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**UNITED STATES V. COMSTOCK:
THE NEXT CHAPTER
IN THE STRUGGLE BETWEEN
STATE AND CONGRESSIONAL POWER**

*Lauren Kulpa**

I. INTRODUCTION

Few issues concern parents, members of Congress, and the courts more than the welfare of children. When it comes to protecting our children, everything seems so necessary that it all becomes proper. Last year, the U.S. Supreme Court held that under the Necessary and Proper Clause¹ the Constitution empowers Congress to enact statutes authorizing court-ordered civil commitment of sexually dangerous, mentally ill federal prisoners.² The statute at issue arose out of a federal statutory regime aimed at protecting children from child pornography and sexual abuse. While the case holding may seem narrow, the flexibility of the Court's novel five-factored test may result in increased federal intrusion into state sovereignty and jeopardize civil liberties.

* J.D., Loyola Law School Los Angeles, 2011; B.A., Texas A&M University, 2008. First, I would like to thank Professor Allan Ides for his insight and encouragement throughout my writing process and Professor Sarah Bensinger for always reminding me to persevere throughout my law school career. I would also like to thank: Collin Wedel for his inspiration and thoughtful feedback; the staffers and editors of *Loyola of Los Angeles Law Review* for helping refine this article; Vartan Madoyan for stepping up (or maybe stepping down) to take over production of this article; Bret Lee for taking the eleventh-hour phone call; and Elena DeCoste Grieco for her patience and incredible knowledge of CMOS. Finally, thank you to my family—Kurt, Patty, Michael, Mary, Thomas, Alyssa, and Sugar—and my friends—especially the Aggie Players, Club 904, and the Pound—for all their love and support.

1. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power To . . . make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

2. *United States v. Comstock*, 130 S. Ct. 1949, 1954 (2010).

II. STATEMENT OF THE CASE

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act to protect children from sexual molestation, abuse, and child pornography, and to promote Internet safety.³ In relevant part, at 18 U.S.C. § 4248 (“Section 4248”) the act provides for the “[c]ivil commitment of a sexually dangerous person.” This statute allows the Attorney General to seek from federal courts a certification that a person in federal custody is sexually dangerous.⁴ For purposes of Section 4248, a person is sexually dangerous if the individual (1) “has engaged or attempted to engage in sexually violent conduct or child molestation”; (2) “suffers from a serious mental illness, abnormality, or disorder”; and (3) “as a result of [the mental illness] would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”⁵ If the court finds the above criteria by clear and convincing evidence, then the court will commit the person to the Attorney General’s custody.⁶

Upon certification, the Attorney General must make reasonable efforts to release the person to either the state in which the person was domiciled or the state in which the person was tried.⁷ If neither state will assume responsibility for the person’s custody, care, and treatment, then the Attorney General must place the person in a suitable facility until either a state will take responsibility for the person or the person is no longer sexually dangerous.⁸

*United States v. Comstock*⁹ involved the government’s attempt to civilly commit five offenders as sexually dangerous pursuant to Section 4248. Three of the offenders—Graydon Comstock, Thomas Matherly, and Markis Revland—had all pled guilty to possession of child pornography;¹⁰ a fourth offender, Marvin Virgil, had pled guilty

3. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (2006).

4. 18 U.S.C. § 4248(a) (2006).

5. 18 U.S.C. §§ 4247(a)(5)–(6) (2006).

6. 18 U.S.C. § 4248(d).

7. *Id.*

8. *Id.* A person may be deemed no longer sexually dangerous if the person’s condition has improved or the condition is controlled by psychiatric, medical, or psychological treatment. *Id.*

9. 130 S. Ct. 1949 (2010).

10. *United States v. Comstock*, 507 F. Supp. 2d 522, 526 & n.2 (E.D.N.C. 2007), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *rev’d*, 130 S. Ct. 1949 (2010).

to sexual abuse of a minor.¹¹ In each case, the offenders were on the verge of release from federal prison when the government sought certification under Section 4248.¹² The fifth offender, Shane Catron, had been charged with aggravated sexual abuse of a minor and abusive sexual conduct but was found incompetent to stand trial.¹³ The government sought to certify Catron under Section 4248 around the same time as the other four offenders.¹⁴ The offenders brought suit against the government claiming, among other things, that Section 4248 exceeded Congress's constitutional authority.¹⁵

The U.S. District Court for the Eastern District of North Carolina held that the statute was unconstitutional because it was not necessary and proper to carry out any enumerated power, such as Congress's power to prosecute,¹⁶ to regulate pursuant to the Commerce Clause,¹⁷ or to prevent criminal conduct.¹⁸ In addition, the district court found that Section 4248 "impermissibly intrude[d] upon an area historically regulated by the states."¹⁹ The Fourth Circuit affirmed the district court's decision, holding that the Necessary and Proper Clause did not authorize Congress to enact this statute due to the absence of a sufficient link between certification as "sexual dangerousness" and a federal crime.²⁰ The U.S. Supreme Court granted certiorari in June 2009 to settle a circuit split.²¹

11. *Id.*

12. *United States v. Comstock*, 130 S. Ct. 1949, 1955 (2010).

13. *Comstock*, 507 F. Supp. 2d at 526.

14. *Comstock*, 130 S. Ct. at 1955.

15. *Comstock*, 507 F. Supp. 2d at 526.

16. *Id.* at 534 (concluding "that civil commitment of sexually dangerous persons whose prison sentences are about to expire is not a necessary and proper extension of Congress's power to prosecute federal crimes").

17. *Id.* at 534–36 (rejecting the government's argument as an attempt to regulate noneconomic activity).

18. *Id.* at 536–40 (rejecting the government's argument because the statute does not account for an offender's likelihood to commit a *federal* sex crime as opposed to a *state* sex crime).

19. *Id.* at 551. The district court also addressed whether the statute constituted a criminal rather than civil proceeding (ultimately finding Section 4248 to be a civil scheme), *id.* at 529–30, and whether the statute's clear and convincing standard violated due process (finding that due process requires a "beyond a reasonable doubt" standard). *Id.* at 551–59. The Supreme Court did not address these issues. *See Comstock*, 130 S. Ct. at 1956.

20. *United States v. Comstock*, 551 F.3d 274, 282, 284–85 (4th Cir. 2009), *rev'd*, 130 S. Ct. 1949.

21. *United States v. Comstock*, 129 S. Ct. 2828 (2009). The Eighth Circuit held that Section 4248 was within Congress's constitutional authority under both the Commerce and Necessary and Proper Clauses. *United States v. Tom*, 565 F.3d 497, 502–03 (8th Cir. 2009). The First Circuit

III. REASONING OF THE COURT

A. Majority Opinion

Justice Breyer delivered the Court's opinion, which was joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, and Stevens.²² The Court only addressed whether Congress had authority under the Necessary and Proper Clause²³ to enact the statute at issue; it did not decide whether other constitutional violations, such as due process or equal protection violations, existed.²⁴ Using an unprecedented analysis, the majority upheld Section 4248, finding that Congress had the constitutional power to enact the statute.²⁵ In coming to this conclusion, the Court relied on five considerations:

(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.²⁶

The reasoning behind each factor is described below.

1. Breadth of the Necessary and Proper Clause

First, the Court set up a deferential backdrop for its analysis.²⁷ The Court found that the Necessary and Proper Clause gives Congress "broad authority to enact federal legislation."²⁸ Citing *McCulloch v. Maryland*,²⁹ Justice Breyer noted that while the government is given limited enumerated powers, it must have "ample

held that the statute was within Congress's constitutional authority under the Necessary and Proper Clause and did not infringe on the states' powers. *United States v. Volungus*, 595 F.3d 1, 10 (1st Cir. 2010).

22. *Comstock*, 130 S. Ct. at 1953. For a poetic recap of the government's and respondents' arguments, see *Court Commentary: U.S. v. Comstock . . . In Verse* (Feb. 28, 2010), <http://culturefuture.blogspot.com/2010/02/court-commentary-united-states-v.html>.

23. U.S. CONST. art I, § 8, cl. 18.

24. *Comstock*, 130 S. Ct. at 1956.

25. *Id.*

26. *Id.* at 1965.

27. *See id.* at 1956–58.

28. *Id.* at 1956.

29. 17 U.S. (4 Wheat.) 316 (1819).

means for [the] execution” of those powers.³⁰ Additionally, “necessary” does not mean absolutely necessary.³¹ To determine whether a statute falls within the Necessary and Proper Clause, courts must “look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”³² This test presumes that Congress’s choice of means is constitutional, leaving much to Congress’s discretion.³³

Justice Breyer then looked to several areas as examples when Congress had passed legislation purportedly in furtherance of its enumerated powers, despite the Constitution not specifically enumerating the power for such legislation.³⁴ To start, Justice Breyer noted that Congress has the power under the Necessary and Proper Clause to further its enumerated powers by creating a wide range of federal crimes, even though the Constitution only explicitly grants Congress the power to criminalize acts relating to “counterfeiting,” “treason,” and “Piracies and Felonies committed on the high Seas” or “against the Law of Nations.”³⁵ The Necessary and Proper Clause also allows Congress to enforce federal crimes by building prison facilities and sentencing offenders to federal prisons.³⁶ Congress’s power extends even further to regulate the federal prisons by enacting laws that “ensure the safety of the prisoners, prison workers and visitors, and those in the surrounding communities”³⁷ In other words, the Constitution does not explicitly give Congress the power to criminalize conduct, imprison offenders, or enact laws governing prisons and prisoners; however, the Necessary and Proper Clause grants Congress these powers because they are rational means to implement constitutionally enumerated powers.³⁸

30. *Comstock*, 130 S. Ct. at 1956 (citing *McCulloch*, 17 U.S. at 408).

31. *Id.*

32. *Id.*

33. *Id.* at 1957.

34. *Id.* at 1957–58.

35. *Id.* at 1957 (referring to U.S. CONST. art. I, § 8, cls. 6, 10).

36. *Id.* at 1958.

37. *Id.*

38. *Id.*

2. History of Federal Involvement

Next, Justice Breyer determined that the federal government had a history of involvement in prison-related mental-health regulation and that Section 4248 was only a “modest addition” to this statutory scheme.³⁹ While the government’s history of involvement is not determinative of a statute’s constitutionality, it is “helpful in reviewing the substance of a congressional statutory scheme” and in determining whether the statute is reasonably related to the pre-existing federal interests.⁴⁰ Justice Breyer traced congressional involvement back to the mid-to-late 1800s, which evolved from establishing a hospital to treat the Army and Navy’s insane population to creating a civil-commitment scheme for persons who had become insane while in federal custody.⁴¹

Starting in the late 1940s, Congress made a series of reforms to its civil-commitment legislation in response to concerns regarding the release of dangerous and insane prisoners.⁴² These reforms eventually led to the creation of the civil-commitment statute used today, the Insanity Defense Reform Act of 1984.⁴³ Section 4246 of the Insanity Defense Reform Act authorizes civil commitment if the prisoner’s “release would create a substantial risk of bodily injury to another person or serious damage to the property of another.”⁴⁴ Justice Breyer found that Section 4248 only differed from Section 4246 in that it targets persons who are “sexually dangerous” due to mental illness.⁴⁵

3. Government’s Custodial Interest

Third, Justice Breyer concluded that the federal government’s extension of its civil-commitment system to cover mentally ill and sexually dangerous prisoners was reasonable, even if it effectively extended the prisoners’ sentences.⁴⁶ Justice Breyer rooted his

39. *Id.* at 1961.

40. *Id.* at 1958 (quoting *Gonzales v. Raich*, 545 U.S. 1, 21 (2005)).

41. *Id.* at 1958–59.

42. *Id.* at 1959–61.

43. Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241–4247 (2006); *Comstock*, 130 S. Ct. at 1960.

44. *Comstock*, 130 S. Ct. at 1960 (quoting 18 U.S.C. § 4246(d)).

45. *Id.* at 1961.

46. *Id.*

reasonableness analysis in the federal government's role as the custodian of its prisoners.⁴⁷ He described this unenumerated role as one that gives the federal government the constitutional power to act to protect communities from dangers that federal prisoners may impose.⁴⁸ Thus, he found Section 4248 “‘reasonably adapted’ to Congress’ power to act as a responsible federal custodian” because it was reasonable for Congress to conclude that mentally ill and sexually dangerous federal inmates might pose a great threat to the public if released.⁴⁹

4. Statute’s Accommodation of State Interests

Fourth, Justice Breyer concluded that Section 4248 does not violate the states’ interests.⁵⁰ He rejected the respondents’ claim that Section 4248 violates the Tenth Amendment by allowing the federal government to regulate an area typically left to state control.⁵¹ Justice Breyer reasoned that powers delegated to the federal government include both constitutionally enumerated powers and the authority under the Necessary and Proper Clause to implement those powers.⁵² Therefore, because the Tenth Amendment reserves only powers not delegated to the United States as powers for the states, the power to regulate federal prisoners cannot be considered a power reserved to the states.⁵³

Justice Breyer also noted that Section 4248 does not invade state sovereignty or limit states’ powers.⁵⁴ Instead, by requiring the Attorney General to encourage states to take responsibility for offenders, the statute accommodates the states’ interests.⁵⁵ If a state asserts authority over a prisoner, then the federal government must immediately transfer that prisoner into state custody.⁵⁶ In addition, Justice Breyer concluded that Section 4248 better protects states’

47. *Id.* at 1961–62.

48. *Id.*

49. *Id.* at 1961 (internal citation omitted).

50. *Id.* at 1962–63.

51. *Id.* at 1962.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (citing Insanity Defense Reform Act of 1984, 18 U.S.C. § 4248(d) (2006)).

56. *Id.*

interests than its 1949 predecessor statute, which the Court had previously upheld.⁵⁷

5. Statute's Narrow Scope

Finally, Justice Breyer found that Section 4248's connection to an enumerated power was neither "too attenuated" nor "too sweeping in its scope."⁵⁸ He rejected the contention that "Congress' authority can be no more than one step removed from a specifically enumerated power."⁵⁹ He found support in the Court's precedent, which has held that from Congress's implied power to punish flows its implied power to imprison and to civilly commit mentally ill prisoners.⁶⁰ Justice Breyer also provided examples in which the Court had applied this "implied power flowing from an implied power" analysis in upholding statutes enacted to execute enumerated powers under the Spending Clause.⁶¹

Justice Breyer also reasoned that the statute's limited application of congressional power did not threaten state sovereignty. He rejected claims that upholding the statute would give Congress a general police power, which is generally reserved for the states.⁶² Because the statute's reach is limited to a small fraction of prisoners and to those already in federal custody, he gave no credence to the concern that the federal government was usurping power from the states.⁶³

B. Concurrences

While Justice Kennedy agreed with the majority holding, his concurrence expressed concern that the majority did not fully account for possible federalism violations.⁶⁴ First, Justice Kennedy (and Justice Alito)⁶⁵ was concerned that the majority's analysis

57. *Id.* at 1963 (referring to *Greenwood v. United States*, 350 U.S. 366 (1956)).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1964.

62. *Id.*

63. *Id.* at 1964–65.

64. *See id.* at 1965–68 (Kennedy, J., concurring).

65. *Id.* at 1968–70 (Alito, J., concurring) (finding that the statute can be upheld under the more traditional Necessary and Proper analysis because it is necessary and proper to "carrying into execution the enumerated powers that support the federal criminal statutes under which the

misapplied rational basis review. He distinguished between the highly deferential rational basis test used in the context of due process challenges and the more exacting rational basis required in Commerce Clause cases.⁶⁶ He warned against blending the two standards, fearing that the majority's discussion of rational basis in analyzing claims under the Necessary and Proper Clause could improperly be read as requiring a "mere conceivable rational relation," as is typically used for due process rational basis, instead of requiring a "tangible link" to the enumerated power.⁶⁷

Second, Justice Kennedy cautioned against Congress usurping states' powers.⁶⁸ He warned that analyzing Congress's power under the Necessary and Proper Clause must go one step further—to address whether the power compromises "essential attributes of state sovereignty."⁶⁹ Merely deciding first that the power falls under the Necessary and Proper Clause without then determining whether federalist concerns improperly limit the power broadens the scope of congressional power.⁷⁰

C. Thomas's Dissent

Justice Thomas, joined for the most part by Justice Scalia, dissented from the majority opinion because the majority failed to show that Section 4248 executed an enumerated power.⁷¹ Justice Thomas emphasized that "[t]he Constitution plainly sets forth the 'few and defined' powers that Congress may exercise" and that the Necessary and Proper Clause is used to carry out these "few and defined powers."⁷² Justice Thomas criticized the majority for failing to name the enumerated power that Section 4248 seeks to carry out.⁷³ He argued that the statute does not even come within the broadly construed Commerce Clause's purview because precedent states that Congress may not regulate noneconomic activity based only on its

affected prisoners were convicted," and thus "protect the public from dangers created by the federal criminal justice and prison systems").

66. *Id.* at 1966–67 (Kennedy, J., concurring).

67. *Id.* at 1967.

68. *Id.* at 1966.

69. *Id.* at 1967–68.

70. *See id.*

71. *Id.* at 1970 (Thomas, J., dissenting).

72. *Id.* at 1971 (quotations omitted).

73. *Id.* at 1973.

effect on interstate commerce.⁷⁴ Instead, he viewed Section 4248 as similar to the involuntary civil-commitment laws that states enact under their general police powers.⁷⁵

Justice Thomas also questioned the majority's use of a five-factor test instead of *McCulloch's* framework to determine Section 4248's constitutionality.⁷⁶ Referring to the test as "novel," Justice Thomas commented that the test raises more questions than it answers because the majority never specified whether all factors are needed, which factors are most important if only some are needed, and so forth.⁷⁷ He then raised counterarguments as to the majority's analysis of each factor.⁷⁸

VI. ANALYSIS

A. Majority's Departure from a Formulaic Analysis

Despite predictions that the Court would find Section 4248 unconstitutional,⁷⁹ the majority held that the Necessary and Proper Clause gives Congress the power to enact this statute. The majority's unprecedented five-factored analysis was necessary to uphold the civil commitment of dangerous sexual offenders because the statute could not withstand a more traditional analysis under the Necessary and Proper Clause.

1. Section 4248 Likely Cannot Withstand the Traditional Means-Ends Analysis

In discussing factor one (the breadth of the Necessary and Proper Clause), Justice Breyer correctly explained that "necessary" under the Necessary and Proper Clause has not been interpreted to

74. *Id.*

75. *Id.* at 1974.

76. *See id.* at 1974–75.

77. *Id.*

78. *Id.* at 1975–83.

79. *See, e.g.,* Robin Morse, Note, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. REV. 1753, 1754–55 (2009). Additionally, some scholars argue that the expansion of federal crimes violates federalism. *See, e.g.,* Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 837–39 (2000). *See generally* Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 53–59 (2008) (tracking the historical expansion of federal crimes).

mean “absolutely necessary.”⁸⁰ He then developed the “means-ends” test to determine whether Congress’s actions fall within the Necessary and Proper Clause’s scope:⁸¹ “whether the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power.”⁸² Put another way, the inquiry asks “whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end” under Congress’s constitutional powers.⁸³ However, as Justice Thomas commented, Justice Breyer ignored this framework and instead listed five factors that led him to conclude that Section 4248 is constitutional.⁸⁴

Under a more traditional means-ends analysis, the Court could not uphold Section 4248 because the statute does not rationally relate to furthering an enumerated power. The majority correctly pointed out that Congress has the power to enact criminal laws that are necessary and proper to carrying out their enumerated powers.⁸⁵ Chief Justice John Marshall described the classic example in *McCulloch*.⁸⁶ From Congress’s enumerated power to establish post offices and post roads, it “has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail.”⁸⁷ These inferred-from-inferred powers are all rationally related to Congress’s enumerated power to establish a national post office system. Here, however, unlike in *McCulloch*, Congress did not seek to punish those who had impeded its enumerated rights. Instead, Congress went one step further to *prevent* crimes—whether or not those crimes involve violations of federal or state law.

The Adam Walsh Act set out “[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child

80. *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–15 (1819)).

81. *Id.* at 1956–57.

82. *Id.* at 1956 (emphasis added).

83. *Id.* at 1957 (quoting *Gonzales v. Raich*, 545 U.S. 1, 37 (2005)).

84. *See id.* at 1974 (Thomas, J., dissenting) (“The Court perfunctorily genuflects to *McCulloch*’s framework for assessing Congress’ Necessary and Proper Clause authority, . . . then promptly abandons both in favor of a novel five-factor test . . .”).

85. *See id.* at 1957–58 (majority opinion).

86. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819).

87. *See id.*

pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.”⁸⁸ The act was likely enacted pursuant to the Commerce Clause, as this clause has been interpreted to give Congress expansive powers.⁸⁹ The act criminalizes child pornography, kidnapping, and child prostitution.⁹⁰ Congress’s “legitimate end” under the Commerce Clause could be to punish those who violate Congress’s statutory mandate that child prostitution and pornography be kept out of the stream of commerce. Thus, Section 4248 must be a means that is “rationally related” to implementing the federal sex-crimes regulations.⁹¹

Past cases upholding congressional action under the Necessary and Proper Clause have had a closer link between the action and the enumerated power than Section 4248 does with the Commerce Clause. For example, in *Greenwood v. United States*⁹² (discussed in briefs for both parties), the Court upheld a civil-commitment statute for those mentally incompetent to stand trial for federal crimes.⁹³ In *Greenwood*, the offender was awaiting trial in federal court for robbing a post office.⁹⁴ The Court, in upholding the statute, explained that the “[t]he power to put [the offender] into such custody—the power to prosecute for federal offenses—[was] not exhausted.”⁹⁵ The government’s power to commit the offender was a rationally related means to carrying out its power to establish post offices; the government must be able to prosecute crimes against post offices to ensure that the post offices are efficiently run.

The majority failed to distinguish *Greenwood* from the case at hand.⁹⁶ Section 4248, unlike the statute in *Greenwood*, does not enable the government to punish and imprison offenders for federal sex crimes because the offenders have already been sentenced. In

88. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

89. See *Comstock*, 130 S. Ct. at 1973 (Thomas, J., dissenting) (describing the Commerce Clause as “the enumerated power [the Supreme Court] has interpreted most expansively”); see, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress’s ban of home-grown marijuana may be upheld under the Commerce Clause).

90. Adam Walsh Child Protection and Safety Act, 120 Stat. at 587-89.

91. See *Comstock*, 130 S. Ct. at 1956.

92. 350 U.S. 366 (1956).

93. *Id.* at 375.

94. *Id.* at 369.

95. *Id.* at 375.

96. See *Comstock*, 130 S. Ct. at 1963.

fact, four of the five offenders in this case were within months of being released when the government sought civil-commitment certification under Section 4248.⁹⁷ In essence, the government's power to prosecute federal crimes had already been exhausted.

The majority's and government's insistence that Section 4248 is linked to the government's custodial power is similarly unconvincing.⁹⁸ It is undisputed that Congress holds the power to house federal prisoners and apprehend escaped prisoners pursuant to the Necessary and Proper Clause.⁹⁹ For instance, extending the *McCulloch* example, the government's implied power to punish those who steal from the post office would be meaningless unless the government could establish a facility to house offenders being punished. In addition, the government has the implied power to apprehend escaped prisoners; it would be meaningless to have the power to punish offenders for federal crimes yet lack the power to ensure that the offenders serve their sentences in their entirety. In this example, both the implied power to build prisons and the implied power to apprehend escaped prisoners rationally relate to the government's enumerated power to establish post offices.

Section 4248, however, does not flow from an implied power to build prisons and apprehend federal prisoners. The statute does not ensure that an offender serves his full sentence as punishment for a federal crime pursuant to Congress furthering an enumerated power.¹⁰⁰ Instead, Section 4248 is a preventive measure—a person in federal custody may be civilly committed to prevent the person from engaging in sexually violent conduct or child molestation upon release.¹⁰¹ The preventive nature of Section 4248, unlike those of the statutes at issue in *McCulloch* and *Greenwood*, does not further Congress's enforcement of an enumerated power. Furthermore, the

97. *Id.* at 1955.

98. *See id.* at 1961–62; Reply Brief for the United States at 14–17, *Comstock*, 130 S. Ct. 1949 (No. 08-1224), 2009 WL 4247966, at *14–17.

99. *Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring).

100. *See* Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2009–2010 CATO SUP. CT. REV. 239, 249–51 (discussing the disconnect between Section 4248 and Congress's authority that flows from its enumerated powers).

101. *See* 18 U.S.C. § 4248(a) (2006) (stating that the Attorney General may certify that the person is sexually dangerous and that he or she may not be discharged until found to no longer be sexually dangerous to others).

civil-commitment statute considers all sex crimes. While an argument could be made that the commitment regime may be necessary and proper to carrying out the prevention of federal sex crimes such as child pornography, the civil-commitment statute does not limit itself to the prevention of purely federal crimes.¹⁰² A propensity toward any sexual violence (whether constituting a federal or state crime) will count in the certification proceedings.¹⁰³

Because Section 4248 is not a means rationally related to furthering any enumerated power, it is beyond Congress's constitutional power. Section 4248 does not allow for the prosecution, or even prevention, of federal crimes. The conduct has already been punished and the statute instead seeks to prevent conduct that exceeds the bounds of Congress's authority under the Commerce Clause. Thus, Section 4248 could not be upheld under the traditional means-ends analysis.

2. Strategic Move to Five-Factored Test

Given that Section 4248 could not withstand the traditional means-ends analysis, the majority's decision to uphold the statute under a five-factored test seems deliberate. Some commentators regard *Comstock* as an indication of the Court's response to inevitable issues regarding the constitutionality of the Patient Protection and Affordable Care Act.¹⁰⁴ Issues like this may fare better under the majority's analysis as opposed to the traditional means-

102. Justice Alito argues that there is an "attenuated link" between congressional powers to enact criminal statutes and Section 4248 because Congress must protect the public from dangerous federal prisoners under a traditional Necessary and Proper Clause analysis. *Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring). However, he fails to address that Congress is exceeding its power by not limiting the statute's application to federal crimes.

103. See 18 U.S.C. § 4247(a)(5) (defining "sexually dangerous person" as "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others").

104. See Marcia Coyle, *Health Care Reform Spurs Litigation Talk*, 32 NAT'L L.J. 25, (2009); David G. Savage, *Justices Widen Federal Scope*, BALTIMORE SUN, May 18, 2010, at 1A; Michael C. Dorf, *The Supreme Court's Decision About Sexually Dangerous Federal Prisoners: Could It Hold the Key to the Constitutionality of the Individual Mandate to Buy Health Insurance?*, FINDLAW.COM (May 19, 2010), <http://writ.news.findlaw.com/dorf/20100519.html>. Still others suggest that the majority wanted to uphold the statute because it dealt with sexual deviants, an unpopular social group. See, e.g., Ruthann Robson, *Necessary and Proper to Extend Civil Commitment for Sex Offenders* CONST. L. PROF. BLOG (May 17, 2010), <http://lawprofessors.typepad.com/conlaw/2010/05/necessary-and-proper-to-extend-civil-commitment-for-sex-offenders-comstock-opinion-analysis.html>.

ends analysis because the majority's five-factored analysis could be read to give Congress even more sweeping powers.¹⁰⁵

First, the five-factored analysis tips the scales in favor of the constitutionality of Congress's actions from the start. The first factor's assertion that "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation" sets the tone for this deferential analysis.¹⁰⁶ In describing this factor, Justice Breyer makes clear that courts should defer to Congress's judgment.¹⁰⁷ Rather than a factor, this seems to state a presumption in favor of upholding congressional action, like the deferential rational basis review used in substantive due process claims.¹⁰⁸

Second, the majority favors constitutionality through its willingness to allow implied powers to count as legitimate ends. This allows Justice Breyer to conclude that the link between Section 4248 and a legitimate end are "not too attenuated."¹⁰⁹ In deciding this, Justice Breyer echoed those powers set out by the government¹¹⁰ to find that Congress has an implied power to punish and imprison, and a further implied power to enact civil-commitment laws. As discussed above, had the majority followed a more traditional means-ends analysis, in which legitimate ends are limited to those enumerated powers in the Constitution, then Section 4248 could not pass constitutional muster.¹¹¹ By allowing an analysis to rest on implied powers rather than enumerated powers, the Court allows Congress to claim broader powers and imposes a less stringent connection between the means and the ends.

Finally, the majority's use of factors allows for flexibility in the analysis, which could favor finding Congress's actions constitutional. Justice Thomas's dissent raises an important question

105. *But see* Somin, *supra* note 100, at 262–64 (explaining how the *Comstock* majority opinion might actually be detrimental to the individual mandate of the Obama administration's health care plan in court).

106. *Comstock*, 130 S. Ct. at 1956.

107. *See id.* at 1957.

108. *See id.* at 1966–67 (Kennedy, J., concurring).

109. *Id.* at 1963 (majority opinion).

110. Brief for the United States at 21–39, *Comstock*, 130 S. Ct. 1949 (No. 08-1224), 2009 WL 2896312, at *21–39 (describing "Congress's unquestioned power to enact criminal laws prohibiting conduct within the scope of its Article I powers, to operate a federal penal system for the punishment of offenses under those laws, and to place persons convicted of or pending trial for violating those laws in federal custody").

111. *See supra* Part IV.A.1.

regarding the “novel” five-factored analysis, pointing out the lack of clarity under the majority’s holding as to whether all five factors are necessary to uphold a statute under the Necessary and Proper Clause.¹¹² Even Justice Alito’s concurrence expresses concern over the ambiguity of the majority’s standard.¹¹³ Because of this, lower courts may be able to uphold a statute that satisfies a few, rather than all, of the outlined factors.

B. Restoring Balance

In his concurrence, Justice Kennedy writes to “caution that the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances.”¹¹⁴ His concern regarding the implications of the majority’s analysis is not unfounded. As discussed above, the analysis has the potential to broaden Congress’s power past its constitutional limits. However, there are ways that courts can limit the majority opinion’s potentially sweeping effects.

First, courts can take note of Justice’s Kennedy’s distinction between the deferential substantive due process rational basis analysis and the more exacting rational basis analysis used under the Commerce Clause. This will allow the first factor to become less of a presumption in favor of congressional action and allow for more scrutiny by the courts.

Second, courts should employ a more robust federalism analysis under the fourth factor. The fourth factor analyzes whether a statute properly accounts for states’ interests.¹¹⁵ However, Justice Kennedy’s concurrence expresses concern that the majority’s opinion sets a precedent that does not properly protect states’ interests.¹¹⁶ Under the majority’s analysis, it seems that Congress can circumvent federalism concerns by giving states the option to step in (like Section 4248, which allows states to take responsibility for the offender).¹¹⁷ Justice Kennedy warns “[i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under

112. *See Comstock*, 130 S. Ct. at 1974–75 (Thomas, J., dissenting).

113. *Id.* at 1968 (Alito, J., concurring).

114. *Id.* at 1966 (Kennedy, J., concurring).

115. *Id.* at 1962 (majority opinion).

116. *Id.* at 1967–68 (Kennedy, J., concurring).

117. *Id.* at 1962–63 (majority opinion).

the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.”¹¹⁸ Thus, courts should take federalism concerns more seriously and be wary of allowing the “inference upon inference” analysis to turn into a general police power.¹¹⁹

Third, courts should use the majority’s fifth factor to limit *Comstock*’s potentially broad implications. Both the majority’s discussion of the fifth factor¹²⁰ and Justice Kennedy’s concurrence¹²¹ note that the statute is narrow as it only applies to sexually dangerous federal prisoners. While a statute’s narrow scope does not justify Congress acting outside the scope of its constitutional powers, this factor can be used by courts to limit its application to federal crimes that society finds particularly reprehensible, such as sex crimes against children.¹²² Even though states have their own sex-offender laws, Congress’s federalization of certain sex crimes attempts to create a national strategy to combat these crimes, allowing for communication among states to prosecute and prevent these crimes.¹²³

Regardless, courts must be wary of this type of analysis because it could be used to justify detaining those convicted of other deplorable crimes beyond their sentences.¹²⁴ As one author noted, many suspected terrorists are not charged under the terrorism statute but instead are charged with immigration or weapons violations, which result in lesser penalties.¹²⁵ By using Section 4248 as a model, Congress could pass a statute that allows the civil commitment of

118. *Id.* at 1967–68 (Kennedy, J., concurring).

119. *See* *United States v. Lopez*, 514 U.S. 549, 567 (1995).

120. *Comstock*, 130 S. Ct. at 1964 (describing Section 4248 as “narrow in scope” and applying “to a small fraction of federal prisoners”).

121. *Id.* at 1968 (Kennedy, J., concurring) (describing Section 4248 as a “discrete and narrow exercise of authority over a small class of persons already subject to federal power”).

122. *See* Logan, *supra* note 79, at 60–61 (discussing the wave of societal concern regarding the sexual victimization of children).

123. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (establishing the National Sex Offender Registry).

124. *See* Collin P. Wedel, *War Courts: Terror’s Distorting Effects on Federal Courts*, 3 LEGIS. & POL’Y BRIEF 7, 23–26 (2011) (explaining how the Court’s ruling in *Comstock* sets a disturbing precedent for terrorist-detainees); *see also* *Predators and the Constitution*, WALL ST. J., Jan. 19, 2010, at A24 (“In other countries, loose detention laws give wide latitude to authorities to lock up any number of people who ‘threaten the public safety,’ including political prisoners.”).

125. Wedel, *supra* note 124, at 24–25.

dangerous terrorists, who may have serious difficulty in refraining from violent or terrorist conduct if released, thus allowing the government to increase incarceration penalties without charging and convicting the person of a new crime.¹²⁶ Similarly, Congress could pass a *Comstock*-like prevention statute targeting violent drug addicts; under such a statute, the government would have the authority to civilly commit federally incarcerated prisoners who have committed violent crimes while under the influence of drugs, have serious drug addictions, and would have serious difficulty in refraining from drug use if released.

VI. CONCLUSION

In conclusion, the majority's employment of a five-factored analysis, as opposed to the traditional means-ends analysis, was pivotal in upholding Section 4248, allowing for the civil commitment of sexually dangerous federal offenders. Whether the Court's analysis was a strategic decision to allow the federal government to combat sex crimes, especially those against children, or to increase the likelihood that constitutional issues will be resolved in favor of the Patient Protection and Affordable Care Act, the majority's approach does tip the scales in favor of the constitutionality of Congress's actions. In the future, courts will need to employ a more rigorous federalism analysis to ensure that states' interests are not overlooked and to limit the federal government's powers to those actually given to them by the Constitution.

126. *Id.* at 25–26 (suggesting that Congress could “tweak the *Comstock* statute to allow indefinite detention based on a finding that a prisoner (1) previously ‘engaged or attempted to engage in [terrorism-related] violent conduct,’ (2) remains committed to his terrorist cause, and (3) as a result of his terrorism connections, remains ‘dangerous to others’ such that ‘he would have serious difficulty in refraining from [terrorist or] violent conduct if released’”).