislation, beginning with the

the republicans.” Letter of Thomas Jefferson to Albert Gallatin, *supra* note 55, at 90. In Jefferson’s political lexicon, “federalist” and “republican” were virtually synonymous with “subverter of” and “upholder of the Constitution’s limitation of national authority.” Cf. Madison, *supra* note 54, at 335 (“[I]t must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution, limited powers.”). See generally 10 *id.* at 334-35.

59. Madison, *supra* note 54, at 314.

60. 17 *Id.* at 315.

61. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (declining “to proceed any further” with the expansion of congressional power suggested by “some of our prior cases”).

62. For his most notable earlier attempt, see *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Rehnquist, J.) (holding particular Commerce Clause legislation to be an unconstitutional invasion of state sovereignty), *overruled by* *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (Rehnquist, J., dissenting).

debate over the 1791 bank bill. The early nationalists differed among themselves over the proper approach to interpreting Congress's powers, but they did share two fundamental positions: they disagreed with the Madisonian test of consequences and its associated rejection of inferential argument, and they maintained that Congress may legislate to accomplish any legitimate governmental purpose and not merely those ends that might be viewed as embodied in Article I, Section 8's enumeration of powers.⁶³

One day after Madison delivered his great speech against the bank bill, the brilliant, if eccentric, Fisher Ames rose to reply. Congress's power to exercise powers not expressly delegated by the Constitution "has long been a bugbear to a great many worthy persons," Ames conceded, because "[t]hey apprehend that Congress, by putting constructions upon the Constitution, will govern by its own arbitrary discretion."⁶⁴ However respectable the group possessed by such fears, Ames dismissed the view as based on an unexamined and insupportable presumption that there is something inherently questionable about the exercise of national power.⁶⁵

The powers of Congress are disputed. We are obliged to decide the question according to truth. The negative, if false, is less safe than the affirmative, if true. Why, then, shall we be told that the negative is the safe side? Not exercising the powers we have, may be as pernicious as usurping those we have not.⁶⁶

Ames rejected Madison's approach to construing federal power as a risible attempt to reduce great questions of public good to lawyers' quibbles: the latter's "rules of interpretation . . . only set up one construction against another" without rendering the public any

63. The distinguished constitutional historian G. Edward White has questioned the utility of applying the term "nationalist" to the Marshall Court on the ground that the "nationalism" of John Marshall and his colleagues was not a commitment to an activist central government of the 20th-century variety but focused instead on the preservation of the Union against the centrifugal forces of regionalism and states' rights. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 1-2 (1988). One might generalize the point to suggest that no early constitutionalist foresaw or would have countenanced the modern federal administrative state that contemporary constitutional nationalists defend. In one sense, that is self-evidently true, but little follows from it for present purposes. By "early nationalists," I intend to refer to the contemporaries of the Madisonians who rejected the test of consequences and refused to limit Congress to the ends enumerated in Article I, § 8's delegation of powers. Whether any particular early nationalist would have changed his mind if shown what the 20th century would do with his reasoning is unanswerable. On the possibility that, even in his own day, Chief Justice Marshall was less nationalist than some of his fellow Federalists, see POWELL, *supra* note 42, at 173-77.

64. 2 WORKS OF FISHER AMES 853 (W.B. Allen ed., Liberty Classics 1983) (1854).

65. Ames also argued that most of Congress's legislation in the first two years of its existence was questionable if Madison's arguments were correct. 2 *Id.* at 853-54.

66. 2 *Id.* at 854-55.

safer.⁶⁷ He denounced Madison's test of consequences as creating a pointless ground of objection to legislation that passed the substantive test of conformity to the public good.⁶⁸

This was not to say, of course, that there were no limits on what Congress could do but only that the limits stemmed from the positive purposes for which the Constitution created the federal government. According to Ames, an exercise of congressional power that in fact serves the public good and does so without violating express constitutional limits or the principles of individual liberty accorded with the Constitution's purposes and was therefore valid: "Congress may do what is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves, or to the powers which are assigned to the states."⁶⁹ Legislation that serves a purpose legitimate for government to pursue — that "promotes the good of the society" without violating "natural rights"⁷⁰ — is constitutional for Congress to enact unless the constitutional text expressly prohibits it.

The author of the bank bill was Secretary of the Treasury Alexander Hamilton, and President Washington can have had little doubt as to the Treasury Secretary's ultimate conclusion when he asked Hamilton, Secretary Jefferson, and Attorney General Edmund Randolph⁷¹ to advise him on the bill's constitutionality. Hamilton's defense of the bill's validity agreed in essentials with Ames's argument, although his opinion was a tightly argued, point-by-point refutation of Jefferson and Randolph that reads quite differently than the report of Ames's often sarcastic and sometimes florid speech. Hamilton characterized the question of Congress's

67. 2 *Id.* at 854.

68. "[T]he proof of the affirmative imposed a sufficient burden, as it is easier to raise objections than to remove them." 2 *Id.* at 855.

69. 2 *Id.* at 856. A few moments later, in restating his approach to interpreting congressional power, Ames made it clear that by "necessary" he did not mean to imply any tight limit on the relationship between constitutional ends and congressional means. "That construction may be maintained to be a safe one which promotes the good of the society, and the ends for which the government was adopted, without impairing the rights of any man, or the powers of any state." 2 *Id.*

70. 2 *Id.*

71. In an interesting opinion, Randolph endorsed Hamilton's broad view of the ends Congress may seek, while agreeing with Jefferson that the bank bill was unconstitutional. Randolph's fundamental concern with the bill was that he agreed with Madison that the arguments necessary to justify it could equally apply to sustain anything. See Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 118-20 (1994).

legitimate ends in terms of the sovereign character of congressional power.

[E]very power vested in a Government is in its nature *sovereign*, and includes by *force of the term*, a right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power; and which are not precluded by restrictions & exceptions specified in the constitution; or not immoral, or not contrary to the essential ends of political society.⁷²

This summary of Hamilton's reasoning parallels the passage from Ames quoted in the preceding paragraph except that it leaves it unclear whether the powers *actually* "vested in [the Federal] Government" are broad enough to encompass *all* of "the essential ends of political society."

The rest of Hamilton's bank opinion made it clear that he did not disagree materially with Ames's view of the unlimited nature of Congress's proper aims. All powers vested in Congress, Hamilton wrote, "especially those which concern the general administration of the affairs of a country, its finances, trade, defence &c ought to be construed liberally, in advancement of the public good" in order that "national exigencies [may] be provided for, national inconveniences obviated, [and] national prosperity promoted."⁷³ Furthermore, Hamilton rejected any claim that the Constitution vested in Congress only "express" powers and "implied" means for the execution of express powers: "[T]here is another class of powers, which may be properly denominated *resulting* powers . . . [which are] a result from the whole mass of the powers of the government & from the nature of political society, [rather] than a consequence of either of the powers specially enumerated."⁷⁴

With respect to the spending power, Hamilton rejected any substantive limitation on the objects for which the spending power could be employed, the only qualification on Congress's choice of ends being that it "cannot rightfully apply the money they raise to

72. Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (1791), reprinted in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 98 (Harold C. Syrett ed., 1965). Hamilton asserted that once this proposition was recognized to be true, the bank bill's validity might be taken to be established "as far as concerns the reasonings of the Secretary of State & the Attorney General" because, as Hamilton read them, their "reasonings" stood or fell on the cogency of their claim that Congress had no power whatever to charter a corporation. 8 *Id.* at 97-99.

73. 8 *Id.* at 105. Like Ames, Hamilton criticized the Madisonian position for its underlying assumption that denying Congress power is safer than recognizing it. "The greater danger of error" in admitting the existence of national rather than state power, Hamilton wrote, "as far as it is supposeable, may be a prudential reason for caution in practice, but it cannot be a rule of restrictive interpretation." 8 *Id.*

74. 8 *Id.* at 100.

any purpose *merely* or purely local. But with this exception they have as large a discretion in relation to the *application* of money as any legislature whatever."⁷⁵ In his *Report on the Subject of Manufactures* of the following December, Hamilton reasoned that by extending the spending power to all matters of the "*general Welfare*," the Constitution had entrusted Congress with authority over a "vast variety of particulars, which are susceptible neither of specification nor of definition."⁷⁶ He added that "there seems to be no room for a 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*."⁷⁷

With sufficient determination, one might discern some marginal differences between Ames's and Hamilton's approach to interpreting congressional powers. In reality, however, their views were substantially identical.⁷⁸ In evaluating the validity of congressional legislation, they agreed, "[t]he only question must be, in this as in every other case, whether the mean to be employed . . . has a natural relation to any of the acknowledged objects or lawful ends of the government."⁷⁹ If so and if the legislation is neither textually prohibited nor "immoral,"⁸⁰ they agreed that it was within Congress's powers. In particular, Hamilton, like Ames, rejected any argument that federal legislation justified under his affirmative test should be subjected to an additional test of consequences.⁸¹

75. 8 *Id.* at 129. Hamilton thought the question whether an expenditure of money was genuinely for the general, as opposed to local, welfare "must be matter of conscientious discretion" for Congress. 8 *Id.*

76. Alexander Hamilton, Final Version of the Report on the Subject of the Manufactures (Dec. 5, 1791), in 10 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 72, at 230, 303.

77. 10 *Id.* Like the bank opinion, the *Report on Manufactures* asserted that the question whether an expenditure is in fact for the general welfare is "of necessity left to the discretion of the National Legislature." 10 *Id.* Madison's *Report of 1800* quoted this passage from the *Report on Manufactures* as one of its primary examples of the Federalist "design" to interpret Congress's powers "so as to destroy the effect of the particular enumeration of powers by which it explains and limits them." Madison, *supra* note 54, at 314.

78. At least rhetorically, Hamilton appeared to require legislation based on a power other than the spending power to be directed toward an end "clearly comprehended within any of the specified powers." Hamilton, *supra* note 72, at 107. But Hamilton's understanding of the powers delegated to Congress was so broad that it is difficult to view this requirement as of much practical significance, and, indeed, neither the early nationalists nor their Madisonian critics appear to have discerned any important difference between Ames and Hamilton.

79. 8 *Id.* at 100.

80. See 8 *id.* at 98. I take Hamilton's reference to immorality to be parallel to Ames's reference to "the natural rights of man." 2 WORKS OF FISHER AMES, *supra* note 64, at 856.

81. "It is no valid objection to the doctrine to say, that it is calculated to extend the powers of the general government throughout the entire sphere of State legislation. The

Ames and Hamilton were creators and primary exemplars of 1790s nationalist thought. They squarely rejected Madisonian interpretation in favor of an approach to congressional power that confidently followed whatever chain of inferences could be drawn between federal legislation and the proper ends of national government. Their descriptions of those ends make it difficult to imagine many areas of legitimate governmental involvement that would lie by definition outside Congress's purview,⁸² as long as congressional action avoided express constitutional limits such as Article I, Section 9 and the somewhat shadowy constraints of "natural rights" and "morality." The logical endpoint of the 1790s nationalist approach to congressional power can be found in Alexander Addison's critique of Madison's *Report of 1800*, which bluntly stated that the Constitution "gives to Congress power over the means, and imposes the duty of providing for the general welfare in all cases whatever, to which in its discretion the means ought to be applied."⁸³

Early nationalist thought was refurbished after the War of 1812 by the congressional leadership of the Republican party which, freed from electoral fear of the Federalists and schooled by the War in the dangers of national weakness, attempted to synthesize Madisonian and nationalist themes. Arguing in support of the 1818 internal improvements bill, the Republican leaders redefined the point of both Madisonian and early nationalist interpretation as the protection of individual freedom. Speaker of the House Henry Clay asserted that a nationalist endorsement of "that vigor which is nec-

same thing has been said, and may be said with regard to every exercise of power by *implication or construction*." Hamilton, *supra* note 72, at 106.

82. Hamilton's 1791 example of legislation outside congressional competence actually reinforces this conclusion. Hamilton informed Washington that "a corporation may not be erected by congress, for superintending the police of the city of Philadelphia because they are not authorized to *regulate the police* of that city." 8 *Id.* at 100. He went on at once, however, to assert that

one may be erected in relation to the collection of the taxes, or to the trade with foreign countries, or to the trade between the States . . . because it is the province of the federal government to regulate those objects & because it is incident to a general *sovereign or legislative power to regulate* a thing, to employ all the means which relate to its regulation to the *best & greatest advantage*.

8 *Id.* at 100-01. It is difficult to see why, on this formulation of the constitutional test, Congress should be unable to create a corporate body to superintend "the police [public order] of the city of Philadelphia" if it concluded that regulation of Philadelphia's public order was related to the protection of interstate or foreign trade. Perhaps Hamilton would have rejected such an argument on federalism or other grounds, but his basic approach to the interpretation of congressional powers would seem to give him no basis to object that such a statute simply lay outside the scope of Congress's powers.

83. Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly (1800), in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 1066 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

essary, in the exercise of [federal] powers" was essential to "fulfil the purposes" of the Constitution as "the sheet-anchor of the national safety,"⁸⁴ while Representative Henry St. George Tucker assured skeptics that support for the bill was compatible with the traditional Republican recognition of the Alien and Sedition Acts as paradigms of federal overreaching.⁸⁵ The Constitution empowered the national government to secure the public good, on the one hand, while it limited national power for the specific protection of individual liberty, on the other. This synthesis undoubtedly stressed libertarian motifs that were underdeveloped in 1790s nationalism, but its center of gravity lay in the original nationalist insistence that the primary reason for enumerating powers and vesting them in Congress was that they might be used for the common good.⁸⁶

From the first responses to the Madisonian position forward, early nationalists insisted that the Madisonians had turned proper constitutional interpretation on its head.⁸⁷ Rather than viewing a limited set of legitimate ends as defining the outer bounds of congressional authority, the early nationalists saw the indefinite range of legitimate governmental purposes suggested by the constitutional references to "the common Defence and the general Welfare" as identifying the positive bases for congressional action. In a subtle sense, constitutional interpretation, for Madison and his allies, was a search for what Congress could *not* do; for the early nationalists, it was an inquiry into what Congress *could* do. The nationalists rejected the Madisonian approach to interpretation with its test of consequences and its suspicion of "piling inference

84. 31 ANNALS OF CONG. 1165 (1818).

85. See 32 ANNALS OF CONG. 1321 (1818).

86. See the discussion of Republican nationalism in Charles Sellers's masterpiece on the Jacksonian era. CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICAN* 1815-1846, at 70-102, 149-52 (1991). Speaker Clay's summary of his approach to interpreting congressional power is typical and revealing.

In expounding the instrument . . . constructions unfavorable to personal freedom, or those which might lead to great abuse, ought to be carefully avoided. But if, on the contrary, the construction insisted upon was, in all its effects and consequences, beneficent; if it were free from the danger of abuse; if it promoted and advanced all the great objects which led to the confederacy; if it materially tended to effect the greatest of all those objects — the cementing of the Union, the construction was recommended by the most favorable considerations.

31 ANNALS OF CONG. 1165-66 (1818). Clay's concern with consequences is not the original Madisonian anxiety to preserve the essentially limited nature of federal power but a restatement of the nationalist endorsement of the exercise of federal power to accomplish public good.

87. Republican nationalists of the 1810s, to be sure, were careful not to criticize Madison directly. See, e.g., 31 ANNALS OF CONG. 1165 (1818) (speech of Speaker Clay) (describing his "Constitutional opinions" as derived from Madison's *Report of 1800* and other documents "of analogous principles").

upon inference" because in their view those interpretive techniques assumed what the nationalists rejected, that the exercise of national power can be, in itself, a negative in the constitutional order.

In what sense, then, did the early nationalists adhere to the principle of enumerated and limited federal powers? In one way, the nationalists' commitment to the existence of limits on Congress was clear: from the beginning they conceded the legally binding nature of "restrictions & exceptions specified in the constitution."⁸⁸ At the same time, however, they appear to have severed the connection between the enumeration of national power and its limitation that was the core of Madisonianism and that Chief Justice Rehnquist invokes in *United States v. Lopez*. The implication of our historical comparisons, to this point, calls into question the compatibility of the nationalist commitment to the proposition that Congress is not limited in its *goals* by the Constitution's enumeration of its *powers* with the Madisonian insistence that enumeration *is* limitation.

IV. RETHINKING THE ROLE OF ENUMERATION

One answer to the dilemma I have raised is simply to concede that the nationalist view of Congress's ends is as a practical matter inconsistent with respect for the principle of enumeration. If one admits unlimited ends even with respect to only a subset of Congress's powers, such as the spending power, Congress has as a practical matter the means of addressing substantially any matter of legitimate governmental concern. From the standpoint of James Madison and his allies, it will then be "wholly immaterial"⁸⁹ that the interpreter is willing to insist that Congress follow one path toward omnicompetence rather than another. One might object to Chief Justice Rehnquist's Madisonian opinion in *United States v. Lopez* on the Madisonian ground that a decision whether to employ the commerce power or the spending power to achieve an end admitted to be within Congress's purview is a "question[] of policy and expediency . . . unsusceptible of judicial cognizance and decision."⁹⁰

There is, perhaps, another approach to this issue, one that I propose we consider as more appropriate to our own common understanding of the Constitution. Although the early nationalists rejected interpretive strategies such as the Madisonian test of consequences that were intended to ensure *ex ante* that there were

88. Hamilton, *supra* note 72, at 98.

89. See Madison, *supra* note 54, at 335.

90. Madison, *supra* note 49, at 317.

things Congress could not do, they nevertheless insisted that their position respected the principle of enumeration and, indeed, the proper connection between enumeration and limitation.⁹¹ In early nationalist thinking, the enumeration of congressional powers plays a meaningful role in limiting federal authority not by pointing to subjects with which Congress could not deal but by placing whatever Congress did do under the rule of law. The principle of enumeration renders it necessary in the American constitutional order for the proponent of congressional action to produce "the proof of the affirmative,"⁹² to show that what Congress has or might do has an appropriate connection to the powers that the Constitution delegates to it. The existence of judicial review, furthermore, creates an institutional means by which individuals may require an independent tribunal to review that connection. As an early nationalist judge wrote, "A comparison of the law with the constitution is the right of the citizen."⁹³ It is in this sense that the enumeration of national powers limits national powers: for any exercise of national authority to be legitimate, it must be possible to demonstrate its basis in the powers the Constitution grants according to the existing standards and doctrines of constitutional interpretation. Federal power is limited because it must be valid and capable of being validated. Judicial review of congressional legislation for its conformity to Article I, Section 8 is meaningful not because of hypothetical statutes the courts could strike down, but because in assuring the polity of the connection between Congress's powers and Congress's actions, the courts display the "authority of constitutions over governments"⁹⁴ in the American constitutional order.

None of this is to say that a court should not invalidate a federal statute if, on examination, it determines that the statute does not have the connection to Congress's enumerated powers our developed constitutional tradition requires. I do not even argue that the majority was in error in *United States v. Lopez*, although shorn of the test of consequences, Chief Justice Rehnquist's opinion does

91. In 1791, Ames rejected the "misconception of his argument" as a claim "for an arbitrary, unlimited discretion in the government to do every thing." 2 WORKS OF FISHER AMES, *supra* note 64, at 859. "[Ames] had noticed the great marks by which the construction of the Constitution, he conceived, must be guided and limited; and these, if not absolutely certain, were very far from being arbitrary or unsafe." 2 *Id.* The reader will recall that those "great marks" were "the good of the society, and the ends for which the government was adopted," "the natural rights of man," and express constitutional reservations of rights or power to the people or the states. 2 *Id.* at 856; see *supra* notes 64-70 and accompanying text.

92. 2 WORKS OF FISHER AMES, *supra* note 64, at 855.

93. *United States v. The William*, 28 F. Cas. 614, 615 (D. Mass. 1808) (No. 16,700).

94. Madison, *supra* note 54, at 312.

seem to me less persuasive than Justice Breyer's dissent. This essay's conclusion is a suggestion about method, not outcome. In a world in which the nationalist principle that Congress's ends are not circumscribed by its enumerated powers is common ground, interpretive strategies such as the test of consequences are inappropriate. They contradict our rejection of the Madisonian limit on Congress's ends, and they are unnecessary to maintain our adherence to the Madisonian insistence that national power is limited power.